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RECOVERING JUDICIAL INTEGRITY: TOWARD A DUTY-FOCUSED DISQUALIFICATION JURISPRUDENCE BASED ON JEWISH LAW

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One who grabs too much has not grabbed anything, but one that grabs just a little has surely grabbed that much.

—Babylonian Talmud, Yoma 80a

INTRODUCTION

The United States Supreme Court's ruling that West Virginia Supreme Court Justice Brent Benjamin's decision not to recuse himself from a case involving a major donor to his judicial election campaign violated Due Process[1] sparked a storm of interest in the (in)adequacy of the judicial disqualification system.[2] Contemporary recusal law makes conclusory determinations of actual or apparent judicial bias, resulting in an inconsistent doctrine that allows dishonest judges to resist recusal and supplant litigants' legal rights in favor of their own personal agendas.[3] The current approach also erodes public confidence in the justice system by under and over-enforcing bias-based recusal,[4] and its focus on top-down mandatory disqualification fails to adequately encourage judges to be personally and professionally integrious.[5]

This Note suggests that these problems might be mitigated by comprehensively rethinking our approach to judicial disqualification based on *halacha*, traditional Jewish law.[6] *Halachic* recusal law offers an alternative to the current American approach, a jurisprudence that is grounded in courts' and judges' personal and professional duties, and which empowers jurists to develop their own integrity by limiting mandatory disqualification and relying instead on judges' duty-consciousness and self-disciplining decisions to voluntarily recuse.[7]

Part I of this Note reviews the jurisprudential underpinnings and substantive rules of American and traditional Jewish disqualification law. Part II briefly compares these two systems, highlighting the

1. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256–57 (2009); *see also infra* notes 81–84 and 101–105 and accompanying text.

2. *See, e.g.*, Gerard J. Clark, Caperton*'s New Right to Independence in Judges*, 58 DRAKE L. REV. 661 (2010); Raymond J. McKoski, *Judicial Disqualification After* Caperton v. A.T. Massey Coal Company*: What's Due Process Got to Do With It?*, 63 BAYLOR L. REV. 368 (2011); Jeffrey W. Stempel, *Completing* Caperton *and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249 (2010); *Symposium:* Caperton v. A.T. Massey Coal Co., 60 SYRACUSE L. REV. 215 (2010).

3. *See infra* Part III.A.1.

4. *See infra* Part III.A.2.

5. *See infra* Part III.A.3.

6. *See generally infra* Part III.B.

7. *See infra* Part I.B.1.

principle differences between the American and *halachic* approaches to recusal, which stem from these doctrines' respective foundations in rights-based and duty-focused jurisprudence. Part III develops a duty-focused alternative to contemporary recusal law by first highlighting some deficiencies in the current system, thereby demonstrating the need for reform,[8] and by then reconceptualizing judicial recusal based on Jewish law's moralizing, duty-oriented approach to removing judges and promoting judicial integrity.[9]

I. JUDICIAL DISQUALIFICATION IN AMERICAN AND TRADITIONAL JEWISH LAW

This Part provides necessary background for considering the relative merits of contemporary American and traditional Jewish recusal law by explaining the jurisprudential underpinnings and substantive doctrines. Section I.A. discusses the American law of judicial disqualification, and Section I.B. lays out the basic contours of the *halachic* approach to removing judges.

A. The American Approach to Judicial Disqualification

This Section discusses the contemporary American approach to judicial disqualification. Section I.A.1 explores the two primary objectives of modern recusal doctrine: protecting litigants' rights against biased rulings, and promoting public confidence in the justice system. Building on this framework, Section I.A.2 summarizes the substantive grounds for a judge's removal under current federal, state, and American Bar Association rules.

1. The Underlying Goals of American Recusal Jurisprudence

Contemporary judicial disqualification law is built on a dual concern for protecting the rights of litigants in individual cases and with preserving public confidence in the court system generally. Litigants are entitled to a court ruling based on the legal merits of their case rather than extraneous, non-legal factors.[10] When judges rule based on their personal values, their decisions subvert litigants' legal rights and

8. *See infra* Part III.A.

9. *See infra* Part III.B.

10. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 33 (2d ed. 2007) ("Every person who appears in court expects to receive a determination of his case based on the merits of the case—rather than on extrinsic circumstances.").

amount to a miscarriage of actual justice.[11] Judges must therefore interpret and apply the law without regard for personal preferences or value judgments;[12] they must decide each case impartially, preserving our justice system as one "of laws and not of men."[13] Disqualification law attempts to protect litigants' legal dues from biased rulings by removing judges from cases that implicate their personal preferences.[14] Thus, the goal of judicial "impartiality is not an end in itself. It is an instrumental value designed to preserve a different end altogether: the rule of law. . . . [T]he ultimate goal is to enable judges . . . to resolve disputes between parties on a case-by-case basis according to the applicable facts and law . . . ."[15]

In addition to protecting litigants' rights from actual injustice, disqualification law seeks to promote confidence in the court system by avoiding even the appearance of judicial injustice. The efficacy of our courts depends on society's willingness to submit disputes to them and accept their rulings.[16] If the public perceives the justice system as

11. Recusal law promotes actual justice by ensuring that judicial rulings are based on the rule of law and not on judges' personal preferences, but also concentrates on maintaining the appearance of justice. *See generally* Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007). This focus on appearances—sometimes to the neglect of reality—engenders criticism of disqualification jurisprudence. *See infra* notes 279–282 and accompanying text.

12. *See* ABA CODE OF JUDICIAL CONDUCT, Preamble, cl. 1 (2007) [hereinafter ABA CODE] ("An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society.").

13. JOHN ADAMS, NOVANGLUS AND MASSACHUSETTENSIS 84 (1819); *see* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 11–25 (2001); LON. R. FULLER, THE MORALITY OF LAW 56 (1964); *see also* Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in* Caperton *and* Citizens United*, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 884–85 (2010) ("The lack of bias is a 'cardinal principle of justice' and an 'indispensible feature of democracy.'").

14. *See* FLAMM, *supra* note 10, at 33 ("Every person who appears in court expects to receive a determination of his case based on the merits of the case—rather than on extrinsic circumstances—and there is no question that the right to a fair trial includes the right to be tried by an impartial and unbiased judge."); *id.* at 53–54 ("[A] party has the right to have her case heard and decided by a judge who is . . . disinterested, dispassionate, and can approach the facts in an objective and impartial manner.").

15. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 65 (2003).

16. *See* Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 5 (1970) ("Possessed of neither purse nor sword, [the judiciary] depends primarily on the willingness of members of society to

corrupted by biased judges deciding cases based on their personal preferences, "the moral authority of the courts is critically undermined,"[17] hampering their effectiveness. Judges must therefore not only be, but must also appear to be unbiased.[18] The Supreme Court recognized this principle in *Offutt v. United States*, noting that "justice must satisfy the appearance of justice."[19] Modern recusal jurisprudence addresses this concern by disqualifying judges not only when they are biased, but even when they merely appear partial.[20]

This heavy focus on eradicating bias is a relatively new development in recusal jurisprudence. At common law, judges were only disqualified for being a party to a case by virtue of their having some interest in the outcome,[21] and early American recusal law tracked this

follow its mandates." (citing Simon E. Sobeloff, *Striving for Impartiality in the Federal Courts*, 24 FED. CIR. B.J. 286, 286 (1964))).

17. JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 7 (1974).

18. United States v. Columbia Broad. Sys., 497 F.2d 107, 109 (5th Cir. 1974) (referring to apparent impartiality as "the palladium of our judicial system"); *see also* State v. Alderson, 922 P.2d 435, 452 (Kan. 1996) ("It is vital to the legal system that the public perceive the system as impartial."); Baier v. Hampton, 440 N.W.2d 712, 715 (N.D. 1989) ("[The court's] primary concern is the preservation of public respect and confidence in the integrity of the judicial system . . . .").

19. 348 U.S. 11, 14 (1954); *see also* Barker v. Sec'y of State's Office of Mo., 752 S.W.2d 437, 439 (Mo. Ct. App. 1988) ("One of the fundamental precepts which govern the sound administration of justice is that . . . an appearance of justice must be maintained.").

20. *See* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980) ("[The] overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence."); Kevin J. Mitchell, *Neither Purse nor Sword: Lessons Europe Can Learn from American Courts' Struggle for Democratic Legitimacy*, 38 CASE W. RES. J. INT'L L. 653, 657 (2007) ("Public confidence is vital to a well-functioning judiciary, so regardless of whether actual bias exists, the appearance can be sufficient to remove a judge from a particular case."). *See generally* FLAMM, *supra* note 10, at 108–13.

21. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947) ("The common law of disqualification . . . was clear and simple: a judge was disqualified for a direct pecuniary interest and for nothing else."); Mark Andrew Grannis, Note, *Safe Guarding the Litigants Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising From Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 387–88 (1987). Some sources indicate that this description of common law disqualification doctrine is overly restrictive, and that Lord Coke's maxim that "no man may be a judge in his own case," 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 141a (1628) ("[*A*]*liquis non debet esse judex in propria causa.*"), was actually understood to include a broader array of circumstances implicating judges' impartiality. *See* Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of London v. Wood, 94 COLUM. L. REV. 2091 (1994) (arguing that Coke's maxim

English doctrine.[22] In the early twentieth century, however, perhaps in response to changing perceptions and new problems related to judicial impartiality, new legislative initiatives began to focus disqualification practice on actual and apparent judicial bias.[23] Recusals are

and the common law doctrine was broadly based in natural law jurisprudence and classical liberal political theory). For example, Lord Bracton followed Roman precedent in disqualifying judges on the mere suspicion of bias. *See* 6 BRACTON, LEGIBUS ET CONSUETUNDINIBUS ANGLIE 249 (Twiss ed. 1883) ("[T]he only cause for recusal is a suspicion, which arises from many causes, as if the judge be a blood relative of the plaintiff, his vassal or subject, his parent or friend, or an enemy of the tenant, his kinsman or his pleader in that cause or another, and in any such like capacity."); CORPUS JURIS CIVILIS, Codex, lib. 3, tit. 1, no. 16 *translated in* Harrington Puttman, *Recusation*, 9 CORNELL L.Q. 1, 3 n.10 (1923) ("[B]ecause it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue joined"). Some cases support Bracton's broad view of common law recusal. *See, e.g.*, City of London v. Wood, (1702) 88 Eng. Rep. 1592 (K.B.); *see also* GRANT HAMMOND, JUDICIAL RECUSAL 11–13 (2009) (recognizing that at common law, judges were disqualified for being party to a case even if they lacked pecuniary interests in the outcome); Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 839 n.75 (2009). Blackstone, supported by several prior cases, rejected Bracton's approach. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1765–1769) ("[T]he law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy censure from those to whom the judge is accountable for his conduct."); *see also* Between the Parishes of Great Charte v. Kennington, (1726) 93 Eng. Rep. 1107 (K.B.) (disqualifying judges from deciding a case involving the removal of a pauper that the judges' home county was otherwise obligated to financially support); The Case of Foxham in Com. Wilts, (1706) 91 Eng. Rep. 514 (K.B.) (disqualifying judge who held another public office that was the subject of the case); Anonymous, (1698) 91 ENG. REP. 343 (K.B.) (laying "by the heels" the Mayor of Hereford for presiding over an ejectment action involving one of his own tenants); Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B. 1608) (disqualifying physician review board from assessing fines against unlicensed practitioners because the fines were received by the members of the board).

22. *See* Liteky v. United States, 510 U.S. 540, 543–44 (1994); Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1480–81 (1981); Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 754 (2010); Stempel, *supra* note 21, at 841 ("The English view . . . was largely incorporated by the colonial and subsequent American legal system of the eighteenth century."). For examples of early American disqualification laws, see An Act for Regulating Processes in the Courts of the United States, and Providing Compensations for the Officers of the Said Courts, and for Jurors and Witnesses, ch. 36, § 11, 1 Stat. 278 (1792) [hereinafter 1792 Act]; MD. CONST. of 1776, art. IV, § 7.

23. *See generally* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is what the Judge Gets*, 94 MINN. L. REV. 1914 (2010).

currently governed by 18 U.S.C. §§ 144 and 455,[24] by the American Bar Association's Model Code of Judicial Conduct,[25] which has been adopted in some form by forty-nine States,[26] and by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[27]

2. Grounds for Disqualification in American Law

Judges may be removed in a variety of circumstances, including where they have a financial stake in a case, are closely related to parties or attorneys, accept bribes or gifts from parties or attorneys, or have extra-judicial knowledge about a case. These substantive grounds for removal are not disqualifying per se; they are indicia of actual or apparent judicial misconduct.[28] As Professor Leubsdorf notes, "disqualification law is clearly directed at the likelihood of warped judgment, with a judge's financial interest or familial stake in the case as just one circumstance from which to infer such a likelihood."[29] Thus, in *Tumey v. Ohio*,[30] the Supreme Court disqualified a

24. The first federal disqualification statute was passed in 1792. *See* 1792 Act, *supra* note 22. This law remained in effect without significant changes until Congress passed sections 20 and 21 of the Judicial Code, which greatly expanded the grounds for disqualifying Federal judges. *See* Act of Mar. 3, 1911, ch. 23, § 20, 36 Stat. 1090. These provisions were slightly revised in 1948, and were then recodified as 28 U.S.C. §§ 144, 455. *See* Act of May 24, 1949, ch.139, §65, 63 Stat. 99; Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908. Congress overhauled the law in 1974 to bring it into harmony with the ABA Cannons, which were far more stringent than the Federal requirements then in force. *See* Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609; *see also* Susan E. Barton, Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L. F. 863, 868 (1978) (noting that under the pre-1974 federal statutes "federal judges were governed by disparate ethical and statutory standards"). For a general discussion of the history of federal disqualification rules see FLAMM, *supra* note 10, at 669–750; Flamm, *supra* note 22, at 753–59.

25. ABA CODE, *supra* note 12, R. 2.11. The original ABA Cannons of Judicial Conduct were issued in 1924, perhaps in response to Judge Kenesaw Mountain Landis's serving as both a federal judge and the first commissioner of Major League Baseball. The ABA standards were revised in 1972 and 1990, and the current version was adopted in 2007. *See generally* McKoski, *supra* note 23, at 1921–36 (2010).

26. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding when a Judge's Impartiality "Might Reasonably be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

27. *See* FLAMM, *supra* note 10, at 30–39; *see also infra* Part I.A.2.f.

28. *See* Burg, *supra* note 22, at 1480–82; Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78, 80 (1927); *see also supra* note 15 and accompanying text.

29. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 247 (1987).

town mayor from serving as a municipal judge, in part, because he would receive additional compensation only if he convicted the defendants appearing before him. The Court did not find that the mayor's obvious interest in the outcome of each case was disqualifying per se. Instead, the Court disqualified the mayor because his interest threatened his impartiality, making it unlikely that he would be able to "hold the balance nice, clear, and true."[31]

This Section reviews the substantive grounds for disqualification, which the law considers indicative of actual or apparent judicial bias. Section I.A.2.a. considers disqualification based on a judge's manifesting actual or apparent bias. Section I.A.2.a. discusses when judges might be disqualified for a bias resulting from a financial interest in a case; Section I.A.2.c. for a familial relationship to litigants or attorneys; Section I.A.2.d. for accepting bribes or gifts from parties appearing in court; and Section I.A.2.e. for possessing extra-judicial knowledge about a case.

a. Bias and the Appearance of Bias

A judge's impartiality is the most "fundamental" and "self-evident" ground for a fair judicial system.[32] In practice, however, it is more difficult to directly remove a judge for bias than it is to disqualify a judge on other substantive grounds like financial interest, which merely indicate potential partiality. This is because whereas removal for external indications of possible bias relies on objectively observable facts, direct disqualification for bias "is focused on the mental attitude or disposition of the judge toward a party to the litigation,"[33] which is often not objectively demonstrable.[34] In light of the difficulties involved in correctly evaluating judges' subjective states of mind, challenged judges are presumed to be impartial.[35] To remove an allegedly biased judge, a party must overcome this presumption by demonstrat-

30. 273 U.S. 510, 532 (1927).

31. *Id.*

32. Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 662 (1984).

33. Freeman v. State, 757 P.2d 1240, 1243 (Idaho Ct. App. 1988).

34. *See* FLAMM, *supra* note 10, at 56 ("[B]ias is ordinarily not an empirically provable fact. It is, rather, a shorthand way of referring to the 'attitude' or 'state of mind' of a judge who cannot be trusted to act in a detached and impartial manner.").

35. *See* Franklin v. McCaughtry, 398 F.3d 955, 959 (7th Cir. 2005) ("The general presumption is that judges are honest, upright individuals and thus that they rise above biasing influences."); State v. DeGroff, No. 30758-8-II, 2005 WL 1540810, at *8 (Wash. Ct. App. June 29, 2005) ("A judge is presumed to perform his functions regularly and properly, without bias or prejudice.").

ing that the judge manifested a predisposition for or against a party or an attorney.[36]

Sections 144 and 455(a) of Title 28 of the United States Code offer two avenues for removing a biased judge. Section 144, the "Peremptory Disqualification Statute," protects litigants from actually biased rulings by disqualifying judges that have "a personal bias or prejudice either against [the movant] or in favor of any adverse party."[37] Judges challenged under section 144 must accept the facts alleged in a section 144 affidavit as true,[38] and may consider only whether those facts are sufficient to reasonably suggest the presence of bias.[39] In deciding section 144 motions, judges consider whether the facts are stated with peculiarity, whether they would convince a reasonable person that the judge is actually biased,[40] and whether they are factual allegations or merely opinions or conclusions.[41]

Section 455(a) goes further to preserve public confidence in the courts by disqualifying judges that merely appear biased.[42] Under section 455, a judge is disqualified when a party demonstrates that a

36. *See* ABA CODE, *supra* note 12, R. 2.3 cmt. 2 ("[M]anifestations of bias . . . include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.").

37. 28 U.S.C. § 144 (2006).

38. *See, e.g.*, United States v. Furst, 886 F.2d 558, 582 (3d Cir. 1989) ("[A] district judge faced with a motion for disqualification under 28 U.S.C. § 144, must accept the allegations of the moving party as true."); Weatherhead v. Globe Int'l., Inc., 832 F.2d 1226, 1227 (10th Cir. 1987) ("Under § 144, the judge cannot assess the truth of the facts alleged.").

39. *See generally* FLAMM, *supra* note 10, at 692–94.

40. *See, e.g.*, United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987) (per curiam), *cert. denied sub nom.* Bd. of Trs. of Ala. State Univ. v. Auburn Univ., 487 U.S. 1210 (1988).

41. *See, e.g.*, United States v. Vespe, 868 F.2d 1328, 1340 (3d Cir. 1989).

42. 28 U.S.C. § 455(a) (2006) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); s*ee* Arocena v. United States, 721 F. Supp. 528, 530 (S.D.N.Y. 1989) ("The purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety." (citing Hardy v. United States, 878 F.2d 94, 96 (2d Cir. 1989))); *see also In re* Antar, 71 F.3d 97, 101 (3d Cir. 1995) ("Because we seek to protect the public's confidence in the judiciary, our inquiry focuses not on whether the judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias."). *See generally* FLAMM, *supra* note 10, at 108–13.

reasonable person would question the judge's impartiality;[43] the movant need not show or even allege actual bias on the part of the challenged judge.[44] When deciding section 455(a) motions, courts ask whether a reasonable person aware of all the relevant facts, without knowing whether the challenged judge is actually biased, would question the judge's impartiality.[45]

b. Financial Interest

American disqualification law maintains the common law proscription against judges presiding over cases in which they have a pecuniary interest because "no man may be a judge in his own case."[46] Section 455 provides that "[a] judge shall disqualify himself whenever he . . . knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."[47] The ABA Code of Judicial Conduct Rule 2.4 similarly cautions that "[a] judge shall not permit . . . financial, or other interests or relationships to influence the judge's judicial conduct or judgment."[48]

43. *See* Sec. & Exch. Comm'n v. Loving Spirit Found., Inc., 392 F.3d 486, 493 (D.C. Cir. 2004) ("Recusal is required when 'a reasonable and informed observer would question the judge's impartiality.'"(citation omitted)).

44. *See* Clemmons v. Wolfe, 377 F.3d 322, 327 (3d Cir. 2004) ("[A]ctual bias is not a requisite element under § 455(a).").

45. *See* Richardson v. Quarterman, 537 F.3d 466, 470 (5th Cir. 2008) ("[The question is whether] 'a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge.'"(citation omitted)); United States v. Amico, 486 F.3d 764, 775 (2d Cir. 2007) (internal quotation marks omitted) ("[W]e ask: '[w]ould a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned?'"(second alteration in original) (citation omitted)); Union Carbide Corp. v. U.S. Cutting Servs., Inc., 782 F.2d 710, 715 (7th Cir. 1986) ("[T]he issue is whether 'an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case.'" (quoting Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985))); State v. Perala, 130 P.3d 852, 859 (Wash. Ct. App. 2006); *In re* Larsen, 616 A.2d 529, 583 (Pa. 1992); *see also* McKoski, *supra* note 23, at 1944–45.

46. 1 COKE, *supra* note 21, at 141a; *see* Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1044 (2007) ("One of the most fundamental precepts of due process is that no man can be a judge in his own case . . . ."). For a more extensive discussion of common law disqualification, see *supra* note 21.

47. 28 U.S.C. § 455(b)(4) (2006).

48. ABA CODE, *supra* note 12, R. 2.4. *See generally* FLAMM, *supra* note 10, at 145–68.

While at common law a judge's financial interest in a case was per se disqualifying,[49] under the current approach, a judge's pecuniary interest in a case is a proxy for judicial bias.[50] As Rule 2.4 of the ABA Model Code indicates, the law is concerned that financially interested judges will partially decide cases in favor of those interests.[51] The Supreme Court confirmed this rationale when it held in *Caperton v. A.T. Massey Coal Co.* that "[n]o man is allowed to be a judge in his own cause; *because his interest would certainly bias his judgment*, and, not improbably, corrupt his integrity."[52]

Courts generally agree that a judge's interest in a case need not be particularly large[53] or directly affected by the outcome of the litigation to be disqualifying.[54] Beyond this, how courts should determine whether a particular judge's interest in a case is disqualifying is "the source of much disagreement."[55] Some decisions follow a categorical approach, holding that a judge is disqualified for any non-negligible pecuniary interest.[56] Others focus on whether the judge's interest in

49. *See supra* note 21.

50. *See* Leubsdorf, *supra* note 29, at 247 ("Today, disqualification law is clearly directed at the likelihood of warped judgment, with a judge's financial interest or familial stake in the case as just one circumstance from which to infer such a likelihood."); *see also* Burg, *supra* note 22, at 1480–82; Note, *supra* note 28, at 79–80.

51. *See* Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1373 (7th Cir. 1994) (en banc) ("[T]he lure of lucre is a particularly strong motivation, and therefore judges ought to be prohibited from presiding over cases in whose outcomes they have a direct financial interest.").

52. 129 S. Ct. 2252, 2259 (2009) (emphasis added) (quoting THE FEDERALIST No. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)).

53. *See, e.g.*, Connally v. Georgia, 429 U.S. 245 (1977) (disqualifying a judge from issuing a search warrant where the judge was paid a five dollar fee for each warrant issued, but received nothing for warrant applications that he denied); Haas v. County of San Bernardino, 119 Cal. Rptr. 2d 341, 358–59 (Cal. 2002) (Brown, J., concurring in part and dissenting in part) ("[The majority] implies that a due process violation would arise from payment of even $10 . . . an amount that today would not cover a hearing officer's parking in many cities.").

54. *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (disqualifying a judge from ruling on an appeal from a punitive damage award where the issue to be decided bore on another pending litigation in which the judge was a plaintiff); Yamaha Motor Corp., U.S.A. v. Riney, 21 F.3d 793, 798 (8th Cir. 1994) ("An indirect financial interest in the claim raises a question of impartiality."). *But see In re* Aguinda, 241 F.3d 194, 201 (2d Cir. 2001) (quoting United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992)) ("Where a case . . . involves remote, contingent, indirect, or speculative interests, disqualification is not required.").

55. Teague v. Bakker, 931 F.2d 259, 261 (4th Cir. 1991).

56. *See, e.g.*, *In re* N.M. Natural Gas Antitrust Litig., 620 F.2d 794, 796 (10th Cir. 1980) (holding that under 28 U.S.C. § 455, direct financial interests are governed by a per se rule); *In re* Estate of Sherburne, 476 N.Y.S.2d 419, 421 (1984) ("[T]he nature

the case is substantial, either in terms of his personal finances, or in terms of the total value of the case.[57] Still, other cases consider whether the judge's interest, however small, stands to be significantly impacted by the outcome of the case.[58] The general governing principle seems to be that a "judge should not act in any matter in which he has any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to that matter."[59]

c. Familial Relationships

Disqualifying judges for a familial relationship with a party is a logical extension of the financial interest proscription and the principle that one cannot judge his own case.[60] Just as judges may not remain impartial when deciding cases implicating their financial interests, jurists who are closely related to litigants will likely rule from bias rather than legal principle.[61] Section 455 disqualifies a judge where "a person within the third degree of relationship to [the judge]: (i) [i]s a party to the proceeding . . . (ii) [i]s acting as a lawyer in the proceeding; [or] (iii) [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."[62] The ABA Code of Judicial Conduct similarly instructs that "[a] judge shall not permit family . . . relationships to influence the judge's judicial conduct or judgment."[63]

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of the interest required . . . is . . . a pecuniary or property right from which the judge might profit or lose.").

57. *See, e.g.*, Huffman v. Ark. Judicial Discipline & Disability Comm'n., 344 Ark. 274, 283 (2001) (considering whether the judge's interest is sufficiently significant to create a reasonable concern that it would lead him to decide the case without the requisite impartiality and integrity).

58. *See, e.g.*, 28 U.S.C. § 455(b)(5)(iii) (2006) (disqualifying judges that "have an interest that could be substantially affected by the outcome of the proceeding.").

59. FLAMM, *supra* note 10, at 149.

60. *See id.* at 169–70; Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 385 (1990).

61. *See, e.g.*, *In re* Nat'l Union Fire Ins. Co. of Pittsburgh, 839 F.2d 1226, 1229 (7th Cir. 1988) (stating that "[a] $50 gift from Continental to Judge Shadur would disqualify him; a $5,000 gift from Continental to Robert Shadur [the judge's son] could be worth more than $50 to Judge Shadu"); Georgia Power Co. v. Watts, 190 S.E. 654, 659 (Ga. 1937) (disqualifying a judge who was related to a stockholder in the corporate party, even though the judge's relative was merely interested in the outcome of the case, but was not an actual party).

62. 28 U.S.C. § 455(b)(5).

63. ABA CODE, *supra* note 12, R. 2.4(B).

Disqualification for a familial relationship is governed by a two-part standard. First, the movant must demonstrate that the judge has a sufficiently close relationship to an interested party.[64] The closeness of judge-party relationships is typically described by statute in terms of "degrees" of relation.[65] Judges related to parties in the statutorily provided degree or closer may be disqualified, while more distantly related judges may preside. Most jurisdictions calculate degrees of relation by tracing the judge and interested party's lineage to a common ancestor, and then counting the generations back down to the judge or party.[66] Each generation by which the judge or interested party are removed from their common ancestor constitutes one degree of relation.[67] Thus, brothers are first degree relations, a father and son, second degree, and uncle and nephew, third degree.[68] After establishing a close relationship between a judge and party, a movant must show that the related party's interest in the case is substantial enough to warrant the judge's removal.[69]

d. Bribes and Gifts

Judges who accept bribes or gifts from parties are disqualified because they may be biased in favor of the party who gave the gift.[70] The ABA Code therefore provides that "[a] judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if ac-

64. *See* FLAMM, *supra* note 10, at 171.

65. *See, e.g.*, 28 U.S.C. § 455(b)(5) (third degree); Ala. Code § 12-1-12 (1975) (fourth degree); Cal. Code Civ. Pro. § 170.1 (West 2010) (same); La. Code Civ. Pro. art. 151 (1999) (same); Mont. Code Ann. § 3-1-803 (third degree); N.Y. JUD. LAW § 14 (McKinney 2001) (sixth degree); Wis. Stat. Ann. 757.19(2) (West 2001) (same).

66. *See* Morton v. Benton Pub. Co., Inc., 727 S.W.2d 824 (Ark. 1987); State v. Daughtery, 563 So.2d 1171, 1175 (La. App. 1990).

67. *See* William W. Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 604 (1986). *See generally* FLAMM, *supra* note 10, at 173–75.

68. Some jurisdictions distinguish between blood-relations (relations by consanguinity) and relations through marriage (relations by affinity), holding that a judge's relationship to a party through marriage is not disqualifying. *See, e.g.*, Wernowsky v. Economy Fire & Cas. Co., 461 N.E.2d 628 (Ill. App. Ct. 1983) (refusing to disqualify a judge from cases involving his brother-in-law); State v. Fullerton, 684 S.W.2d 59, 62 (Mo. Ct. App. 1984) (judge's daughter's marriage to prosecutor's brother does not disqualify the judge from cases tried by that prosecutor because they do not share a common ancestor).

69. *See* FLAMM, *supra* note 10, at 171.

70. *See* Bracy v. Gramley, 520 U.S. 899, 905 (1997) ("A judge who accepts bribes from a criminal defendant to fix that defendant's case is 'biased' in the most basic sense of that word."); Cartalino v. Washington, 122 F.3d 8, 11 (7th Cir. 1997) ("[A] bribed judge is biased per se.").

ceptance . . . would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."[71] A judge is not only disqualified for receiving gifts from a party to a case then pending before him, but also for having accepted a gift from someone who later becomes involved in litigation before the judge, or for taking a gift from someone that is not party to any case before the judge.[72]

Judges' accepting valuable gifts may result in bias, but their accepting "mere social hospitality" does not raise concerns about their impartiality, and does not typically warrant removal.[73] In deciding whether a particular gift is valuable or just an ordinary social convention, courts consider the monetary value of the gift, the relationship between the judge and giver, and local social practices related to gift-giving.[74] As with financial interests and familial relationships, the test is not a categorical one; the question is whether the nature of the gift raises concerns that the judge will fail to decide the case with complete impartiality.[75]

Bias arising from judges' receiving gifts raises concerns about judges' receiving judicial election campaign contributions.[76] The ABA Code of Judicial Conduct explains:

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71. ABA CODE, *supra* note 12, R. 3.13(A).

72. *See, e.g.*, Wallace v. Wallace, 352 So. 2d 1376 (Ala. Civ. App. 1977) (disqualifying a judge appointed by Governor George Wallace from hearing subsequent divorce proceedings between Wallace and his wife); State v. Hodges, 305 S.E.2d 278 (W. Va. 1983) (judge's accepting gifts from a jury and other court personnel created an appearance of bias). *But see In re* Aguinda, 241 F.3d 194, 205 (2d Cir. 2001) ("[F]ederal judges routinely receive free copies of books, journals, magazines, and other publications that discuss disputed policy issues without any imputation . . . that, if they read some of the unsolicited materials, they are thereafter recused on any matter connected with those issues.").

73. ABA CODE, *supra* note 12, R. 3.13(B)(3).

74. *See* Charles F. Scott, *Reconciling Conflicts in Illinois Judicial Ethics*, 19 LOY. U. CHI. L.J. 1067, 1069 (1988).

75. *See id.* at 1072–73.

76. *See* Keith Anderson, *Ethical Problems of Lawyers and Judges in Election Campaigns,* 50 A.B.A. J. 819, 823 (1964) ("As long as a judge's campaign committee must accept gifts of money and work from lawyers, there will be gnawing doubts as to the freedom from influence and bias."); Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 494 (2005) ("If the judge felt beholden to particular supporters for their gifts, and believed that he was morally obliged to rule in their favor (i.e., to exercise favoritism) whenever they appeared before him, we would accuse him of bias or partiality."). For general discussions of problems arising from judicial elections, see Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI-KENT L. REV. 133 (1998); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003); Leona C. Smoler & Mary A. Stokinger, *The Ethical Dilemma of Campaigning for Judicial Of-*

> [A] judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, . . . judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.[77]

Recognizing the prevalence of elected judiciaries[78] and the need to finance judicial election campaigns, the law permits judges to receive "reasonable donations" in support of their candidacies.[79] The ABA Model Code suggests merely that legislatures set a reasonable monetary value beyond which contributions to a judicial campaign would appear inappropriate.[80] The Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*,[81] where, relying on the Due Process Clause, the Court disqualified a state high court judge from deciding a case where one party's CEO had spent three million dollars supporting the judge's election,[82] placed some "outer boundaries" on judges' ability

fice: A Proposed Solution, 14 FORDHAM URB. L.J. 353 (1986); Jon R. Waltz, *Some Firsthand Observations on the Election of Judges*, 63 JUDICATURE 185 (1979); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988); Grannis, *supra* note 21.

77. ABA CODE, *supra* note 12, R. 4.1 cmt. 1.

78. *See State Judicial Elections,* BRENNAN CENTER FOR JUSTICE*,* http://www.brennancenter.org/content/section/category/ state_judicial_elections (last visited Feb. 21, 2012) ("Thirty-nine states elect at least some of their judges").

79. *See* Williams v. Viswanathan, 65 S.W.3d 685, 687–89 (Tex. Ct. App. 2001) ("[A] reasonable person must . . . know that our judges have to stand for election on a regular basis, that elections cost money, and that money must be raised to conduct an effective campaign . . . to require a sitting justice to recuse, something more than the mere fact that . . . she prevailed in a contested election and that contributions were received must be shown."); FLAMM, *supra* note 10, at 245–46 ("[C]ourts have generally accepted that as long as a state chooses to select its judges by means of popular elections, the judiciary must condone to some extent the collection and expenditure of money for judicial election campaigns.").

80. *See* ABA CODE, *supra* note 12, R. 4.4. Under the ABA Code, however, contributions cannot be solicited by or given to the judicial candidate directly. Rather, solicitations and contributions must be funneled through a campaign committee which serves to insulate the candidate from his contributors. *See id.*, R. 4.2(B), 4.4 & cmt. 1; FLAMM, *supra* note 10, at 247; *see also* Mackenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1336 (Fla. 1990) ("[Requiring judicial candidates to solicit campaign contributions through a campaign committee] insulates, to the extent possible, justices, judges, and judicial candidates from those asked to make contributions to the campaign. This insulation of judges and judicial candidates reduces the possibility of a quid pro quo relationship and serves to avoid the appearance of impropriety.").

81. 129 S. Ct. 2252 (2009).

82. *See id.* at 2257–64.

to decide cases involving their own campaign contributors.[83] *Caperton's* full impact remains to be seen, however, since the decision rested on extreme facts and the Court emphasized that less troubling circumstances might not require the judge's removal.[84]

e. Prior Knowledge

Judges are disqualified for having extrajudicial knowledge about a case because special insight into the facts of a case may prevent them from impartially weighing parties' evidence and arguments.[85] Federal law disqualifies a judge who has "personal knowledge of disputed evidentiary facts concerning the proceeding."[86] The ABA Model Code similarly provides that "[a] judge shall disqualify himself or herself in any proceeding in which . . . [t]he judge has . . . personal knowledge of facts that are in dispute in the proceeding."[87] Judges are not disqualified, however, where their knowledge about a case is generally available to the public[88] or is the product of judicial proceedings[89] because

83. *Id.* at 2267 ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications."(quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986))).

84. *Id.* at 2265–66 ("In each [previous recusal] case the Court dealt with extreme facts that created an unconstitutional probability of bias that 'cannot be defined with precision.' Yet . . . [t]he Court was careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level." (citation omitted)). For discussions of the potential impact of *Caperton* on disqualification for judges' accepting campaign contributions, see Bruce A. Green, *Fear of the Unknown: Judicial Ethics After* Caperton, 60 SYRACUSE L. REV. 229 (2010); James Sample, Caperton*: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293 (2010); James Sample, *Court Reform Enters the Post-*Caperton *Era*, 58 DRAKE L. REV. 787 (2010) (noting responses related to funding judicial elections in some states following the *Caperton* decision).

85. *See In re* Murchison, 349 U.S. 133, 136–39 (1955) (disqualifying a judge from presiding over contempt proceedings against defendants arising from their conduct in one-man grand jury proceedings held by the same judge because the judge could not free himself from influence of personal knowledge of what occurred in the grand jury session); United States v. Craven, 239 F.3d 91, 102–03 (1st Cir. 2001); Edgar v. K.L., 93 F.3d 256, 259–62 (7th Cir. 1996) (per curiam); *cf.* Onishea v. Hopper, 126 F.3d 1323, 1340 (11th Cir. 1997); United States v. Sidener, 876 F.2d 1334, 1336 (7th Cir. 1989) (judge's impartiality not reasonably questioned when judge had some prior knowledge about the case because the movant did not present any evidence of impartiality arising from that knowledge).

86. 28 U.S.C. § 455(b)(1) (2006).

87. ABA CODE, *supra* note 12, R. 2.11.

88. *See* State v. Dorsey, 701 N.W.2d 238, 247 (Minn. 2005) ("'[P]ersonal knowledge' pertains to knowledge that arises out of a judge's private, individual connection to particular facts. . . . [I]t does not include the vast realm of general knowledge that a judge acquires in her day-to-day life as a judge and citizen."); *see also* United States v. Bonds, 18 F.3d 1327, 1330 (6th Cir. 1994) ("[A] judge should

such information is considered conducive to good judicial decision making.[90]

f. The Due Process Clause

The Due Process Clause protects people from being deprived of life, liberty, or property without due process of law.[91] In part, "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal," so that his life, liberty, or property will not be taken based on a judge's biased or incorrect understanding of the law or facts.[92] Due Process also "assures equal application of the law," and guarantees "that the judge who hears [each litigant's] case will apply the law to him in the same way he applies it to any other party."[93]

While "most matters relating to judicial disqualification [do] not rise to a constitutional level,"[94] the Supreme Court has found that in some circumstances Due Process does mandate a judge's removal.[95] Judges are constitutionally disqualified when their pecuniary interest in a case would "offer a possible temptation to the average man . . .

never be reluctant to inform himself on a general subject matter area, or participate in conferences relative to any area for the law, for fear that the sources of information might later be assailed as 'one sided.'").

89. *See, e.g.*, United States v. Jamieson, 427 F.3d 394, 405 (6th Cir. 2005) (holding judge was not disqualified from presiding over a case despite his concurrently presiding over a related action because the judge's knowledge about the matter came from a judicial, not extrajudicial, source); United States v. Flowers, 818 F.2d 464, 468–69 (6th Cir. 1987) (finding that the Canons of Judicial Conduct did not require the district judge to recuse due to his personal knowledge of disputed evidentiary facts because the information did not come from an extrajudicial source).

90. *See generally* Liteky v. United States, 510 U.S. 540, 548–53 (1994).

91. U.S. CONST. amends. V, XIV.

92. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

93. Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002); *see also* Bigby v. Dretke, 402 F.3d 551, 558 (5th Cir. 2005) ("[T]he cornerstone of the American judicial system is the right to a fair and impartial process. Therefore, any judicial officer incapable of presiding in such a manner violates the due process rights of the party who suffers the resulting effects of that judicial officer's bias."). *See generally* Gerard J. Clark, Caperton's *New Right to Independence in Judges*, 58 DRAKE L. REV. 661, 668–69 (2010).

94. FTC v. Cement Institute, 333 U.S. 683, 702 (1948).

95. *See generally* FLAMM, *supra* note 10, at 31–33; Terri R. Day, *Buying Justice:* Caperton v. A.T. Massey*: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 366–70 (2009); Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 SYRACUSE L. REV. 247, 249–55 (2010); Grannis, *supra* note 21, at 391–96; Benjamin A. Levin, Note, Caperton v. A.T. Massey Coal Co.*: Something is Rotten in the State of West Virginia—A Common-Law Approach to Constitutional Judicial Disqualification*, 69 MD. L. REV. 637, 640–53 (2010).

not to hold the balance nice, clear and true."[96] A judge who becomes heavily involved with the parties or subject matter of a case may also be constitutionally disqualified. For example, in In re *Murchison*[97] the Court held a judge may not preside over the criminal prosecution of a defendant that the judge had indicted while serving as a one-man grand jury.[98] Similarly, in *Offutt v. United States*,[99] the Court ruled a judge was constitutionally disqualified from a case being tried by an attorney who leveled "personal attacks or innuendoes" against the judge.[100]

Most recently, the Court expanded constitutional disqualification by holding that Justice Brett Benjamin was disqualified from hearing an appeal where the appellant's CEO had spent three million dollars to support Benjamin's election to the bench several years earlier.[101] *Caperton* established that Due Process does not "require proof of actual bias,"[102] and that the relevant question is whether the circumstances pose "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be

96. Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972); *see* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 827–29 (1986) (constitutionally disqualifying a state appellate judge from an appeal because the judge was a party to pending litigation that turned on one of the questions presented to the appellate court for review); Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."); *see also* Gibson v. Berryhill, 411 U.S. 564, 579–81 (1973) (constitutionally disqualifying a state optometry board composed solely of members of one professional association from license revocation proceedings brought against optometrists employed by a competing optometry association).

97. 349 U.S. 133, 139 (1955).

98. *Id.* at 137 ("It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. . . . A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."). *But see* Withrow v. Larkin, 421 U.S. 35, 54–55 (1975) (holding an administrative agency tasked with licensing physicians is not disqualified from adjudicating license-revocation proceedings simply because it also investigates claims of physician misconduct and initiates such proceedings itself).

99. 348 U.S. 11 (1954).

100. *Id.* at 14; *see also* Cooke v. United States, 267 U.S. 517, 539 (1925).

101. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257–59 (2009); *see also supra* notes 81–84 and accompanying text.

102. *Caperton*, 129 S. Ct. at 2263.

adequately implemented."[103] Reasoning that "fears of bias arise when . . . a man chooses the judge in his own cause,"[104] the Court concluded that Justice Benjamin would feel a debt of gratitude to the appellant's CEO for the latter's extraordinary efforts on behalf of his election campaign, and that his presiding over the case would therefore lead to a "possible temptation . . . not to hold the balance nice, clear, and true."[105]

B. The Traditional Jewish Law of Judicial Disqualification and Recusal

This Section reviews the traditional Jewish law approach to judicial disqualification. Because *halachic* disqualification jurisprudence is grounded in the Jewish law's unique conception of the role of courts and judges in the litigation process, Section I.B.1. begins by providing appropriate jurisprudential context for the substance of Jewish recusal doctrine. Building on this theoretical framework, Section I.B.2 lays out the basic doctrines governing judges' removal in the *halachic* system.

1. Litigation, Courts, and Judges in the Halachic *System: The Jurisprudential Aims of Jewish Disqualification Law*

Halachic recusal law serves principally to preserve the integrity of courts' institutional role in the adjudicative process, to protect judges' professional integrity, and to encourage judges to be personally integrious. Courts' institutional role and judges' professional and personal duties stem, in turn, from the Torah law's goal of encouraging the moral ennoblement of mankind through other-focused self-transcendence.

Jewish tradition characterizes God as performing *chessed*, selfless actions calculated to impart good unto others.[106] God expressed His characteristic *chessed* by creating Man "in His own image,"[107] by en-

103. *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

104. *Id.* at 2265.

105. *Id.* at 2262–64 (quoting *Tumey*, 273 U.S. at 532).

106. *See* AVOS D'RAV NOSSON 4:5 ("The world was initially created with nothing but *chessed*, as it says, For I [God] have said: The world will be built with *chessed*.") (internal quotations omitted); R. MOSHE CHAIM LUZZATTO (1707–1746), 1 DERECH HASHEM 2:1 ("Behold, the very purpose of [God's] creating [the world] was to confer from His goodness unto his creations."). All translations of Hebrew-language sources in this Note are my own unless otherwise indicated.

107. *Genesis* 1:27; *cf.* R. ELIYAHU DESSLER, 1 MICHTAV M'ELIYAHU 32 (1997) (quoting *Genesis* 1:27) ("The power of giving is the greatest of God's characteristics .

dowing him with God-like creativity and free will,[108] and by directing him to use these abilities to harness the natural world as a means of performing *chessed* himself.[109] God fashioned a *chessed*-based universe to benefit His creations,[110] and Man can emulate God by choosing to utilize his own creative potential to do *chessed* for others,[111] thereby becoming truly human.[112] The Talmud thus teaches that by suppressing his natural self-centeredness and instead using his talents for *chessed* in accordance with God's will Man becomes "a partner with God in the ongoing work of Creation."[113]

. . and with this characteristic He created Man, as it says: 'In God's image was Man created . . . .'").

108. *See* R. CHIZKIYAH B. MANOACH (d. 13th century), CHEZKUNI, GENESIS 1:26 (s.v. *Na'aseh Adam*) (explaining that just as God controls the heavens, so too, is Man empowered to rule over the earth); R. OVADIAH SFORNO (d. 1550), COMMENTARY ON THE PENTATEUCH, GENESIS 1:27 (s.v. *B'tzelem Elohim*) (reasoning that Man's likeness to God lies in his ability to exercise free-will to choose between good and evil).

109. *See Genesis* 1:28; *Genesis* 2:15 ("And God set a goal for [Adam and Eve], and God said to them: 'Be fruitful and multiply, and fill the earth, and conquer it . . . And God took Man and place and set him in the Garden of Eden to develop and guard it."); NACHMANIDES (1194–1270), COMMENTARY ON THE PENTATEUCH, GENESIS 1:28 (s.v. *v'kivshuha*); *see also* R. SAMSON RAPHAEL HIRSCH, THE NINETEEN LETTERS 62 (Joseph Elias, trans., 2d. ed. 1995) ("God created [Man] . . . to be, so to speak, a 'partner in the work of creation,' able to direct the forces that make up our world and free to choose how to use this power." (quoting BABYLONIAN TALMUD, SHABBOS 10a)).

110. *See supra* note 106.

111. HIRSCH, *supra* note 109, at 64 ("Since God's world is built . . . on loving kindness, man's duty to follow God and imitate His ways is discharged, in the first place, by doing acts of kindness.").

112. *See* R. YEHUDAH LOEW (1525–1609), DERECH CHAIM 2:1 (stating that Man makes himself truly human by choosing to govern himself with his intellect and awareness of his God-given purpose instead of with his base physicality); R. SAMSON RAPHAEL HIRSCH, HOREB: A PHILOSOPHY OF JEWISH LAWS AND OBSERVANCES 247–48 (Dayan Dr. Isidore Grunfeld, transl., 7th ed. 2002) [hereinafter HIRSCH, HOREB] ("[T]he highest goal you can reach is to become a *chasid*, that is to say, a person who lives entirely, with everything he has, for the welfare of others, who is nothing for himself and everything for others."); Dayan Dr. Isidore Grunfeld, *Introduction*, *in* HOREB, *supra*, at p. xliii [hereinafter Grunfeld, *Introduction*] ("[To perfect the world through the reign of God]—this is the aim, the striving for which makes us into pious souls." (quoting R. SAMSON RAPHAEL HIRSCH, 3 GESAMMELTE SCHRIFTEN 449 (1912) (Ger.))).

113. BABYLONIAN TALMUD, SHABBOS 10a; *see* Michael J. Broyde, *Rights and Duties in the Jewish Tradition, in* CONTRASTS IN AMERICAN AND JEWISH LAW xxix (Daniel Pollack ed., 2001) ("[Jewish law] is predicated on the duty to imitate the Divine"); *see also* BABYLONAIN TALMUD, SHABBOS 133b ("Just as God is merciful and gracious, so should you act mercifully and graciously."); BABYLONIAN TALMUD, SOTAH 14a; MAIMONIDES (1135–1204), SEFER HAMITZVOS, Positive Commandment 8. *See generally* R. MOSHE CORDOVERO (1522–1570), TOMER DEVORAH, ch. 5–6 (discussing Man's duty to emulate God's characteristics).

Torah law, which governs individual, communal, and national Jewish life,[114] teaches Jews how to fulfill this *chessed*-imperative in practice.[115] Jews fulfill their *imitatio dei* obligation by transcending their baser instincts and choosing to act in accordance with the Torah's *chessed*-oriented legal norms instead.[116] The Jewish law system thus functions primarily as a means of enabling its adherents to develop their humaneness through self-transcendence, by teaching them how and instructing them to choose to adopt God's *chessed*-focused will as their own.[117] The *Midrash* thus posits that "[t]he Torah's laws were given to the Jews for the sole purpose of refining their social interactions."[118]

114. *See* Grunfeld, *Introduction*, *supra* note 112, at xlvii ("What the Torah desires to regulate is . . . the whole of human existence—man's sensual impulses, his needs and desires, his individual life as well as that of his family, society, and State." (quoting R. SAMSON RAPHAEL HIRSCH, 1 GESAMMELTE SCHRIFTEN 83 (1912) (Ger.))).

115. *See* R. SAMSON RAPHAEL HIRSCH, 2 COLLECTED WRITINGS 207 (Marc Breur et al. eds., 2d ed. 1997) [hereinafter HIRSCH, COLLECTED WRITINGS] ("The Law [of the Torah] . . . establishes God's will as the motive and measure of man's ennoblement."); HOREB, *supra* note 112, at 219–20 ("[God] has announced His justice to the world [in the laws of the Torah] so that you may freely submit to Him in consequence of His command to you . . . and so that you may be *just*."); Steven H. Resnicoff, *Autonomy in Jewish Law—In Theory and Practice*, 24 J. L. & RELIGION 507, 508–09 (2008) ("Jewish law assumes that there is a God, that God is morally perfect, that God wants human beings to act morally, and that God communicated to the Jewish people specific and general moral rules (Torah precepts).").

116. *See* LAW, POLITICS, AND MORALITY IN JUDAISM 8 (Michael Walzer ed., 2008) ("If [man] could only fathom the inner intent of the law, he would realize that the essence of the true divine religion lies in the deeper meaning of its positive and negative precepts, every one of which will aid man in his striving after perfection . . . ." (quoting MAIMONIDES, LETTER TO YEMEN); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. L. ISSUES 1, 17 (1989) ("[The Jewish legal system] is based on the value of encouraging individuals to expand their narrow self centeredness and reach out to a level of consideration of others: self-transcendence as a key form of moral education."); *see also* Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306 (1961).

117. This concept is illustrated by the following Mishnaic teaching. "R. Chanina b. Akashia said: God, blessed be He, wanted to provide benefit to the Jews. He therefore gave them a multitude of Torah commandments, as it says: 'For the sake of upholding His justness, God made his teachings [the laws of the Torah] numerous and glorious.'" BABYLONIAN TALMUD, MAKKOS 23b (quoting ISAIAH 42:21). R. Shlomo Yitzchaki, an eleventh century French scholar and author of the preeminent commentary on the Talmud explained that the multitude of *halachic* directives benefit adherents to the Torah because they provide additional opportunities for man to suppress his base desires and accept God's will as his own. *See* R. SHLOMO YITZCHAKI, RASHI to MAKKOS 23b (s.v. *L'zakos es Yisrael*) [hereinafter, YITZCHAKI, RASHI].

118. MIDRASH RABAH, LEVITICUS 13:3.

Moral ennoblement through self-transcendence requires other-referentiality, the adoption of an externally-dictated rather than internally-devised value system. While the implementation of even an objective standard of conduct necessitates subjective interpretation, by reposing ultimate authority in some other, morally superior authority an individual can minimize the degree to which seemingly self-transcendent actions are really self-indulgent appeals to his own vanity. As a moralizing medium, therefore, the Torah relies more on the process of Jews' choosing to subjugate their naturally self-referential instincts in favor of God's own value judgments as revealed in the Torah.[119] When one performs a good act because his own conscious dictates he do so, his conduct stems from self-referential instinct; when he does that same act because it is commanded by an external moral authority, however, the performance becomes a self-transcending, moralizing act.[120] The Talmud thus teaches, "one who is commanded to act and acts is greater than one who acts similarly but of his own accord,"[121] and "[o]ne may do much or one may do little [in service of God], it is all equal provided each one directs and orders his heart with reference to Heaven."[122]

Interpersonal disputes challenge the *halacha*'s other-referential character and the Torah's self-transcending, moralizing ideal. The other-referential acceptance of Torah law in traditionally religious matters governing Man's relationship with God is unproblematic. Jews study the *halacha*, transcend their base instincts by self-applying the Torah's *chessed*-focused laws to their lives, and consult their rabbis when they are unsure about what the law requires.[123] The moral-

119. *See* Grunfeld, *Introduction*, *supra* note 112, at lxxvii ("If a person makes the will of God his own will, and fights" his natural self-centered desires and impulses "he develops his moral power although his action is not the consequence of his own moral discernment and of a purpose recognized by himself. For moral power and one's own moral discernment do not depend on one another." (quoting R. SAMSON RAPHAEL HIRSCH, ERSTE MITTEILUNGEN 7 (1838) (Ger.))).

120. Aharon Lichtenstein, *Communal Governance, Lay and Rabbinic: An Overview*, *in* RABBINIC AND LAY COMMUNAL AUTHORITY 20 (Suzanne Last Stone & Robert S. Hirt eds., 2006) ("[A]ction in response to the halakhic call is superior to the same act voluntarily undertaken.").

121. BABYLONIAN TALMUD, AVODA ZARA 3a.

122. BABYLONIAN TALMUD, BERACHOS 17a; *see also* MISHNA TORAH, The Laws of Kings 8:11 [hereinafter MISHNA TORAH] ("It is essential that the . . . Laws be obeyed as commandments of God and not as the result of man's own speculative reasoning and moral discernment.").

123. *See* MARC D. ANGEL, LOVING TRUTH AND PEACE: THE GRAND RELIGIOUS WORLDVIEW OF RABBI BENTZION UZIEL 83 (1999) ("One of the vital functions of the rabbi was to serve as a posek, a decisor of Jewish law."); JOSEPH S. OZAROWSKI, TO

izing, other-referential acceptance of the *halacha* in interpersonal conflicts is far more problematic. Disputing parties often reasonably disagree about how to "*halachicly*" resolve their disagreement. Further, a solution adopting one party's view would negate the intended moralizing impact of *halachic* practice because such a resolution, even if substantively correct, would be self-referential, grounded in base instinct rather than a self-transcending, reasoned acceptance of God's will.

This problem is remedied through adjudicatory procedures whereby Jewish law courts, or *batei din* (singular: *beis din*), provide parties with other-referential assessments of how their cases should be resolved under Torah law.[124] *Batei din* hear and evaluate parties' claims, investigate facts, deliberate, and issue rulings elucidating their views of litigants' Torah-based responsibilities.[125] As adjudicatory institutions, Jewish law courts function as disinterested third-parties that are able provide other-referential *halachic* rulings precisely be-

WALK IN GOD'S WAYS: JEWISH PASTORAL PERSPECTIVES ON ILLNESS AND BEREAVEMENT 54 (2004).

124. For an extensive explanation of the self-transcendence facilitating role of Jewish law courts, see R. Jospeh B. Soloveitchik, *The Role of the Judge*, *in* SHIRUREI HARAV: A CONSPECTUS OF THE PUBLIC LECTURES OF RABBI JOSEPH B. SOLOVEITCHIK 81 (Joseph Epstein ed., 1974). This conception of the role of litigation in Jewish law finds support in the *halachic* doctrine of self-help. The Torah generally prohibits individuals from using self-help to resolve monetary disputes with others. A party may, however, employ self-help to enforce his legal claims on another when it is legally and factually clear that the self-helper is in the right and that he would certainly prevail if he resolved the matter in court. *See generally* R. YOSEF KARO (1488–1575), SHULCHAN ARUCH, Choshen Mishpat 4:1 [hereinafter KARO, SHULCHAN ARUCH]. This rule indicates that the general prohibition on self-help is not grounded in the need to maintain social order by proscribing vigilantism, but is instead premised on the fact that in most cases the facts and law are not entirely clear, and that, therefore, neither parties' self-interested view of its Torah obligations under the circumstances is likely to be entirely other-referential and moralizing. Under such circumstances, self-help based on a party's self-referential understanding of the *halacha* would undermine the Torah's moralizing purpose. When the facts and law unavoidably support one disputant over the other, however, the party in the right may enforce the law himself, because the obviousness of the result permits his act of self-help to be other-referential and moralizing. The law of self-help thus suggests that *halachic* adjudication serves to resolve legal disputes in a moralizing manner in cases where each litigants' position is a product of its self-interested interpretation of the Torah, rather than servile acceptance of God's value judgment. *See* SHIMON ETTINGER & HANINA BEN-MENAHEM, SELECTED TOPICS IN JEWISH LAW: SELF-HELP IN JEWISH LAW 15 (1988); Yedidya Dinari, *Self Help in Jewish Law*, 4 DINE ISRAEL 91 (1973).

125. *See* Silberg, *supra* note 116, at 306 ("[L]itigation in Jewish law was in the nature of a common request for clarification by people willing to perform their duty once made known to them."); Suzanne Last Stone, *Judaism and Civil Society*, *in* LAW, POLITICS, AND MORALITY IN JUDAISM, *supra* note 116, at 20.

cause they are not parties to the cases they decide.[126] From this vantage, *batei din* can deliver what litigants cannot furnish for themselves: an external, other-referential evaluation of what the *halacha* requires in a particular dispute.[127] Previously self-focused litigants can consequently transcend their personal priorities by adopting a court's disinterested judgment as their own standard, thereby morally ennobling their conduct consonant with Torah ideals. The Torah preserves this institutional arrangement by disqualifying judges whose connection to a case is incompatible with the court's third-party character. Judges who are in effect parties to a case—such as those who are financially interested in the outcome or are related to a party[128]—are legally incapable of proceeding in a judicial capacity and are disqualified because their connection to the matter prevents them from rendering other-referential, moralizing *halachic* decisions.[129] Such litigant-judges literally cease being jurists,[130] and thus, any measures they take under the guise of judicial proceedings are *ex post* void.[131]

126. *See* BABYLONIAN TALMUD, BAVA BASRA 43a; KARO, SHULCHAN ARUCH, *supra* note 124, at 7:9, 7:12, 37:1.

127. *See* R. SAMSON RAPHAEL HIRSCH, COMMENTARY ON THE PENTATEUCH, DEUTERONOMY 1:17 (s.v. *Ki Hamishpat L'Eilokim Hu*) [hereinafter HIRSCH, COMMENTARY] ("In giving judgment [the judge] is engaged in God's work. . . . [The Torah's] [j]ustice shapes a humane way of life and gives it the form intended by the Creator at the Creation; for the whole purpose of man's creation was so that he should freely realize God's Will, and only for this purpose did the Creator place man in His world."); *see also* Bush, *supra* note 117, at 17–18; Silberg, *supra* note 116, at 306.

128. *See infra* Part I.B.2.a.ii.; *see also infra* Part I.B.2.a.iii (disqualification for receiving bribes or gifts); Part I.B.2.a.iv. (disqualification for having previously issued an advisory opinion).

129. *See* RASHI to BAVA BASRA 43a (s.v. *Noga'im B'eidusan Hein*). Rashi discusses financially interested witnesses who wish to testify on behalf of their interest, writing that since "if any plaintiff were to collect a judgment against the [property in question] they [the witnesses] would lose, it comes out that they would be testifying in their own case." *Id.* This comment, and other *halachic* discussions relating to witness disqualification, also applies to judicial recusal, because under Jewish law, judges are disqualified in every instance where a similarly situated witness would be ineligible to testify. *See* MISHNAH, NIDDAH 6:4 ("All those disqualified from testifying are disqualified from judging, but there are those that are disqualified from judging that are nevertheless qualified to testify."); BABYLONIAN TALMUD, SANHEDRIN 27b; *see also supra* notes 123–127 and accompanying text.

130. *See* R. YONASAN EIBESHUTZ, TUMIN 37:1 and sources cited therein (reasoning that a financially interested witness or judge cannot really be considered disqualified because, on account of their stake in the case, they were never "within the legal definition of a witness" or judge).

131. *See* R. MOSHE ISSERELES (1520–1572), DARCHEI MOSHE [hereinafter ISSERELES, DARCHEI MOSHE] to R. YOSEF KARO, BAIS YOSEF [hereinafter KARO, BAIS YOSEF], Choshen Mishpat 33:1 (citing R. MORDECHAI B. HILLEL ASHKENAZI (thirteenth century), RAV MORDECHAI [hereinafter MORDECHAI] to SANHEDRIN §

The professional responsibilities of Jewish law judges, or *dayanim* (singular: *dayan*), extend beyond maintaining the courts' requisite third-party vantage. A *dayan's* duty is to, as the Talmud puts it, "issue true and honest judgments."[132] "True" decisions are substantively correct applications of Torah law norms to the facts of each case,[133] and "honest" rulings are conclusions motivated solely by a judges' commitment to uphold and enforce the *halacha*, unadulterated by extralegal considerations or personal value judgments.[134] To help *dayanim* fulfill their charge, Jewish law obligates judges to voluntarily recuse from cases that implicate their personal biases.[135] Unlike interested *dayanim* who are disqualified because they cease being jurists,[136] potentially partial judges are legally competent to preside and are only obligated to recuse *ex ante* out of concern that despite their best efforts they will fail to rule "truthfully and honestly."[137] Therefore, if a *dayan* wrongfully presides over and rules on a matter that implicates his biases, the decision—if substantively correct—will stand, whatever his failure to recuse might say about the judge's personal and professional integrity.[138]

698) ("All those [judges or witnesses] that are disqualified, even after they rule or testify [accurately] in a case, their rulings and testimony are void.").

132. BABYLONIAN TALMUD, SHABBOS 10a.

133. *See* DEUTERONOMY 16:19 ("Do not twist the law."); TOSFOS to BAVA BASRA 8b (s.v. *Din*).

134. *See* TOSFOS to MEGILLAH 15b (s.v. *Zeh*); BEIS YOSEF, Choshen Mishpat 1:2 (s.v. *V'zehu Kavanas Raboseinu*); R. MOSHE DOVID ASHKENAZI (1774–1814), BE'ER SHEVA, Sanhedrin 111b; HAGAOS V'HEAROS to R. YAAKOV B. ASHER (D. 1343), ARBAH TURIM [hereinafter ARBAH TURIM], Choshen Mishpat 1:17 and sources cited therein (Machon Yerushalayim 1993); *see also* HIRSCH, HOREB, *supra* note 112, at 266 ("The duty of the judge is to be not more, but also not less, than the mere instrument of the law, and thus hold himself completely above case and party."). A judge's injecting personal considerations into his judicial decision making process—even if these extralegal motivations do not alter the substantive correctness of the ruling—undermines the other-referential character of the decision, negating the quintessential moralizing purpose of *halachic* adjudication. *Id.*

135. *See infra* notes 176–77 and accompanying text.

136. *See supra* notes 129–31 and accompanying text.

137. *See* R. YEHOSHUA FALK, SEFER MEIROS EINAYIM 33:1 [hereinafter SMA] ("Judgment is dependent on [the judge's] reasoning, and his thought processes may be changed on account of [the judge's] love or hatred [for a litigant], even without malicious intentions.").

138. *See* MISHNA TORAH, The Laws of Sanhedrin 23:6 ("It is prohibited for a person to judge a party he loves . . . [so too,] one may not judge a person he hates . . . "). Commentators point to Maimonides' decision to write that a biased judge is "prohibited" (*assur*) rather than "disqualified" (*pasul*) from judging as indicative of his holding that a biased judge is only initially prohibited from deciding cases implicating his personal preferences, but that if he rules correctly in such cases the decision is legally

Dayanim must also maintain exceedingly high standards of personal integrity in excess of what may be required to rule truthfully and honestly.[139] The Torah prescribes the inherent equality of all people, distinguishing between them only in terms of their differing rights and obligations under the law.[140] *Dayanim* are obligated to affirm and actualize this concept by treating litigants equally, demonstrating that plaintiff, defendant, judge, and court are brought to together and hold power over one another only by virtue of their collective moralizing commitment to abide by God's law.[141] Additionally, judges, like all Jews, must constantly strive to suppress their base instincts and internalize as their own God's *chessed*-focused value judgments as expressed in the *halacha*.[142] In support of this lofty vision or judges' personal obligations, Jewish law demands that judicial candidates possess a wide array of meritorious character traits, including humility, aversion to wealth and luxury, a love of truth and justice, a love of people, and a good reputation.[143]

2. Grounds for Disqualification and Recusal in Jewish Law

This Section examines the substantive *halacha* governing the removal of judges. Subpart I.B.2.a. discusses instances in which a judge is disqualified because his connection to a case is incompatible with the institutional role of the *beis din* in the adjudication process. Subpart I.B.2.b. then reviews grounds for which a *dayan* may be *ex ante* prohibited from presiding and obliged to voluntarily recuse. Subpart I.B.2.c. concludes by discussing the Jewish law judges' extrajudicial obligations to develop their personal integrity by affording equal treatment and consideration to every litigant.

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valid after the fact. *See, e.g.*, BAIS YOSEF, Choshen Mishpat 7:8 (s.v. *Ein Hadayan*); R. YOSEF ISSER, SHA'AR MISHPAT 7:2.

139. *See* MISHNAH TORAH, The Laws of Sanhedrin 2:7; *infra* Part I.B.2.c.

140. *See* R. YITZCHAK ARAMA (1420–1494), AKEIDAS YITZCHAK, *Numbers* 1:2; Emanuel Rackman, *Judaism and Equality*, *in* JUDAISM AND HUMAN RIGHTS 33–34 (Milton Ridvas Konvitz ed., 2001).

141. *See* SHULCHAN ARUCH, Choshen Mishpat 17:1–11; *infra* notes 195–196 and accompanying text.

142. *See* ARBAH TURIM, Choshen Mishpat 1. For a discussion of the parallel principle that the Torah views all Jews as judges, constantly evaluating and deciding the proper *halachic* course of conduct in every situation in which they find themselves, and expected to always conduct themselves in accordance with the highest standards of judicial integrity, see Hon. Rick Haselton, *Of Judging and Judaism*, 13 LEWIS & CLARK L. REV. 483, 489–90 (2011).

143. *See* ARBAH TURIM, Choshen Mishpat 7:15; *see also* MISHNAH TORAH, The Laws of Sanhedrin 2:7.

a. Disqualification to Maintain the Institutional Integrity of the Court

The Torah preserves courts' institutional role as third-party adjudicators capable of providing litigants with other-referential, moralizing evaluations of their *halachic* duties by disqualifying judges when their connection to a case renders them parties to the litigation, undermining the court's fundamental *raison d'etre*.[144] This Subpart discusses the rules governing these disqualifying relationships, which include financial interests, close familial relationships, receiving bribes or gifts, and issuing advisory opinions.

i. Financial Interest

The Talmud disqualifies a resident judge from a case brought by his town's communal charity fund to collect an unpaid pledge,[145] and from an action brought by his community against a defendant accused of stealing the town's Torah scroll.[146] The resident *dayan* is legally incapable of ruling, because in both cases he has a financial interest in the outcome of the suit.[147] In the Torah scroll case, the judge is a party to the litigation because all Jews must hear public Torah readings thrice weekly,[148] and because the town's citizens—including the judge—will have to collectively purchase a new scroll if they fail to

144. *See supra* notes 126–131 and accompanying text.

145. *See* BABYLONIAN TALMUD, BAVA BASRA 43a ("If one says, 'Give a sum of money to the people of my city,' the case may not be judged by judges of that city, nor may evidence be presented based on the testimony of residents of that city."). For a discussion of the nature of communal charity funds as institutions and the capacity of these institutions to bring legal suits in court, see PRINCIPLES OF JEWISH LAW 161–62 (Menachem Elon ed., 2007).

146. *See* BABYLONIAN TALMUD, BAVA BASRA 43a ("The residents of a city from whom a Torah scroll was stolen; the case may not be judged by judges of that city, and evidence may not be presented based on the testimony of the residents of that city."). For an overview of the legal remedies for alleged robbery or theft, see SHULCHAN ARUCH, Choshen Mishpat 359–78; *see also Theft and Robbery*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0019_0_19785.html (last visited Nov. 21, 2011).

147. *See* BABYLONIAN TALMUD, BAVA BASRA 43a.

148. According to the Talmud, the prophet Ezra enacted ten new laws when he led the Jewish people from exile in Persia to resettle their lands in Israel. *See generally Ezra* 1–4. Among these measures was that the Torah should be read publicly on Mondays, Thursdays, and Saturdays, so that the masses should not pass three days without Torah study. *See* BABYLONIAN TALMUD, BAVA KAMMA 82a; 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 556 n.47 (Benard Auerbach & Melvin S. Sykes trans., 1994) (1988).

recover against the alleged thief.[149] Likewise, in the charity fund case, the judge is disqualified because the residents of every community are obligated to support their poor,[150] and recovering the bequest would offset the charity burden otherwise born by the town's residents, including the judge.[151]

According to the *halachic* codes,[152] *dayanim* are disqualified for direct and indirect financial stakes in cases pending before them,[153] as well as for even small non-pecuniary interests in such matters.[154] Be-

149. *See* BABYLONIAN TALMUD, BAVA BASRA 43a; 1 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 63 n.42 (1990); *see also* SHULCHAN ARUCH, Choshen Mishpat 163:1 ("Members of the community may legally compel each other . . . to purchase a Torah scroll.").

150. *See* SHULCHAN ARUCH, Yoreh Deah 256:1 ("[The community of] every city in which there are Jews is obligated to appoint charity fund trustees who are well-known and trustworthy in order that they may go and collect from each member of the community the amount that has been fixed for him to contribute [to the public fund]."); R. MOSHE ISSERLES, REMA [hereinafter ISSERLES, REMA] to SHULCHAN ARUCH, Choshen Mishpat 163:1; R. YECHIEL MICHEL EPSTEIN (1829–1908) ARUCH HASHULCHAN, Choshen Mishpat 163:1. For a more extensive discussion of local Jewish communities' obligation to support their poor and the manner in which this burden devolves on the members of that community see generally AARON LEVINE, ECONOMICS & JEWISH LAW: HALAKHIC PERSPECTIVES 107–37 (1987).

151. *See* RASHBAM (Samuel ben Meir c. 1085–c. 1158) to BAVA BASRA 43a (s.v. *D'keivan D'ravach*); BAIS YOSEF, Choshen Mishpat 7:17, 18 (s.v. *U'mah Shekasuv V'afilu*); R. YOEL SIRKIS (1561–1640), BAYIS CHADASH [hereinafter BACH], Choshen Mishpat 7:17; Quint, *supra* note 149, at 62 n.42.

152. *See* MISHNAH TORAH, The Laws of Evidence 15:2–3; ARBAH TURIM, Choshen Mishpat 7:16–17; SHULCHAN ARUCH, Choshen Mishpat 7:12.

153. *Compare* SHULCHAN ARUCH, Choshen Mishpat 37:1 (ruling that where two partners own a single property and a suit is brought against one of the partners alleging that the whole property had been stolen from the plaintiff and illegally sold to the partner-defendant, the non-party partner is disqualified from judging the case) *and* SHULCHAN ARUCH, Choshen Mishpat 37:4 (ruling that a debtor holding a debt in partnership with another party is disqualified from judging a case brought by the creditor against only the partner for repayment of the loan) *with* SHULCHAN ARUCH, Choshen Mishpat 37:11 (holding that where A holds a note of credit against B and conveys the note to C, B is disqualified from judging an action seeking to invalidate the conveyance since he may prefer to be indebted to A over C, or vice versa) *and* SHULCHAN ARUCH, Choshen Mishpat 37:15 (ruling that where A sells property to B without a guarantee and C subsequently brings a suit against B to recover title to the property, A is disqualified from judging the case since he may prefer that the property remain with B so that his own creditors can attach the property to pay debts owed to them by A).

154. *See, e.g.*, R. ASHER B. YECHIEL, RESPONSA ROSH 6:25 (disqualifying a judge from deciding a case involving a bequest of books and lamps to the synagogue the judge frequented, even though the members of the congregation would be under no obligation to purchase these items themselves if the bequest was invalidated); R. YOM TOV ASEVILLI (RITVA) (1250–1330), NOVELLAE TO BAVA BASRA 43a, n.62 (Mossad Harav Kook, ed.) (s.v. *Ibayis Eimah*) (quoting R. MEIR ABULAFIA (1170–

cause they cannot expressly provide for every kind and degree of interest that a judge may have in a case, the codes give *dayanim* discretion to determine whether a particular interest is disqualifying, but caution judges to voluntarily recuse themselves in doubtful circumstances:

> These matters are dependent on the mind of the judge and the strength of his understanding of the roots of the legal issues and of his knowledge of causation; he must delve deeply to determine whether this [judge] has any interest in this judgment, even through a far-off and circuitous route.[155]

ii. Familial Relationships

Dayanim are disqualified from deciding cases involving their close relatives because a court presided over by a litigant's relative cannot maintain its position as a third-party institution.[156] Relationships between judges and litigants are reckoned in terms of degree[157] by tracing the lineage of both the judge and party to a common ancestor and then counting the number of generations each one is removed from their common progenitor, each generation counting as one degree.[158] A father and son or two brothers are thus termed "first-first" relations;[159] a nephew and uncle, "first-second" relations; and first cousins

1244), RESPONSA RAMAH § 159) (holding a judge is disqualified for even non-pecuniary interests in the outcome of a case).

155. SHULCHAN ARUCH, Choshen Mishpat 37:21.

156. *Cf.* BABYLONIAN TALMUD, BAVA BASRA 159a (reasoning that disqualification for familial relationship cannot be premised on a concern for biased judgment since even Moses and Aaron themselves would be ineligible to judge each other because they were brothers); HIRSCH, COMMENTARY, *supra* note 127, DEUTERONOMY 24:16 ("The reason for this *halacha* lies in the very nature of the Jewish institution of jurisdiction by judges."); *cf.* SMA, *supra* note 137, at 33:1; EIBESHUTZ, *supra* note 130, at 33:1.

157. *See generally* SHULCHAN ARUCH, Choshen Mishpat 33:2–12; ARBAH TURIM, Choshen Mishpat 33:3–41.

158. *See* QUINT, *supra* note 149, at 234–36 (explaining the Jewish law approach to degrees of relation, and providing a list of thirty-five permutations of disqualifying judge-litigant familial relations); *see also* Rabbi Meyer Waxman, *Criminal and Civil Procedure of Jewish Courts*, *in* STUDIES IN JEWISH JURISPRUDENCE 181, 212 (Edward M. Gorshfield ed., 1971).

159. A father and his son are first-first relations since each is one generation removed from their common relative. In this case, in accordance with the Talmudic dictum "a man is related to himself," the father himself is the common relative of both parties. BABYLONIAN TALMUD, SANHEDRIN 25a. Legally speaking, the father is one generation removed from himself, and the son is one generation removed from the father, and father and son are therefore "first-first" relatives, each being one legal generation removed from the common ancestor, the father. *See* BACH, *supra* note 151, at 33:3.

are referred to as "second-second" relatives.[160] *Dayanim* cannot judge cases involving first-first, first-second, or second-second degree relatives.[161] Some authorities maintain that judges are also disqualified from presiding over cases involving first-third relations, such as a great-grandfather and great-grandson or great-nephew and great uncle.[162] Most hold, however, that such relationships are not disqualifying, and that they merely obligate the presiding judge to voluntarily recuse for bias.[163] Individuals related in the second-third or third-third degrees, as well as those more distantly related, may judge each other according to all opinions.[164]

iii. Bribes, Gifts, and Personal Favors

The Torah instructs: "You shall not take bribes, for bribes blind the eyes of the clear-sighted and corrupt the words of the righteous."[165] The Talmud explains homiletically that bribery is called "*shochad*" in Hebrew because it makes the judge and bribing litigant like one—

160. *See* HIRSCH, COMMENTARY, *supra* note 127, at 24:16 (s.v. *Lo Yamusu*) ("The degrees of relation are reckoned by descent from a common ancestor. Thus, father and son, brother and brother, are relatives of the first degree: first-first; cousins are relatives of the second degree: second-second; nephew and uncle, grandson and grandfather are first-second; great-grandson and great-grandfather, great-nephew and great-uncle are first third, and so forth.").

161. *See* SHULCHAN ARUCH, Choshen Mishpat 7:9, 33:2.

162. *See, e.g.*, TOSFOS *to* BAVA BASRA 129a (s.v. *Eehi*); BAAL HALACHOS GEDOLOS, The Laws of Testimony § 51. *See generally* BAIS YOSEF, Choshen Mishpat 33:6 (s.v. *Aval L'Rabbeinu Tam*).

163. *See, e.g.*, R. YITZCHAK ALFASI (11th century), RIF, Bava Basra 56b; R. YITZCHAK ALFASI, RIF, Sanhedrin 6b; MISHNAH TORAH, The Laws of Witnesses 13:4–5; RAMA to SHULCHAN ARUCH, Choshen Mishpat 33:2 (suggesting that even though first-third relatives are not disqualified from judging each other, it is nevertheless proper for them to voluntarily recuse themselves from such cases, though their failure to do so will not invalidate a substantively correct ruling). *See generally* BAIS YOSEF, Choshen Mishpat 33:3.

164. *See* SHULCHAN ARUCH, Choshen Mishpat 33:2. Regardless of whether or not a distantly related judge is fully disqualified, he must remain vigilant of his own partiality and is encouraged to voluntarily recuse himself from any suit involving a relative towards whom he may be unable to remain entirely dispassionate and concerned solely for the law. *See infra* notes 182–183 and accompanying text.

165. *Exodus* 23:8. The *halacha*'s concern for judicial graft is so severe that many *halachic* codes introduce their discussion of the subject with a double exhortation: "A judge must be *very, very* careful not to take a bribe, even to find for the party who is anyway in the right." ARBAH TURIM, Choshen Mishpat 9:1 (emphasis added); SHULCHAN ARUCH, Choshen Mishpat 9:1; *see also* SMA, *supra* note 137, at 9:1.

"*shehu chad*."[166] A bribed *dayan* thus becomes a party to the case and is legally incapable of presiding.[167]

Disqualifying benefits include all valuable goods or services conveyed by a party to a judge while the litigant's case is docketed in the *dayan's* court.[168] Judges are even disqualified for borrowing household goods from neighbors who are also parties to litigation before the judge.[169] Talmudic judges held themselves disqualified in numerous seemingly innocuous circumstances, such as where a litigant brushed a feather from the judge's robe, where a party kicked some

166. *See* BABYLONIAN TALMUD, KESUBOS 105b. The fundamental incompatibility of bribery with the *beis din*'s proper institutional role is further evidenced by the rule disqualifying judges for accepting equally valuable gifts from each party in a case. Even though such even-handed bribery would not likely sway a judge to favor one litigant over the other, it is nevertheless disqualifying because a bribed judge ceases to be the embodiment of the third-party court and becomes a party to the case. *See* R. YEHOSHUA FALK, DRISHA to ARBAH TURIM, Choshen Mishpat 9:1; SMA, *supra* note 137, at 9:2. *Cf.* BABYLONIAN TALMUD, KESUBOS 105a (discussing the case of a judge who accepted an equal sum from each litigant in payment for his judicial services, and then questioning the judge's conduct as a violation of the prohibition on accepting bribes).

167. *See* MISHNAH, BECHOROS 4:6 ("The rulings of a judge that accepts payment for judging are null and void."); BACH, *supra* note 151, at Choshen Mishpat 9:9 ("It appears to me that anytime a judge accepts [a benefit] that falls within the legal definition of a bribe, his rulings are null and void.").

168. *See* BACH, *supra* note 151, at Choshen Mishpat 9:4. A *dayan* is not ordinarily disqualified, however, by his receiving a gift or other benefit prior to the giver's filing his claim or appeal in the recipient judge's court, even if the immanency of the litigant was commonly known at the time the gift was given. *See* ARBAH TURIM, Choshen Mishpat 9:6; SHULCHAN ARUCH, Choshen Mishpat 9:2. Nevertheless, because such gifts may result in the recipient judge's finding it difficult to remain impartial, judges that receive such preemptive gifts from prospective litigants are strongly urged to voluntarily recuse themselves as an expression of personal integrity. *See* ARBAH TURIM, Choshen Mishpat 9:6; SHULCHAN ARUCH, Choshen Mishpat 9:2; R. AVRAHAM TZVI HIRSCH EISENSTADT (1813–1868), PISCHEI TESHUVA, Choshen Mishpat 9:5. *But see*, Eisenstadt, *supra*, at 9:7 ("If the judge feels that the gift was sent to him only because the giver expected to appear before him in litigation . . . even if [the case is not to be heard] for some time after the gift is given, the judge is disqualified." (citing BACH, *supra* note 151, at Choshen Mishpat 9:6)).

169. *See* SHULCHAN ARUCH, Choshen Mishpat 9:1 ("Any judge that borrows something is disqualified from judging the lender."). A judge might preside over a case involving his creditor, however, if the nature of their relationship is one of ordinary social convention. Thus, if a judge borrows from a party while also being in a position to lend to that party, the debtor-creditor relationship is considered ordinary neighborly sociability, and is not disqualifying. *See id.* ("[Disqualification for borrowing from a party] applies only if the judge does not have what to lend; but if he has what to lend he is qualified, since the party, too, may borrow from him."). Even if a judge borrows something from a litigant as a matter of ordinary social convention, he may still be disqualified if circumstances indicate that the loan was made on account of the lender's pending litigation before the judge. *See* RAMAH to SHULCHAN ARUCH, Choshen Mishpat 9:1.

dirt to cover spittle that lay at the judge's feet, and where a litigant who was also the judge's sharecropper delivered the year's crop to the judge shortly before it was actually due.[170] Some authorities even disqualify *dayanim* to whom a litigant says "good morning" or offers other salutations or compliments unless the comments could be considered ordinary social conventions.[171]

iv. Advisory Opinions

Judges are disqualified from deciding cases about which they previously issued advisory opinions.[172] Privately issued legal opinions by *halachic* decisors in response to questions submitted to them by members of the public, or responsa, are a major feature of the Torah law system.[173] R. Shmuel de Medina (1505-1589) explained:

> [O]nce a judge has decided [in a responsa] a question posed to him by one [who later appears before him as a] litigant, how can the judge now listen to the arguments of the other litigant, for [by committing himself to a certain legal view on the matter] he has attached himself to the subject matter of the case . . . . Therefore, it appears to me that one who has ruled [privately] on a matter cannot be a judge in that case . . . for he is interested in the litigation. [174]

Thus, a judge is disqualified from presiding over a case about which he previously decided in a responsa because he has an interest in sustaining his original ruling, and is therefore a party to the litigation.[175]

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170. *See* BABYLONIAN TALMUD, KESUBOS 105b.

171. *See* MISHNAH TORAH, The Laws of Sanhedrin 23:3; R. YOSEF COLON TRABATTO (1420–1480), RESPONSA MAHARIK § 16. Most authorities rule that such trite platitudes do not disqualify a judge, but that a judge who receives such comments should take stock of his continuing ability to remain impartial, and if in doubt should voluntarily recuse himself. *See* TOSFOS to KESUBOS 105b (s.v. *Lo*); MORDECHAI, *supra* note 131, at Sanhedrin § 683; TRABATTO, *supra*, at § 21. *See generally* BACH, *supra* note 151, at Choshen Mishpat 9:4; Eisenstadt, *supra* note 168, at Choshen Mishpat 9:4.

172. *See* RAMAH to SHULCHAN ARUCH, Choshen Mishpat 17:5 ("A scholar must not provide a litigant with a prospective ruling on a matter pending before him, nor may he offer his opinion—even without writing a formal decision—as long as he has not yet heard both side's arguments."); *see also* R. SHABTAI HAKOHEN (1621–1662), SIFSEI KOHEIN 17:9 [hereinafter SHACH].

173. *See generally* HANINA BEN-MENAHEM & NEIL S. HECHT, AUTHORITY PROCESS AND METHOD: STUDIES IN JEWISH LAW 59–101 (1998) (discussing the history and legal authority of responsa literature).

174. R. SHMUEL DE MEDINA, RESPONSA MAHARASHDAM, Choshen Mishpat § 2.

175. *See* R. YOSEF TRANI (1538–1639), RESPONSA MAHARIT § 79.

b. Voluntary Recusal to Preserve the Professional Integrity of the Judge

Dayanim must render "true," substantively correct judgments, and also keep their decision-making processes "honest" and free of personal motivations.[176] The Torah therefore obligates *dayanim* to recuse themselves from judging matters that strongly implicate their personal biases, or about which they have extrajudicial knowledge, bebecause, despite their best efforts, they may fail to rule truthfully and honestly.[177] Because a biased judge's deciding a case is not incompatible with the court's institutional third-party role, however, a substantively correct decision by a *dayan* who improperly failed to recuse himself is valid *ex post.*[178] This Section discusses the instances that trigger a judge's duty to voluntarily recuse himself, including where he is biased, and where he has prior extrajudicial knowledge about a case.

i. Bias and the Appearance of Bias

Even an integrious and pious judge may be unable to rule truthfully and honestly in cases that strongly implicate his personal preferences.[179] The Talmud therefore instructs that "[a] man should not judge someone he loves or someone he hates."[180] To trigger a judge's duty to recuse himself, a litigant must demonstrate that the judge is actually biased.[181] Even if actual bias is not proven, however, the Torah urges challenged judges to step down because a litigant's allega-

176. *See supra* notes 133–34 and accompanying text.

177. *See* SMA, *supra* note 137, at 33:1 ("Judgment is dependent on [the judge's] reasoning, and thought processes may be changed on account of [the judge's] love or hatred [for a litigant], even without malicious intentions.").

178. See Maimonides who writes: "It is prohibited (*assur*) for a person to judge a party he loves . . . So too, one may not judge a person he hates . . . ." MISHNAH TORAH, The Laws of Sanhedrin 23:6. Several commentators point to Maimonides' conscious decision to write that a biased judge is "prohibited" rather than "disqualified" (*pasul*) from judging as indicative of his holding that a biased judge is only prohibited from deciding cases implicating his personal preferences, but that if he did rule correctly in the case, his ruling is legally valid after the fact. *See, e.g.*, BAIS YOSEF, Choshen Mishpat 7:9, 10 (s.v. *Vichein Kasav*); ISSER, *supra* note 138, at 7:2.

179. *See* SMA, *supra* note 137, at 33:1

180. BABYLONIAN TALMUD, KESUBOS 105b.

181. *See* RAMA to SHULCHAN ARUCH, Choshen Mishpat 7 ("One who says about a judge that he hates him, or that he loves his opponent is not believed, and needs proof for his allegation.").

tion of judicial partiality may result in the judge's unconscious prejudice toward him.[182] The *halachic* codes further direct judges to recuse themselves from all matters that in their own self-introspective judgment strongly implicate their personal values.[183]

Halachic authorities disagree about the precise parameters of judges' duty to recuse themselves. Some distinguish between cases of extreme and nominal bias, disqualifying judges in cases of the former, but only obligating them to recuse *ex ante* in the latter.[184] Relying on Talmudic precedent, these authorities maintain that extreme bias only exists in very limited circumstances, such as where the judge has intentionally refrained from speaking to the litigant out of enmity.[185] Less troubling manifestations of judicial partiality are not disqualifying and merely obligate a *dayan* to recuse *ex ante*.[186] Most *halachic* decisors disagree with this framework, however, and rule that bias—no matter how extreme—is never disqualifying.[187] These authorities maintain that all allegedly biased judges are only obligated to volun-

182. *See* R. YAAKOV KARLINER, RESPONSA MISHKENOS YAAKOV § 7.

183. *See generally* AVRAHAM DREBERMDIGER, SEDER HADIN 341–43 (2010).

184. *See, e.g.*, R. ASHER B. YECHIEL, PISKEI HAROSH to SANHEDRIN 3:23; ARBAH TURIM, Choshen Mishpat 7:8; R. DOVID HALEVI SEGEL (1586–1667), TUREI ZAHAV, Choshen Mishpat 7:9, 10 (s.v. *Ein Hadayan Yachol Ladon*); 1 R. YAIR BACHRACH (1639–1702), RESPONSA CHAVAS YAIR § 141. Mandatory disqualification in cases of extreme bias, like other grounds for full disqualification, would appear to be premised on the notion that the judge's unusually close friendship or bitter rivalry with one of the litigants does not merely incline him to a partial verdict, but actually gives him a stake in the outcome of the case: his close friend's winning or his bitter enemy's losing the case is really his own victory. *Cf.* BABYLONIAN TALMUD, SANHEDRIN 23a (tracing disqualification of an extremely biased judge to a biblical verse, *Numbers* 35:23, interpreted to disqualify a judge specifically when the judge himself wants to cause one of the litigants to lose the case).

185. *See* BABYLONIAN TALMUD, SANHEDRIN 27b; *see also* SIFRI, Deuteronomy § 181–83 (deriving the three day rule from scriptural sources). An even more restrictive view of disqualifying bias, maintaining that a judge who served as a party's wedding attendant is only disqualified on the first day following the wedding, is cited by EISENSTADT, *supra* note 168, at Choshen Mishpat 7:13. EIBESHUTZ, *supra* note 130, at 7:17, rules that while the Jewish people remain in the Diaspora, their happiness is reduced, and consequently, the especially close friendship between a groom and his groomsman lasts only for one day. Therefore, a groomsman-judge is disqualified from presiding over a case involving the groom on the day of the wedding, but not for any period of time thereafter.

186. *See* R. ASHER B. YECHIEL, *supra* note 154, at 56:9 ("If a judge proceeds to preside" over a case implicating his biases, the litigant prejudiced by the judge's bias "cannot disqualify him entirely unless he demonstrates by eyewitness testimony that the judge had not spoken to him in the last three days out of enmity.").

187. *See* SMA, *supra* note 137, at 7:19.

tarily recuse *ex ante*, and that their failure to step down will not invalidate their otherwise substantively correct rulings *ex post*.[188]

ii. Prior Knowledge

The Torah says, "I charged your judges with their duties, saying: 'Hear disputes *between* your brethren, and then you may judge correctly and justly between man and his fellow.'"[189] The Talmud interprets this verse as requiring *dayanim* to learn about a case only through adversarial judicial proceedings.[190] A *dayan* who receives information about a case without the benefit of also hearing an opposing point of view in the context of formal adversarial proceedings risks unconsciously closing his mind to alternative narratives and issuing a partial decision.[191]

This rule is restated in the *halachic* codes, which obligate judges who receive extrajudicial information about a case to recuse themselves, though such knowledge is not fully disqualifying.[192] Maimonides recognizes the prior knowledge rule as a judicial ideal: "Both litigants must be equal in the eyes of the judge, and there is no more correct and righteous judge than one that does not recognize the litigants or the subject matter of the case."[193]

188. *See, e.g.*, BAIS YOSEF, Choshen Mishpat 7:9, 10 (explaining Maimonides' position on judicial bias in MISHNAH TORAH, The Laws of Sanhedrin 23:6 as disqualifying extremely biased judges and invalidating their verdicts, but merely obligating moderately biased judges to recuse themselves and validating their substantively correct decisions rendered in violation of this prohibition against sitting); SMA, *supra* note 137, at 7:18–19. Some of the more permissive opinions still distinguish between extreme and nominal bias, holding that extreme bias obligates the judge to recuse, while nominal bias has no legal ramifications on the judge whatsoever, though he is nevertheless urged to step down as an expression of personal piety and integrity. *See* TOSFOS to SANHEDRIN 8a (s.v. *Pasilnah*); MORDECHAI to SANHEDRIN § 683.

189. *Deuteronomy* 1:16 (emphasis added).

190. *See* BABYLONIAN TALMUD, SANHEDRIN 7b.

191. *See* RASHI to SANHEDRIN 7b (s.v. *Shomeah Bein Acheichem*) ("The judge should listen to the litigants evidence and claims when they are both together before him, but he must not hear one account without the other side's being present, for it will cause him to set falsehood as truth since there is nothing [presently] contradicting it. And since the judge's heart will be inclined to rule in favor of the narrative he hears alone, he may not be able to bring himself to find in favor of the side he hears from later [during court proceedings].").

192. *See, e.g.*, SHULCHAN ARUCH, Choshen Mishpat 17:5; SMA, *supra* note 137, at 17:11 ("[Once a judge has received extrajudicial information about a case] he may not preside over the case thereafter unless the parties agree to be judged in his court even though he has already heard about the case."); R. YAAKOV B. MOSHE LEVI MOELIN (1365–1427), RESPONSA MAHARIL § 195.

193. MISHNAH TORAH, Laws of Sanhedrin 23:6.

c. Judges' Extralegal Duty to Treat Litigants Equally

Dayanim must maintain high standards of personal integrity in their management of court proceedings.[194] "Every [Jew] is obligated to uphold the Torah, and this common obligation forms the bond that joins . . . the witnesses . . . the litigants and the judges: . . . This bond . . . must be apparent throughout the whole legal procedure, and should be emphasized with full clarity, unalloyed by a foreign element."[195] *Dayanim* affirm their commitment to the *halacha* and their humble role in God's creative order by treating every party equally, privately internalizing and publicly affirming that "the judgment is God's,"[196] and that everyone—especially the judge—is equally bound by Torah law.

The *halacha* prescribes numerous personal judicial obligations designed to ensure that every litigant is (and believes he is) treated equally under God's law.[197] The general refrain, "judges must be careful to treat the litigants equally,"[198] entails a variety of specific obligations.[199] Judges may not allow one party to present its case at length while cutting the other short;[200] they may not speak to one litigant amicably and to the other harshly;[201] they may not allow one party to sit in court while requiring the other to stand;[202] and they may not permit one side to bring counsel to court while denying that opportunity to the other party.[203] Judges must even ensure that a litigant does not appear in court dressed in a manner that would intimidate his opponent,[204] and must help unintelligent litigants articulate

194. *See supra* notes 139–43 and accompanying text.

195. *See* HIRSCH, COMMENTARY, *supra* note 127, at 24:16 (s.v. *Lo Yamusu*); *see also* Dr. Naftali Hirsch, *Pricip des Beweifes und Beweisverfahrens im Criminalprozes des Jud Rechtes*, 12 JESHURUN 80 (1865) (Ger.) [hereinafter Hirsch, *Pricip*].

196. *Deuteronomy* 1:17.

197. *See generally* MISHNAH TORAH, The Laws of Sanhedrin 23; ARBAH TURIM, Choshen Mishpat 17; SHULCHAN ARUCH, Choshen Mishpat 17.

198. ARBAH TURIM, Choshen Mishpat 17:1; *see also* MISHNAH TORAH, The Laws of Sanhedrin 21:1 ("What is correct and righteous judgment? This is when both litigants are made equal [in the eyes of the judge] in all matters.").

199. *See generally* SHULCHAN ARUCH, Choshen Mishpat 17:1–4.

200. *See* BABYLONIAN TALMUD, SHEVUOS 30a; SHULCHAN ARUCH, Choshen Mishpat 17:1.

201. *See* BABYLONIAN TALMUD, SHEVUOS 30a; SHULCHAN ARUCH, Choshen Mishpat 17:1.

202. *See* SHULCHAN ARUCH, Choshen Mishpat 17:1–3.

203. *See* MORDECHAI to SANHEDRIN § 761; SHULCHAN ARUCH, Choshen Mishpat 17:4.

204. *See* SHULCHAN ARUCH, Choshen Mishpat 17:1 ("If one litigant wears noticeably expensive clothing while the other is dressed in a cheap and degrading manner,

their claims.[205] These rules negate distinctions of class, wealth, social standing, and even intelligence, emphasizing the inherent equality of participants in the adjudicatory process and their equal obligation to the Torah.[206] These rules also promote rulings grounded solely in legal value judgments by protecting judges' decision-making processes against the subconscious influence of parties' appearance, social standing, or articulateness.[207]

II. THE AMERICAN AND *HALACHIC* DOCTRINES OF JUDICIAL REMOVAL: A COMPARISON

This Part discusses four principle differences between American and Jewish disqualification jurisprudence. First, American recusal law is grounded in rights-based jurisprudence, but the *halachic* approach relies on a duty-focused legal tradition.[208] Second, American law polices actual and apparent judicial bias in order to protect litigants' rights and promote public confidence on the court system, but Jewish recusal doctrine focuses on preserving proper institutional arrangements between courts, judges, and litigants, and on engendering a professionally and personally integrious judiciary.[209] Third, the American doctrine relies on mandatory disqualification to ensure judicial impartiality, while the *halachic* approach limits top-down disqualification in favor of utilizing judges' duty-consciousness and self-

the judges say to the well-dressed party, 'either dress your opponent as you dress yourself, or dress as he does.'"); *see also* MISHNAH TORAH, The Laws of Sanhedrin 21:2. Because in modern times disparities in dress between rich and poor are less pronounced than they once were, however, *batei din* do not maintain this practice, and instead verbally assure a poorly dressed litigant that his appearance will in no way cause the court to favor his better dressed opponent for "justice can uproot mountains." BACH, *supra* note 151, at Choshen Mishpat 17:1 (s.v. *V'im Ha'echan Lavush Begadim Na'im*); *see* SHACH, *supra* note 172, at 17:2.

205. *See* SHULCHAN ARUCH, Choshen Mishpat 17:9 ("If the judge is aware of a favorable argument for one of the litigants, and sees that the litigant wants to articulate the argument but cannot—either because he does not know how to organize his words; or, because he has forgotten the argument on account of his being agitated by his desire to save himself with a true claim, or due to the anger he feels [towards his opponent]; or because he is embarrassed on account of his weak intelligence—the judge should help him by reminding him of the beginning of the argument . . . .").

206. *See* HIRSCH, COMMENTARY, *supra* note 127, at 24:16 (s.v. *Lo Yamusu*); *see also* Hirsch, *Pricip*, *supra* note 195; QUINT, *supra* note 149, at 132–35.

207. *See* RASHI to SHEVUOS 31a (s.v. *Lavush K'mosoh*) ("So that the [exquisite dress] of one party should not cause the judges to incline their faces [i.e., incline their decision making] towards him.").

208. *See infra* notes 212–20 and accompanying text.

209. *See infra* notes 221–29 and accompanying text.

discipline to achieve unbiased judging.[210] Finally, in American law a judge's improper failure to recuse himself warrants reversal of his final judgment, while the *halacha* voids a biased judge's ruling only when it is substantively incorrect, relying instead on peer review of the *dayan's* personal and professional decisions to ensure an integrious judiciary.[211]

American political and legal culture—including judicial disqualification law—is dominated by rights-based thinking; it is concerned primarily with what individuals and societies can properly demand from one another.[212] In rights-focused jurisprudence, the law articulates positive and negative entitlements which provide individuals with the freedom to act secure from interference within these rights-protected spheres.[213] Modern recusal jurisprudence, too, is rights-focused; litigants are *entitled* to an impartial judge,[214] *entitled* to a court system that upholds their legal rights in both fact and appearance, and *entitled* to a justice system in which they can place their trust.[215]

The *chessed*-based *halachic* system, by contrast, is principally concerned with duties,[216] with what individuals and societies owe to one another and the self-transcendental moral quality of public and pri-

210. *See infra* notes 223–35 and accompanying text.

211. *See infra* notes 238–42 and accompanying text.

212. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF OUR POLITICAL DISCOURSE 3–5 (1991); John Laws, *Beyond Rights*, 23 OXFORD J. LEGAL STUDIES 265, 265–66 (2003) ("The vocabulary of modern liberal speech is very largely the vocabulary of rights.").

213. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 171–73 (1977).

214. *See supra* note 14 and accompanying text.

215. *See supra* notes 10–20 and accompanying text.

216. *See* Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & REL. 65, 65 (1987) ("The principle word in Jewish law, which occupies a place equivalent in evocative force to the American legal system's 'rights,' is the word 'mitzvah,' which literally means commandment but has a general meaning closer to 'incumbent obligation.'"); *see also* SOL ROTH, HALAKHA AND POLITICS: THE JEWISH IDEA OF THE STATE 97 (1988); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165, 182 (2007); Silberg, *supra* note 116, at 312 ("[In Jewish law], when a person refuses to pay his debt he is physically coerced to fulfill his religious obligation to pay. The concern of the court is not the creditor's debt, his damages, but the duty of the debtor, his religious-moral duty, the fulfillment of a precept by him. The creditor receives his money almost incidentally, as a secondary result of the performance of this duty.").

vate conduct.[217] Jewish disqualification doctrine, therefore, focuses on what *batei din* and *dayanim* owe litigants rather than on what disputants may demand from courts and judges. *Batei din* owe disputants a moralizing, other-referential determination of their Torah obligations.[218] *Dayanim* are obligated to issue "true and honest" decisions,[219] and have a duty to develop their humane qualities in a *chessed*-focused manner by treating parties equally under the law.[220]

Based on their different jurisprudential traditions, the American and Jewish recusal schemes offer unique visions of the goals of judicial disqualification. American doctrine, grounded in rights-jurisprudence, seeks to preserve litigants' and the public's right to a justice system that metes out impartial decisions grounded in legal norms.[221] To this end, the American approach prevents actually or apparently biased rulings by disqualifying judges from cases that implicate their biases.[222] Thus, like American law generally, contemporary recusal doctrine enforces minimal standards of conduct without encouraging unnecessarily integrious actions;[223] as long as the bad man cannot be (or pays for being) bad, it matters little whether we teach and encourage him to be good.[224] American recusal doctrine

217. *See* DWORKIN, *supra* note 213. For an articulate explication of the moral distinction between rights-based and duty-focused jurisprudence, see Laws, *supra* note 212, at 269.

> [W]hat is meant by the statement that I have a moral right—a right to do something, or a right not to have something done to me? It is not a statement that implies any virtue on my part. I am not *good* because I assert that I have a right. I am not *bad* because I do not do so. The assertion of a right involves no moral action on my part. There is nothing virtuous in my asserting it. It is not an act of self sacrifice or self restraint, kindness or consideration towards anyone else; it is not other centered, it claims what is due, or what is thought to be due.

Id.

218. *See supra* notes 124–31 and accompanying text.

219. *See supra* notes 132–38 and accompanying text.

220. *See supra* notes 139–43 and accompanying text.

221. *See supra* notes 10–15 and accompanying text.

222. *See supra* Part I.A..

223. This general tendency of American law is well exemplified by rules like the tort doctrine of no affirmative duty to rescue. *See* RESTATEMENT (THIRD) OF TORTS §37 (2005). *Cf.* Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 5 (2011) ("Constitutional requirements typically function as negative rights. They prohibit governmental actors from usurping powers beyond the scope of their authority and they protect individuals from certain forms of state action, rather than imposing affirmative duties on the government to provide for the individual's protection and welfare.").

224. For a discussion of the "bad man" theory of law, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897).

thus controls judicial bias to protect private and public rights, but does not impose ethical standards beyond those necessary to preserve the rights of litigants and the public.[225]

Duty-oriented Jewish disqualification law is less concerned with preventing dishonest judges from harming litigants and more focused on directing *dayanim* to be as moral and integrious as possible.[226] The *halacha* cannot merely prevent wrongdoing, it must also teach and empower potential wrongdoers to do right; helping man be good is the *raison d'etre* of the Torah law system.[227] Therefore, Jewish law does not coercively prevent partial judges from acting dishonestly, but instead directs them to voluntarily preserve their professional trust[228] and to develop their personal integrity.[229]

The American and Jewish doctrines also diverge in their approaches to enforcing recusal rules. Rights-based American disqualification law relies on a top-down scheme for removing judges.[230] When a judge's impartiality can be reasonably questioned, that judge is adjudged unfit to preside; he is disqualified regardless of his own self-conscious assessment of his ability to rule impartially.[231] Consonant with American law's rights-foundations, this mandatory approach ensures that litigants' and the public's rights are protected against biased judgments,[232] even as its stifling judicial self-discipline fails to encourage integrious judging grounded in judges' sense of institutional, professional, and personal duty.[233]

The Jewish disqualification regime, by contrast, is a bottom-up system. The *halacha* mandatorily disqualifies judges only when their presiding would be inconsistent with the courts' institutional function,[234] and in such instances disqualification is more descriptive than prescriptive; a judge simply cannot be a party to a suit and still remain a judge.[235] In all cases where a judge's fitness to rule turns on his sub-

225. Indeed, the duty to sit doctrine might actually discourage morally-minded jurists from acting with integrity by recusing themselves from cases from which they are not legally disqualified to protect the rights of the parties. *See infra* notes 281–282 and accompanying text and sources.

226. *See supra* notes 139–43 and accompanying text.

227. *See supra* note 216.

228. *See supra* notes 124–43 and accompanying text.

229. *See generally supra* Part I.B.2.c.

230. *See supra* notes 37–45 and accompanying text.

231. *See infra* notes 280–81 and accompanying text.

232. *See infra* notes 280–81 and accompanying text.

233. *See infra* notes 280–81 and accompanying text.

234. *See supra* notes 125–31 and accompanying text.

235. *See supra* notes 130–31 and accompanying text.

jective state of mind, the *halacha* relies on the judge himself to integriously evaluate his own impartiality and to determine whether he should voluntarily recuse due to the risk of biased judgment.[236] By insuring impartial judging through voluntary recusal, the *halachic* system infuses judges with a sense of moral obligation, encouraging them to live up to the law's high expectations.[237]

The Jewish and American doctrines also differ in how they deal *post hoc* with decisions improperly issued by judges who should have recused. American law immediately addresses the problem of biased rulings by disqualifying potentially partial judges before they can express their prejudices in judicial opinions.[238] When prophylactic disqualification fails and a judge presides when he should have recused himself, the judge's final disposition is reversed on appeal, even if the decision is substantively correct, thereby preserving litigants' rights and public confidence in the courts.[239]

The *halacha*, however, only voids judicial decisions when they cannot be fairly characterized as court proceedings on account of the judge's being a party to the case.[240] When a partial *dayan* decides a case after wrongly failing to recuse himself, however, his ruling is considered substantively; the decision is reversed if it cannot be legally justified, but upheld if it can be justified.[241] A biased judge who fails

236. *See supra* notes 132–38 and accompanying text.

237. *See* ARBAH TURIM, Choshen Mishpat 1:2 (*quoting* 2 *Chronicles* 17:6) ("[Jehoshaphat] appointed judges for every city, and he said to them: 'Be well aware of what you do, for it is not for men that you judge, but for God! And He will be with you in judgment.'").

238. *See* Geoffrey P. Miller, *Bad Judging*, 83 TEX. L. REV. 431, 460 (2004) ("[D]isqualification . . . can be effective at screening out [biased] judges.").

239. *See* FLAMM, *supra* note 10, at 1012 ("The traditional rule was that when a disqualified judge sat in violation of an express statutory standard, his rulings were to be vacated on appeal."); *see also* Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (holding that a partial judge's presiding over a case is a "structural defect" in the proceedings that is not subject to "harmless-error' standards"); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 758 (2011) ("[A] judge about whom there exists a reasonable question regarding impartiality should not preside. Everything taking place in the case after the improper failure to recuse is wrongful, and the resulting outcome should logically be viewed as a nullity . . . ."). *But see, e.g.*, Lyons v. Sheetz, 834 F.2d 493, 495 n.1 (5th Cir. 1987) (ruling that while the trial judge should have disqualified himself, his decision should be upheld because it was the only possible reasonable disposition); Powell v. Anderson, 660 N.W.2d 107, 120 (Minn. 2003) ("[N]ot every case involving judicial disqualification deserves vacatur.").

240. *See supra* notes 130–31 and accompanying text.

241. *See supra* notes 137–38 and accompanying text.

to recuse himself, but whose decision is upheld as substantively correct may nevertheless be disciplined if his ethical failing is deemed indicative of his unfitness to hold judicial office.[242]

The respective American and *halachic* approaches to recusal thus come full circle. The American disqualification doctrine is grounded in a culture of rights, and focuses strictly on protecting the entitlement to a fair legal process by enforcing minimum standards of impartial judicial decision-making through a top-down mandatory disqualification scheme supplemented by *ex post* reversal of biased judges' decisions. By contrast, traditional Jewish recusal law is rooted in duty-jurisprudence, and concentrates on fostering judges' moral integrity by directing *batei din* and *dayanim* to maintain high standards of institutional, professional, and personal integrity through a largely voluntary recusal scheme that still protects litigants' rights by reversing actually biased judicial rulings.

III. MOVING IN A NEW DIRECTION: TOWARD A DUTY-FOCUSED RECUSAL JURISPRUDENCE

This Part suggests that the conceptual disqualification framework of traditional Jewish law provides a valuable perspective that might be used to improve the problem-plagued contemporary American doctrine. This Part begins in Section III.A., which highlights the need for recusal reform by laying out some serious failings of the contemporary recusal regime, all of which relate to the rights-based and mandatory-disqualification-focused nature of the current approach. In light of these problems, Section III.B. proposes a duty-based alternative to contemporary disqualification jurisprudence based on *halachic* recusal law, which, by focusing on the third-party institutional role of courts and the personal and professional ethical obligations of judges, might improve on some of the deficiencies that inhere in the current disqualification system.

A. Problems with the Current American Doctrine

Rights-based American disqualification doctrine seeks to protect litigants' rights and to promote public confidence in the courts by mandatorily removing judges in an expansive array of circumstances

242. *Cf.* MISHNAH TORAH, The Laws of Sanhedrin 2:8 (discussing ethical and moral standards of judicial conduct and integrity and implying that judges failing to meet these criteria are unfit to remain on the bench).

in which the law determines they are or appear to be biased.[243] This Section discusses three major failings of the contemporary recusal regime that stem from its rights-focused jurisprudential foundations, and which highlight the need for a new disqualification framework not grounded in rights-jurisprudence. Subpart III.A.1. argues that recusal law fails to adequately protect litigants' rights from biased judging because the doctrine conclusorily determines judges' impartiality based on malleable decisional standards. Subpart III.A.2. contends that the law's quixotic obsession with appearances fails to engender public confidence in the justice system because it over and under enforces actual judicial impartiality. Finally, Subpart III.A.3. argues that American recusal jurisprudence fails to address the root of the judicial bias problem because the contemporary rights-focused doctrine virtually ignores judges' personal and professional moral integrity.

1. The Failure of Ad Hoc and Conclusory Recusal Doctrines to Adequately Protect Litigants from Biased Judgments

American recusal doctrine purports to protect the rights of individual litigants from biased judging by disqualifying judges that are or appear to be biased.[244] Bias, however, is a vague and subjective concept, more a statement of legal conclusion than an actual description of a judge's state of mind. Judges, like all human beings, are biased;[245] such personal values literally "constitute our being."[246] Most

243. *See supra* Part II.

244. *See supra* Part I.A.1.

245. *See* CHOICES, VALUES AND FRAMES (Daniel Kaneman & Amos Tversky eds., 2000); Burg, *supra* note 22, at 1485; Leubsdorf, *supra* note 29, at 237 ("We all take it for granted that personal values and assumptions help shape every judge's decisions."); Jeffrey M. Shaman, *The Impartial Judge*, 45 DEPAUL L. REV. 605, 606 (1996); Nancy A. Welsh, *What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395 (2010); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921) ("[Human beings] try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."); Catherine A Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 68 (2005) ("[A]bsolute impartiality is impossible as a matter of cognitive psychology."). *Cf.* CARDOZO, *supra*, at 167, 176.

246. RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS 129 (1983) (quoting HANS GORG GADAMER, PHILOSOPHICAL HERMENEUTICS 9 (1976)); *see also* Harold Bloom, *Breaking the Form*, *in* DECONSTRUCTION AND CRITICISM 1, 9 (Jacques Derrida, et al., eds., 1979) ("There is always and only bias, inclination, pre-judgment, swerve."); Leubsdorf, *supra* note 29, at 250 ("[U]nconscious motives sway everyone").

biases—a preference for chicken over beef, or a strong commitment to majoritarian government—do not rise to the level of disqualifying prejudice, however.[247] The *right* biases—preconceptions representing the community's most cherished values—are not only tolerated, but encouraged.[248] Judges are only disqualified for the *wrong* kinds of biases, the kinds of "wrongful or inappropriate"[249] impressions that, in the eyes of the law, lead to judgments based on personal rather than legal values.[250] Recusal law's disqualifying judges based on conclusory findings of improper bias is thus "a step backward in [the] journey" toward the rule of law.[251] "Instead of rules, we have the conclusory prohibition of a vague term that invites *ad hoc* and *ex post facto* judgments."[252]

Under current law, a challenged judge determines whether an alleged bias is disqualifying.[253] This scheme curiously leaves questions about whether a judge "shall" be mandatorily disqualified to the

247. *See In re* J.P. Linaham, Inc., 138 F.2d 650, 651 (2d Cir. 1943) ("If, however, bias and partiality be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will."); Lindsey v. City of Beaufort, 911 F. Supp. 962, 968 (D.S.C. 1995) ("Bias cannot be defined as the total absence of preconceptions."); Cravens, *supra* note 11, at 29 ("There will always be some bias that does not rise to a level meriting recusal.").

248. *See Linaham*, 138 F.2d at 652–53 (reasoning that some preconceptions represent the community's most cherished values, and need not be disregarded by judges, but that a judge's other "idiosyncratic" and "uniquely personal prejudice[s]" should not be tolerated); Leubsdorf, *supra* note 29, at 250–52.

249. Liteky v. United States, 510 U.S. 540, 550 (1994).

250. *See id.* at 552 ("[T]he pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that *go beyond what is normal and acceptable*.") (emphasis added); *see also* Spangler v. Sears, Roebuck & Co., 759 F. Supp. 1327, 1332 (S.D. Ind. 1991) ("[L]itigants are protected from bias not by its absence but by the contours within which it must be exercised.").

251. Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1343 (2006).

252. *Id.*

253. *See, e.g.*, *In re* Bertrand, 31 F.3d 842, 843 (9th Cir. 1994) ("[T]he somewhat surprising (and not entirely comfortable) reality is that the motion is addressed to, and must be decided by, the very judge whose impartiality is being questioned."); Commonwealth v. Abu-Jamal, 720 A.2d 79, 89 (Pa. 1998) ("As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged."); *see also* Roy v. Tomlinson, 639 So.2d 1112, 1112 (Fla. Dist. Ct. App. 1994) ("[A] motion to disqualify a judge should be acted upon by the judge to whom the motion is directed."); People v. Johnson, 294 A.D.2d 908, 908 (N.Y. App. Div. 2002) ("[T]he court is the sole arbiter of whether it should recuse."); Magill v. Casel, 568 A.2d 1221, 1224 (Pa. 1990) ("A motion for recusal must be made to the judge sought to be disqualified.").

"sound discretion" of the challenged judge himself,[254] running the risk that an actually biased judge may use his discretion to deny meritorious recusal motions.[255] This danger is alleviated by limiting challenged judges' discretion by requiring them to assume the truth of factual allegations in a recusal motion,[256] and allowing them to decide only whether those facts are legally sufficient to indicate a disqualifying bias.[257] This limitation does little to prevent judges from exercising biased discretion in ruling on their own impartiality, however, because disingenuous judges can circumvent the presumption of truth by characterizing factual claims as conclusions;[258] by holding that alleged facts are not relevant;[259] or by finding that alleged biases are based on court proceedings or on general views about the law and

254. *See* Garcia v. Women's Hospital, 143 F.3d 227, 230 (5th Cir. 1998) ("The tenor of § 455's language is mandatory, but this Court has recognized that disqualification under this section 'is committed to the sound discretion of the district court.'"); United States v. Hatchett, 978 F.2d 1259 (6th Cir. 1992) ("[28 U.S.C. § 455] is addressed to the trial judge who is the subject of the motion to disqualify, and requires that the judge disqualify *himself* from the proceeding. The use of the imperative '*shall* disqualify himself' further demonstrates that the decision is placed squarely in the hands of the questioned judge himself.").

255. *See* Miller, *supra* note 238, at 461–62.

256. *See* Berger v. United States, 255 U.S. 22, 33–35 (1921); United States v. Furst, 886 F.2d 558, 582 (3d Cir. 1989) ("[A] district judge faced with a motion for disqualification under 28 U.S.C. § 144, must accept the allegations of the moving party as true . . . ."); Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987) ("[T]he judge may not consider the truth of the facts alleged."); Klinck v. Dist. Court of the Eighteenth Judicial Dist., 876 P.2d 1270, 1276 (Colo. 1994) ("For purposes of our review, we also must take the facts asserted in the motion and affidavits as true."); Suarez v. State, 527 So.2d 190, 191 (Fla. 1988) ("The judge with respect to whom a motion to disqualify is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations."). *But see, e.g.*, Dyson v. Sposeep, 637 F. Supp. 616, 619 (N.D. Ind. 1986) ("[T]he judge determining the motion need not accept as true the allegations made in the recusal motion; the judge may contradict the allegations with facts drawn from his own personal knowledge."); State v. Mincey, 687 P.2d 1180, 1197 (Ariz. 1984) ("It is the burden of the moving party to establish the truth of his or her allegations.").

257. *See, e.g.*, St. David's Episcopal Church v. Westboro Baptist Church, Inc., 921 P.2d 821, 833 (Kan. Ct. App. 1996) ("The reviewing judge, as well as the appellate court, passes only on the legal sufficiency of the affidavit and not on the truth of the facts alleged."); *see also supra* note 45.

258. *See, e.g.*, Hodgson v. Liquor Salesmen's Union, 444 F.2d 1344, 1349 (2d Cir. 1971) (rejecting as conclusory a disqualification motion alleging that one party's attorney stated that he was "very close to" the judge and "could get favored treatment from her").

259. *See, e.g.*, United States v. Harrelson, 754 F.2d 1153, 1166 (5th Cir. 1985), *cert. denied,* 474 U.S. 908 (1985) (finding that allegations of a judge's friendship with a murder victim were not relevant to the judge's ability to fairly try the alleged murderer because the judge's hatred for the real killer was not relevant to his opinion about the defendant who was merely accused of committing the murder).

life.[260] The problem is exacerbated by judges assessing the recusal motions using a reasonable person standard.[261] Even well-meaning judges may erroneously decide both the truth and sufficiency of alleged facts because of the difficulty inherent in deciding whether the facts would lead a reasonable person to question their impartiality without also considering whether a reasonable person would find those facts sufficiently plausible to convince him of anything at all.[262] As a result of these malleable decisional standards, it is often the judges who fail to recuse themselves that ought to have been disqualified, while those with the integrity to step down when challenged could likely have judged the matter impartially in any case.[263]

Due in part to the discretion judges have in ruling on disqualification motions, recusal law is often inconsistent and unpredictable, further threatening litigants' rights. The tension between the law's encouraging disqualification in doubtful cases and the extrajudicial source rule illustrates the problem.[264] The extrajudicial source originated in the Supreme Court's decision in *Liteky v. United States,*[265] where the Court held that a judge who directed deprecatory comments towards a defendant and his counsel in prior judicial proceedings was not disqualified from trying that same defendant in a later

260. The extra-judicial source rule limits biased-based disqualification to biases that arise from the judge's personal opinions about a party rather than any judicial opinion the judge may form about a party based on in-court proceedings. *See* Liteky v. United States, 510 U.S. 540, 554 (1994) (applying the extra-judicial source rule to motions made under 28 U.S.C. § 455); United States v. Grinell Corp., 384 U.S. 563, 583 (1966) (applying the extra-judicial source rule to motions made under 28 U.S.C. § 144); *see also* State v. Williams, 601 So.2d 1374, 1375 (La. 1992); Purpura v. Purpura, 847 P.2d 314, 318 (N.M. Ct. App. 1993); Bell v. N.Y. Higher Educ. Assistance Corp., 560 N.Y.S.2d 439, 440 (N.Y. App. Div. 1990); *In re* Antonio, 612 A.2d 650, 653 (R.I. 1992). *See generally* FLAMM, *supra* note 10, at 81–102; *supra* note 89.

261. *See supra* notes 42–45 and accompanying text.

262. *See, e.g.*, United States v. Hanrahan, 248 F. Supp. 471, 477 (D.D.C. 1965), *aff'd sub nom.* Tynan v. United States, 376 F.2d 761 (D.C. Cir. 1966) (denying recusal motion alleging a judge threatened the defendant with prison time if he refused to plead guilty because the "allegation is not only untrue, but also ridiculous. It is inconceivable that any sane and reasonable mind could believe that such a statement was made . . . the court holds it to be legally sufficient."), *cert. denied*, 389 U.S. 845 (1967); *see also* Burg, *supra* note 22, at 1467. For a discussion of some additional logical and administrative difficulties associated with the use of the rational person standard in recusal law see McKoski, *supra* note 23, at 1945–46.

263. *Cf.* Leubsdorf, *supra* note 29, at 277.

264. *See generally* Adam J. Safer, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787, 791 (1993) (arguing that "the extrajudicial source requirement detracts from judicial integrity").

265. 510 U.S. 540 (1994).

case because the judge's prejudice was the product of judicial proceedings and was therefore "not subject to the deprecatory characterization as 'bias' or 'prejudice.'"[266] The extrajudicial source rule, however, is at odds with the pro-recusal tenor of the federal disqualification statutes.[267] Modern disqualification law strives to eliminate even the appearance of bias, but the extrajudicial source rule sanctions—and even encourages[268]—actual partiality provided it stems from a judge's professional rather than personal experiences.

The "duty to sit," raises similar problems.[269] The duty to sit, which instructs judges to decide the cases assigned to them absent compelling reasons for recusal,[270] is a long standing principle of American disqualification law, and continues to feature prominently in federal and state court decisions despite the contemporary trend favoring recusal.[271] This doctrine places judges faced with difficult disqualification motions on the horns of a dilemma: they are obligated to sit absent compelling reasons to recuse, but must disqualify themselves whenever their impartiality might reasonably be questioned, a standard that is likely satisfied by any good-faith recusal motion.[272]

266. *Id.* at 551.

267. *See, e.g.*, Safer, *supra* note 264.

268. *See Liteky,* 510 U.S. at 551 (reasoning that a judge's personal views are "properly and necessarily acquired in the course of the proceedings, and are indeed sometimes . . . necessary to completion of the judge's task.").

269. *See generally* MACKENZIE, *supra* note 17, at 81; Stempel, *supra* note 21, at 814–18.

270. *See, e.g.*, ABA CODE, *supra* note 12, Cannon 3(B)(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required."); Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (en banc), *cert. denied*, 379 U.S. 1000 (1965).

271. *See* Switzer v. Berry, 198 F.3d 1255, 1257 (10th Cir. 2000); Maier v. Orr, 758 F.2d 1578, 1583 (Fed. Cir. 1985); Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979); United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976); Peterson v. Borst, 784 N.E.2d 934, 936 (Ind. 2003); Hi-Country Estates Homeowners Ass'n v. Bagely & Co., 996 P.2d 534, 538 (Utah 2000). *But see, e.g.*, *In re* Sch. Asbestos Litig., 977 F.2d 764, 784 (3d Cir. 1992). *See generally* FLAMM, *supra* note 10, at 604–12.

272. *See* United States v. Patti, 337 F.3d, 1317, 1321 (11th Cir. 2003) ("[A]ny doubts must be resolved in favor of recusal."); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 659 (10th Cir. 2002) ("If the issue of whether § 455 requires disqualification is a close one, the judge must be recused."); Republic of Pan. v. Am. Tobacco Co., 217 F.3d 343, 347 (5th Cir. 2000) ("[I]f the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal." (citations omitted)); United States v. Snyder, 235 F.3d 42, 46 (1st Cir. 2000) ("[T]he duty to recuse and the duty to sit do not exert equal pull; in close cases, 'doubts ordinarily ought to be resolved in favor of recusal.'"); Union Planter's Bank v. L & J. Dev. Co., 115 F.3d 378, 383 (6th Cir. 1997) ("Where the question is close, the judge must recuse himself." (citing United States v. Dandy, 998 F.2d 1344, 1349 (6th Cir. 1993))); Stempel, *supra* note 21, at 821–23.

Wide judicial discretion in deciding recusal motions by using flexible, conclusory, and conflicting standards undermines the law's ability to protect litigants against partial rulings. Instead of a consistent and predictable doctrine, recusal law is highly dependent on the whims and personal discretion of individual judges. Instead of a rule of law, disqualification is a law of men that provides little protection against a truly biased judge bent on using the adjudicatory process to further his personal value judgments.

2. The Failure of Expansive Disqualification Doctrines to Promote Public Confidence in the Justice System

American disqualification law's quixotic quest to eradicate actual and apparent judicial bias undermines public confidence in the court system. The current regime tries to engender public trust in the judiciary with a dramatic show of force by disqualifying judges in an ever expanding set of questionable circumstances.[273] Liberal recusal standards, however, are self-defeating. The modern doctrine threatens public confidence in the courts because by disqualifying every judge whose "impartiality might reasonably be questioned," the law simultaneously over-enforces and under-enforces actual judicial impartiality and cheapens the idea of judicial integrity.[274]

Professor Rotunda observes that "[o]ne can . . . be too ethical."[275] By over-enforcing disqualification against impartial judges due to the mere appearance of impropriety, recusal law denigrates the notion of judicial impartiality. Like a criminal justice system that declares all defendants guilty to be certain of incarcerating offenders, a recusal scheme that removes every judge whose integrity might be questioned regardless of actual bias cheapens the idea of judicial impartiality to the point that judicial integrity means nothing at all.[276]

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273. *See* Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 289 (2010) [hereinafter McKoski, *Reestablishing*] ("Today, judges suffer accusations of creating an appearance of impartiality under virtually limitless circumstances.").

274. *See generally* Miller, *supra* note 238, at 460–61. A recent Campbell Institute poll found that nearly seventy percent of survey participants believe that "[j]udges always say that their decisions are based on the law and the Constitution, but in many cases judges are really basing their decisions on their own personal beliefs." Keith J. Bybee, *U.S. Public Perception of the Judiciary: Mixed Law and Politics*, JURIST: LEGAL NEWS AND RESEARCH, Apr. 10, 2011, http://jurist.law.pitt.edu/forum/2011/04/us-public-perception-of-the-judiciary-mixed-law-and-politics.php

275. Rotunda, *supra* note 252, at 1338.

276. *See id.* ("Unnecessarily imprecise ethics rules allow and tempt critics, with minimum effort, to levy a plausible and serious charge that the judge has violated

To be sure, this aggressive approach to recusal succeeds in removing numerous impartial judges, but it also disqualifies many integrious jurists who could have ruled impartially, simply because their presiding would create the appearance of impropriety.[277] "[Disqualifying judges] whenever there is an appearance of impropriety . . . leaves the door wide open to increasingly broad categories or characteristics that might give rise to an appearance of impropriety . . . . Ultimately, this line of reasoning brings into question whether any case can be apparently impartially judged."[278] The public likely sees large numbers of disqualifications as indicative of a partial and untrustworthy justice system, which is, after all, precisely what a judge's removal is supposed to signify.[279] By disqualifying capable judges whenever enterprising attorneys dredge up facts that make the judges' presiding look bad, the contemporary approach undermines public confidence in the integrity of the justice system.[280]

The expansive, appearance-based approach to recusals may also under-enforce actual judicial impartiality.[281] Professors Cravens and McKoski observe that the law often places the appearance of impartiality before de facto impartiality such that "the appearance of fairness is possibly more important than its actuality."[282] Disqualification

ethics rules. Overuse not only invites abuse with frivolous charges that have the patina of legitimacy, but also may eventually demean the seriousness of the charge of being unethical."); *see also* Christopher R. Carton, Comment, *Disqualifying Judges for Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a),* 24 SETON HALL L. REV. 2057, 2057 (1994) ("[C]ommentators agree that while the standards for judicial disqualification have been textually broadened, they are anything but 'clear' and that, consequently, public confidence in the impartiality of the judicial process is threatened."). *Cf.* Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMP. L.Q. 697, 697–98 (1987) (articulating concern that judicial interpretations of § 455 requiring an elevated standard of proof of bias and limiting the circumstances where bias can be found has wrongly limited the law's intended purpose).

277. *See* McKoski, *Reestablishing*, *supra* note 273, at 289–90; Cravens, *supra* note 11, at 12 & nn. 52–53.

278. Cravens, *supra* note 11, at 19.

279. *See id.* at 12 & nn. 52–53; *see also* THOMAS E. BAKER, THE GOOD JUDGE 55–56 (1989).

280. *See* McKoski, *Reestablishing*, *supra* note 273, at 261.

281. *See* Cravens, *supra* note 11, at 13.

282. McKoski, *Reestablishing*, *supra* note 273, at 261, 290; *see also* Cravens, *supra* note 11, at 12–14; Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of* Pro Se *Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1583 (2005) ("The appearance of impartiality is just as important, if not more important, as the reality of impartiality." (citation omitted)); Bethany Krajelis, *An Age-Old Debate Exists About Effect of Politics in the Judiciary*, CHI. DAILY L.

doctrine may consequently allow truly biased jurists to remain on the bench so long as they are circumspect enough to not externally manifest their personal values.[283] If true—or even if apparently credible—this conclusion should give the public pause. It is all well and good to have a justice system that looks integrious, but if it may not be so in reality how much trust does it deserve?

Disqualification law's expansive targeting of even remote appearances of partiality undermines the seriousness of actually biased judging, and results in the over and under-enforcement of actual judicial impartiality. The public is likely to view courts and judges—whose integrity can be called into question based on the scantest external indicators—as biased, partisan, and self-serving, a far cry from the kind of popular trust in the justice system that recusal law ought to engender.[284]

3. The Failure of Modern Recusal Law to Engender an Integrious Judiciary

All judges are biased,[285] but integrious jurists suppress their impartialities and decide cases based on the law, while unintegrious ones enforce their personal value judgments from the bench. The root cause of biased judging, then, is a lack of personal and professional judicial integrity, defined as "probity, fairness, honesty, uprightness,

BULL., Apr. 21, 2010, at 1 (quoting Malcolm C. Rich, Executive Director of the Chicago Appleseed Fund for Justice, The Research Arm of The Chicago Council of Lawyers) ("You can't have real justice until you have an appearance of justice.").

283. *See* Cravens, *supra* note 11, at 13 ("[F]ocusing on appearances, and, more importantly, on guesswork about the meaning of those appearances, fails to hold judges to account in a way that would ensure capture of whatever sources of actual bias might be . . . unapparent to outside observers, particularly if they are unapparent to the particular litigants in a given case . . . ."); *see also id.* at 20–21 (arguing that overemphasizing appearances may simply encourage judges to be less transparent in their decision-making).

284. For one recent example of an attempt to impinge a respected jurist's integrity, see Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. TIMES, June 18, 2011, at A1. McIntire questioned Justice Clarence Thomas's integrity on the grounds of Thomas's friendship with Harlan Crow, a real estate magnate, and Crow's support for causes championed by both Thomas and his wife, for even though Crow was never himself a party to Supreme Court litigation, organizations on whose boards he served had filed amicus briefs in cases before the Court. *Id.* It is precisely this sort of attenuated guilt-by-association argument that the current focus on appearances enables. *See also* McKoski, *Reestablishing*, *supra* note 273, at 273–75 (examining the apparent partiality of an acknowledged integrious judge through the lens of modern recusal law).

285. *See supra* notes 244–45.

and soundness of character"[286] and "the quality of being honest and having strong moral principles[,] moral uprightness."[287] Modern recusal law fails to foster these kinds of personal qualities because it mandatorily disqualifies judges in a wide array of questionable circumstances, leaving little room for judges to develop the integrity that is so essential to unbiased judging.

Recusal law defines the conditions under which a judge is disqualified due to actual or apparent impropriety, and directs a challenged judge to remove himself whenever those conditions are met.[288] If a judge fails to disqualify himself when required to do so, his ruling in the matter may be reversed and his conduct severely criticized by an appellate court.[289] Disqualification doctrines, however, do not direct or encourage judges to be honest, of sound moral character, or to develop a strong, principled compass.[290] Instead, the law takes a "bad man" view of judges[291]—it assumes that judges lack the integrity to voluntarily recuse themselves from cases in which their biases may sway their decision-making processes, and therefore, mandatorily disqualifies them in all questionable circumstances. Thus, as Judge Kozinski notes, "there is a growing tendency to distrust judges—to craft more elaborate ethical rules and restrictions; to expand the scope of what is encompassed within the appearance of impropriety standard; to adopt more and better methods of intruding into judges' private lives—all in a misguided effort to promote ethical judicial behavior."[292] Instead of engendering personal honesty and probity in judges by making them responsible for their own conduct, the current regime treats judges like naughty little children, kicking them out of the kitchen instead of instructing them to keep out of the cookie jar.[293]

286. ABA CODE, *supra* note 12, at 6.

287. OXFORD ENGLISH DICTIONARY (2011).

288. *See generally supra* Part I.A.

289. *See* Miller, *supra* note 238, at 462–64.

290. *See supra* notes 221–25 and accompanying text.

291. *See generally* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

292. Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004).

293. *See generally* Robert P. George, *The Central Tradition—Its Value and Limits, in* VIRTUE JURISPRUDENCE 43–47 (Colin Farrelly & Lawrence B. Solum, eds., 2008) (arguing that moral goods often cannot be realized through legal compulsion, and that to facilitate individual moral integrity the law must sometimes decline to regulate so as to enable individuals to make themselves moral).

This paternalistic approach to ensuring impartial judging is, in part, a result of modern recusal law's focus on appearances.[294] Even if judges were trusted to police themselves, under the current approach, they could not do so because the arrangement would *appear* questionable. Whatever mandatory disqualification rules accomplish in terms of appearances, however, is likely negated by their failure to promote actual integrity, the real panacea for biased judging.[295] By falling short of fostering integrious judges, the system leaves itself open to abuse at the hands of dishonest jurists dedicated to using the courts to further their own agendas.

B. Duty-Focused Disqualification: Some Proposals

The drawbacks of rights-based recusal law highlight the need to comprehensively rethink the premises and substantive standards of the disqualification system. This Section suggests that recusal law might be reconceptualized based on the *halachic* system's duty-oriented approach, which emphasizes personal and professional judicial integrity while still protecting litigants from actually biased judgments. Professor Leubsdorf notes that "[t]o decide when a judge may not sit is to define what a judge is. To define what a judge is is to decide what a system of adjudication is all about."[296] Subpart III.B.1. therefore begins by developing a duty-focused conception of the roles of courts and judges in the American adjudicatory system. With this theoretical foundation in place, Subparts III.B.2. and III.B.3. argue that recusal law should limit mandatory disqualification to preserving courts' third-party institutional role, and that judges should be given the latitude to develop personal and professional integrity by policing their own biases. Subpart III.B.4 suggests that recusal law should deal with unintegrious judges' failings to recuse when required through a system of peer review and sanctions and by examining the substance of their decisions for actual bias.

1. Thinking About the Roles of Courts and Judges in the American

294. *See* Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 653 (1994) ("In building and maintaining the image of the judiciary, it is the reasonable perception of the people that counts—and that is all that counts."); Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1110 (2004) (stating that a recusal standard defined in terms of appearances is not surprising because "in modern-day society, it is perception, rather than reality, that has the greater importance").

295. *See* McKoski, *Reestablishing*, *supra* note 273, at 300.

296. Leubsdorf, *supra* note 29, at 237.

System of Adjudication

At their core, courts provide a means of disinterested third-party dispute resolution in accordance with normative legal rules previously acceded to by litigants.[297] Whatever other legislative, executive, and administrative functions modern courts may serve in practice, dispute resolution remains their *raison d'être*—the role which courts' other non-adjudicative activities support.[298]

This conception of courts' adjudicatory purpose features strongly in the western political-legal tradition. John Locke posited that the chief motivation for the creation of civil societies and legal systems was the need to provide a neutral, principled basis for settling disagreements.[299] Individuals driven by malice, self-interest, or reasonable judgments made from different perspectives disagree about how to resolve their conflicts.[300] Members of society establish legal systems to provide a mutually agreeable framework for resolving conflicts, thereby committing themselves to resolve disputes based on rules they themselves have a hand in making.[301] No system of laws can be so perfectly crafted as to leave no room for dispute. Laws may be vague, and subject to competing reasonable interpretations; disputes may arise from novel factual circumstances not adequately addressed by existing frameworks; and parties may disagree about the facts underlying their dispute, or about the relevance of the broader social implications of their conflict.[302] Individuals may also disagree about how legal norms ought to be applied in individual cases.[303] Maintaining a court system tasked with resolving disputes in accord-

297. *See* HAROLD J. BERMAN, ET AL., THE NATURE AND FUNCTIONS OF LAW 45 (6th ed. 2004); H.M. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 185–86 (1958); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282, 1285–88 (1976).

298. *See generally* THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS 40–44 (Jethro K. Lieberman ed., 1984).

299. *See* JOHN LOCKE, TWO TREATISE OF GOVERNMENT 269–78 (Peter Laslett ed., 1960).

300. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 11–12 (2001).

301. *See id.* at 12; Cravens, *supra* note 11, at 24 ("[T]he function of law is to provide for the reasoned settlement of normative disagreements."). *See generally* Berman, *supra* note 297, at 24–35.

302. *See* ALEXANDER & SHERWIN, *supra* note 300, at 12.

303. *See id.*

ance with established procedures and accepted legal norms remedies this problem.[304]

Courts thus function to provide mutually agreeable conflict resolutions in cases where the mere existence of a rule of law or accepted standard of conduct is not enough. Courts must act as disinterested third-party deciders; when a court is a party to a case, it quite simply ceases being a court. This idea, which is often expressed conclusorily with the maxim that "no man may be a judge in his own case,"[305] goes to the very essence of what a court is and does.[306] Courts do what litigants cannot: decide cases in a mutually agreeable manner based on legal norms and untarnished by personal interests in the result. When a court decides a case to which it is a party, however, its ruling is not a judicial decision, but the imposition of one litigant's self-interested view of the law upon others, the very antithesis of the rule of law.[307] To maintain their institutional legitimacy, therefore, courts must preserve their characteristic third-party vantage relative to the cases they decide.[308]

Judges' professional duty emerges from this conception of courts' third-party institutional role as an obligation to resolve litigious disputes by reasonably applying legal norms to the facts of each case in a neutral and impartial manner. Whether judges are passive referees or active problem solvers,[309] whether they discover existing rules of law and apply them to new circumstances or create new legal principles to address evolving social norms,[310] their judicial task is essentially the

304. *See id.* at 12–15; LON L. FULLER, THE MORALITY OF LAW 56 (1964) ("In a complex and numerous political society courts perform an essential function. No system of law—whether it be judge-made or legislatively enacted—can be so perfectly drafted as to leave no room for dispute. When a dispute arises concerning the meaning of a particular rule, some provision for a resolution of the dispute is necessary. The most apt way to achieve this resolution lies in some form of judicial proceeding.").

305. COKE, *supra* note 21, at 141a; *see supra* note 21.

306. *See* JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 16 (2d ed. 1996) ("'Adjudication' refers to the process by which . . . authoritative decisions are rendered by a neutral third party.").

307. *See supra* notes 127–32 and accompanying text.

308. *See* ALEXANDER & SHERWIN, *supra* note 300, at 15–17; *see also* JEREMY WALDRON, LAW AND DISAGREEMENT 7 (1999).

309. *See* Chayes, *supra* note 297.

310. *See* RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 777 (1976) (discussing various approaches to judicial decision making); *see also* Thomas B. Griffith, *Was Bork Right About Judges?*, 34 HARV. J.L. & PUB. POL'Y 157 (2011).

same: to carry out the courts' institutional function by disinterestedly resolving disputes in accordance with accepted rules of law.

As human embodiments of the judicial institution, judges cannot be personally interested in the cases they decide. Interested judges are merely litigants in robes who cease functioning in a judicial capacity, and instead impose their own self-referential view of the case on the other parties.[311] Judges therefore cannot preside over cases in which they have a litigious interest.

In addition to adhering to the formalistic requirements that preserve courts' disinterested third-party vantage, judges are also obligated to rule correctly based on accepted legal norms. Litigants turn to courts to resolve their disputes, not only because they provide a disinterested third-party forum—if process was their sole concern, disputants would submit their disagreements to any number of cheaper, quicker, and less adversarial alternative dispute resolution venues.[312] Parties come to court, in part, because courts are supposed to resolve disputes in accordance with legal rules to which the litigants have consented and upon which they have relied in structuring their relationships.[313] Judges' power over litigants thus stems from all parties' common commitment to the law, and judges may not use their positions to supplant the rule of law with personal value judgments under the guise of judicial process.[314] The duty to exercise authority over others only in accordance with the law to which all have assented is of course incumbent on all citizens,[315] and is particularly important with respect to judges who, by virtue of their professional positions have a unique ability to violate their trust, but because of

311. *See supra* notes 124–31 and accompanying text.

312. *See* Linda Mealey-Lohman & Eduardo Wolle, *Pockets of Innovation in Minnesota's Alternative Dispute Resolution Journey*, 33 WM. MITCHELL L. REV. 441, 442 (2006) ("Legal practitioners use the term ADR to cover a wide variety of processes that involve a neutral third party to help resolve disputes or conflicts.").

313. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–6 (1990); Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRY 185, 200 (2008).

314. *See* Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1256 (2010) ("What judges should never do is use the power of their office to change the law to suit their own personal notions of what the law should be.").

315. *See, e.g.*, Benjamin C. Zipursky, *Legal Positivism and the Good Lawyer: A Commentary on W. Bradley Wendel's Lawyers and Fidelity to Law*, 24 GEO. J. LEGAL ETHICS 1165, 1167 (2011) ("Citizens have a prima facie duty to obey the law; this is a moral duty whose content is supplied by a political process, and in this sense it is a duty rooted in political morality.").

what they represent, must be that much more cautious not to do so.[316] As professionals, then, judges may not use their third-party position to give just any answers to the questions posed by litigants; they must give answers that are grounded in and justified under the law.[317]

Parties' expectation to be judged in accordance with accepted legal norms does not mean that jurists must give the right legal solution to each case. Most often, there is no singularly correct answer to any but the most simplistic legal queries,[318] and the very fact that a dispute must be adjudicated indicates that it has a number of reasonably correct resolutions based on legal norms.[319] A judge's professional duty, therefore, is to resolve disputes in one of potentially many legally justifiable ways, not necessarily a single, objectively correct way.[320] In some sense, preserving courts' third-party institutional position is more important than the substance of judges' adjudicatory dispositions. When litigants reasonably disagree about the correct legal resolution to their dispute, it does not much matter whose view a judge enforces since both are reasonably grounded in the law. What does matter is that the judge's ruling emanates from a disinterested third-party court that reached a particular decision not because that was the view advocated by the one litigant or the other, but because the judge neutrally and independently determined that that was the best

316. *See* Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 970 (2004) ("[J]udges' authority and vast power invest in them a greater responsibility not only to uphold the law and not supplant their own biases, but also to shine as a beacon of reasonableness and fair play.").

317. *See generally* KEITH C. CULVER, READINGS IN THE PHILOSOPHY OF LAW 144–92 (2007) (presenting, contrasting, and elaborating on H.L.A. Hart's and Ronald Dworkin's views on the nature of a judge's task).

318. *See Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 386, 386 (1988); *see also infra* note 353.

319. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 536–43 (1981) (showing a winnowing process from grievance, to claim, to disputed claim, to the use of lawyers and courts); *cf.* SCOTT J. SHAPIRO, LEGALITY 234 (2011).

320. *See* Cravens, *supra* note 11, at 24–25 ("[Adjudication] is not about requiring a judge to give the *one* right reason, but about giving at least *a* right reason and an explanation of why it is a . . . right reason in this case."). *But see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1977) (arguing that even the hardest legal questions can, under the lens of proper judging, admit of one right answer); Ronald Dworkin, *No Right Answer?*, *in* LAW, MORALITY, AND SOCIETY 58–84 (P.M.S. Hacker & Joseph Raz eds., 1977) (same). On the so-called indeterminacy thesis that most legal questions do not have any singularly correct answer, see generally BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 86–90 (2004).

legal solution to the conflict.[321] Thus, the fact that a dispute is reasonably settled in accordance with legal norms by a disinterested third party often overshadows the precise substance of the resolution.[322] As Justice Brandeis opined, "[i]t is sometimes more important that the applicable rule of law be settled [by the court] than that it be settled right."[323] While a judge's ruling is likely only one of many legally correct resolutions, it can nevertheless be treated as process-authoritative because it emanates from a disinterested, third-party court.[324]

Judges' obligations are not exhausted by their issuing substantively just rulings. As representatives of the court, judges must act in a way that inspires confidence in courts' ability to disinterestedly adjudicate disputes based on legal norms.[325] Judicial conduct that engenders even incorrect impressions of partiality discredits courts' institutional legitimacy, and also detracts from a vigorous adversarial process, because litigants who are given reason to believe the system is weighted against them are less likely to energetically press their cause.[326] Judges, therefore, are personally obligated to maintain the appearance of justice, even above that which is necessary to ensure substantively correct third-party rulings, by insuring that all parties are, and believe they are, equal under the law.[327]

321. In Jewish law, the principle that judicial authority stems from a court's third-party position, rather than from the singular legal correctness of its rulings is illustrated by Talmudic discussion that indicates that while God's interpretations of Torah law are undoubtedly correct, they are not authoritative as against the judgments of competent human *halachic* authorities. *See* BABYLONIAN TALMUD, BAVA METZIAH 59b; JERUSALEM TALMUD, MOED KATAN 3:1; Menachem Elon, *Law, Truth, and Peace: "The Three Pillars of the World"*, 20 N.Y.U. J. INT'L L. & POL. 439, 450–53 (1997).

322. *Cf.* Thomas McCarthy, *Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue*, 105 ETHICS 44, 57 (1994) (approving the idea that those who regard a decision-making process as "basically just" can accept as legitimate specific, resulting decisions that of which do not approve).

323. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

324. *See* Austin Sarat & Joel B. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication* 69 AM. POL. SCI. REV. 1200 (1975).

325. *See supra* notes 16–20; *supra* Part I.B.2.c.

326. *See, e.g.*, RASHI to SHEVUOS 30a (s.v. *Sheloh Y'hei Echad Omed*) ("So that one party should not see that [the court] honors his opponent more than himself, and as a result" be intimidated into "silencing himself.").

327. *See supra* notes Part I.B.2.c.

2. Curtail the Role of Mandatory Disqualification in Eliminating Judicial Bias

Based on this jurisprudential conception of the roles of courts and judges in the adjudicatory process, duty-focused recusal reform should begin by limiting the scope of mandatory disqualification to instances that implicate the institutional integrity of the courts. The current doctrine's use of mandatory disqualification to prevent actual and apparent judicial bias fails to protect litigants' rights or engender actual judicial integrity.[328] The *halachic* model suggests that these aims might be better achieved by limiting top-down disqualification to cases where the judge's sitting would be incompatible with the court's fundamental third-party role.[329]

Judges should be disqualified only when their connection to a case is incompatible with the courts' requisite third-party posture. In circumstances where a judge has a litigious interest in a case, the judge should be disqualified—legally incapacitated from acting as a judge—because interested jurists literally cease to exist in a judicial capacity and instead take on the role of a litigious parties.[330] If a judge decides a case to which he is a party, therefore, his disposition is not a judicial ruling in any real sense, even if it is substantively correct.[331] A ruling by a judge-litigant amounts to one party's imposing its own self-interested view of the law on the others and is incompatible with the courts' institutional function. Interested judges should be mandatorily disqualified and their rulings voided not because they are, or may be, biased in favor of their interests, but because their sitting cannot be squared with courts' adjudicatory role, no matter how impartial and integrious they may be.

Disqualification should not be used to police judicial impartiality. The current recusal scheme disqualifies judges who are or appear to be biased,[332] but problems in this approach demonstrate that the law is ill-suited to determine judges' subjective impartiality, and that it therefore tends to over and under-enforce judicial bias.[333] Disqualification for bias also impinges on removed judges' integrity, and there-

328. *See generally supra* Parts III.A.1, III.A.3.
329. *See supra* Part I.B.2.a.
330. *See supra* notes 305–07, 311 and accompanying text.
331. *See supra* notes 124–31 and accompanying text.
332. *See supra* notes 28–31 and accompanying text. *See generally supra* Part I.A.2.
333. *See generally supra* Part III.A.

fore uses flexible standards to resist removal,[334] undermining public trust in the courts and threatening litigants' rights.[335] Recusal law might detach itself from this pernicious association between disqualification and integrity by limiting disqualification to instances where a judge's presiding would be incompatible with the court's fundamental third-party role in the adjudicatory process.[336] By using disqualification to police institutional boundaries rather than to indicate professional malfeasance, duty-focused recusal law might avoid the many problems associated with trying to legally determine judges' subjective biases, make judges more willing to step down in disqualifying circumstances, and thus preserve litigants' rights and public confidence in the institutional integrity of the courts.

3. Expand Judges' Professional Obligation to Voluntarily Recuse

Duty-driven limitations on mandatory disqualification should be complemented by an expansion of judges' personal and professional duty to voluntarily remove themselves from cases that strongly implicate their personal values. The current doctrine controls biased judging by mandatorily disqualifying partial judges. The *halachic* tradition, by contrast, suggests that impartial judging is better achieved by giving judges the opportunity to assess their own biases and integriously removing themselves from cases they feel they cannot judge with complete, actual and apparent impartiality.

The law should instruct judges to voluntarily recuse themselves from cases that, in their self-aware judgment, their presiding over may result in a miscarriage of justice. As judicial professionals, judges should step down when they feel they may unintentionally fail to uphold their duty to rule "truthfully and honestly." As private citizens, judges should recognize their personal obligation to recuse rather than risk imposing their personal values on others due to uncontrollable bias.

To effectively police their own impartiality, "[j]udges need to be ever cognizant of the effect their own personal biases have on their decision-making process" in ways that are not presently emphasized.[337] "At a minimum, judges should mentally list potential biases

334. *See, e.g.*, United States v. Balistrieri, 779 F.2d 1191, 1203 (7th Cir. 1985) (noting that "a judge may be especially reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved").

335. *See generally supra* Part III.A.

336. *See supra* notes 124–31 and accompanying text.

337. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 58 (1994).

that may permeate their decision-making process . . . and, with every decision, ask themselves, '[c]ould any of my biases affect this decision?'"[338] If, after an honest self-evaluation, a judge fears that his personal values may taint his decision-making process, he should voluntarily recuse himself. While urging judges to err on the side of caution and recuse in doubtful cases is inconsistent with the duty to sit,[339] the duty cannot be reasonably construed as an obligation to remain on the bench when doing so may well result in injustice.[340]

In a duty-oriented system, the decision to recuse cannot rest on the law's conclusory determination of actual or apparent bias, but must be made by each judge based on a self-aware evaluation of his own impartiality. Contemporary recusal law attempts to preserve judicial impartiality by mandatorily disqualifying judges that, in the law's objective judgment, are or appear biased. This approach, however, fails to consistently control actual bias or engender a integrious duty-conscious judiciary.[341] Duty-focused voluntary recusal might avoid conclusory and inconsistent bias-based disqualification standards by empowering judges who are best situated to know their own minds to determine whether they can judge a case impartially. Moreover, by policing their own impartiality and controlling their natural desire to vindicate their personal values from the bench, judges might develop their own moral integrity, building a foundation for future impartial judging. Additionally, by demonstrating the integrity, humility, and self-discipline to voluntarily recuse from cases that could compromise their ability to rule with complete impartiality, a duty-focused judiciary might engender public confidence in the courts in a way that the current doctrine does not.

4. Ensure Sound Legal Judgments and Promote Integrious Judging

Jewish law suggests that duty-focused recusal law should use substantive appellate review of judges' decisions and peer review backed by sanctions to ensure that judges maintain the highest standards of integrity and impartiality. Curtailing mandatory disqualification and giving judges the opportunity to develop their own integrity through voluntary recusal gives dishonest jurists the opportunity to wrongfully vindicate their personal values under the guise of judicial rulings. Duty-focused recusal law, therefore, cannot rely exclusively on the good

338. *Id.*
339. *See supra* notes 269–71 and accompanying text.
340. *See generally* Stempel, *supra* note 21.
341. *See supra* Parts III.A.1, 3.

will of duty-conscious judges to ensure impartial judging; it must also address the inevitability that some judges' personal interests will get the better of them, leading them to issue biased decisions that supplant litigants' legal rights.

Ideally, the law should prevent problems before they arise. If duty-focused recusal law expects judges to act integriously, it should work to insure that only those of the highest moral character don judicial robes. Traditional Jewish law requires *dayanim* to exhibit traits that go to the heart of the judicial role.[342] American recusal law, too, should try ensuring an honest judiciary by using judicial oversight boards to investigate judicial candidates' integrity before they ascend to the bench.[343] These boards should be comprised of sitting and retired judges who are likely best situated to evaluate candidates' character qualifications and aptitude for integrious judicial practice.[344] While judicial discipline commissions exist in every state, and in the federal court system as well, they do not typically engage in pre-appointment vetting of judicial candidates.[345] These commissions should be authorized to undertake such investigations of those that hold themselves out to become judges, thereby helping prevent problems before they can arise.[346]

Prophylactic measures are no guarantee of complete success, however. Unintegrious candidates may slide through the vetting process, and ordinarily honest judges might occasionally allow their personal interests to get the better of them in the course of their duties. The

342. *See supra* note 143.

343. *See generally An Introduction to Aretaic Theories on Law*, *in* VIRTUE JURISPRUDENCE 7–16 (Colin Farrelly & Lawrence B. Solum eds., 2008) (laying out a "theory of uncontested judicial virtues" that all can agree are integral to good judging).

344. State legislatures might require candidates for elected judicial office to receive a favorable review by a board comprised of state judges before being allowed to appear on the ballot. Candidates nominated to the federal bench could be vetted by national or circuit-specific judicial panels staffed by sitting and retired judges with whom the nominee would not work closely if confirmed. Such boards, restricted to screening nominees' character and integrity might offer non-binding recommendations to the Senate about nominees' ethical fitness, thereby avoiding conflict with constitutional advise-and-consent requirements. For a short discussion of the virtues and dangers of merit selection of judges, see Miller, *supra* note 238, at 467–69.

345. *See* Gray, *infra* note 348, at 408–09 (discussing some commissions' very limited authority to discipline sitting judges for actions they took prior to ascending to the bench, and implying that review boards certainly have no jurisdiction to investigate judicial candidates); Hellman, *infra* note 348, at 427 ("[O]rdinarily, the [disciplinary] process begins with the [post hoc] filing of a complaint about a judge with the clerk of the court of appeals for the circuit.").

346. For suggestions of relevant factors that vetting boards should consider, see sources cited *supra* note 143, and *infra* note 358.

current disqualification scheme addresses *post hoc* allegations of judicial misconduct through appellate review of judges' recusal decisions[347] and disciplinary action by government-sponsored judicial conduct review commissions.[348] This approach suffers from several problems, however, and is in any case ill-suited to a duty-focused recusal regime. Appellate courts typically reverse judges' recusal decisions only for an abuse of discretion,[349] which merely reflects and compounds the problems related to the original disposition, including vagueness, malleability, and inconsistency.[350] Critics also identify several problems with the current disciplinary commission scheme.[351] From the perspective of duty-jurisprudence, however, perhaps the greatest difficulty with contemporary appellate and commission re-

347. *See supra* notes 238–39 and accompanying text.

348. *See generally* Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405 (2007) (outlining the jurisdictions, functions, and constitutions of State judicial discipline boards); Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426 (2007) (explaining the framework for judicial discipline in the Federal system).

349. *See In re* Triple S Rests, Inc., 422 F.3d 405, 417 (6th Cir. 2005); Omega Eng'g, Inc. v. Omega, 432 F.3d 437, 447 (2d Cir. 2005); Selkridge v. United Of Omaha Life Ins. Co., 360 F.3d 155, 166 (3d Cir. 2004) ("Where a motion for disqualification was made in the District Court, we review the denial of such a motion for abuse of discretion."); United States v. Cherry, 330 F.3d 658, 665 (4th Cir. 2003); United States v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002) ("We review the refusal of a trial judge to recuse himself for abuse of discretion."); Bryce v. Episcopal Church, 289 F.3d 648, 659 (10th Cir. 2002); *In re* City of Houston, 745 F.2d 925, 927 (5th Cir. 1984) ("[T]he determination of the judge concerned should be accorded great weight, and should not be disturbed unless clearly erroneous."); People v. Moreno, 515 N.E.2d 200, 202 (N.Y. 1987) ("A court's decision in this respect may not be overturned unless it was an abuse of discretion."); Commonwealth v. Bonds, 890 A.2d 414 (Pa. 2005) ("Our standard of review of a trial court's determination not to recuse from hearing a case is exceptionally deferential. We recognize that our trial judges are 'honorable, fair and competent,' and although we employ an abuse of discretion standard, we do so recognizing that the judge himself is best qualified to gauge his ability to preside impartially."). *See generally* FLAMM, *supra* note 10, at 983–88.

350. *See supra* notes 253–64 and accompanying text; *see also* Jeffrey W. Stemple, *Impeach Brent Benjamin Now!? Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 65 (2010) (noting that "[f]rom the halls of the U.S. Supreme Court to the local judiciary and state disciplinary boards, it appears that judges who fail to recuse when they should seldom face significant consequences or criticism."). While some courts review recusal decisions *de novo*, see, for example, *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 997–1088 (7th Cir. 2001); *United States v. Moody*, 997 F.2d 1420, 1422 (11th Cir. 1992); *State v. O'Neill*, 663 N.W.2d 292, 297 (Wis. App. 2002), this more exacting standard of review simply reflects the problems inherent in the original disposition of recusal motions, see *supra* Part III.A., with an additional layer of unpredictability at the appellate level.

351. *See* Miller, *supra* note 238, at 467–69.

view is that it tries to coerce judicial integrity by reversing the decisions and disciplining partial judges who fail to remove themselves when mandatorily disqualified.[352]

Biased rulings should be remedied through ordinary appellate procedures providing substantive review of allegedly partial judges' final dispositions. Judges are obligated to issue correct rulings reasonably grounded in legal norms, but litigants are not entitled to any particular legally justifiable decision.[353] When an allegedly partial judge's ruling is reasonably grounded in the law, therefore, a reviewing court should uphold the decision, notwithstanding the ethical impropriety of the challenged judge's failure to recuse.[354] A biased judge's failure to recuse himself may seriously impinge his integrity, but it does not itself speak to the substantive validity of his otherwise legally sound decisions.[355] The losing litigant will have received his due—a decision reasonably based on accepted legal norms—and should not be allowed to burden his opponent and the court system with new proceedings simply because the trial judge had personal biases unless his prejudices perverted the judicial decision making process.[356] Appellate courts should reverse allegedly biased rulings only if those decisions cannot be justified on the basis of legal norms and thus represent the deciding judges' subversion of litigants' rights in favor of his own personal values.

352. For a discussion of why such coercion undermines the basic ends of duty-focused recusal, compare *supra* Parts III.A.3., III.B.2., III.B.3.

353. *See supra* notes 318–23 and accompanying text. *Compare* Christine Hayes, *Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis*, 25 DINE ISRAEL 73 (2008) (arguing that while in the *halachic* system there is often one best answer to a given legal question, this does not mean that there is only one *halachicly* legitimate answer), *with* Richard Hidary, *Right Answers Revisited: Monism and Pluralism in the Talmud*, 26 DINE ISRAEL 229 (2010) (arguing, contrary to Hayes, that in fact the Jewish law tradition maintains that there can be any number of ontologically correct answers to a given legal issue all reasonably grounded in Torah norms).

354. *See* Cravens, *supra* note 11, at 36–40; *see also* United States v. Vespe, 868 F.2d 1328, 1342 (3d Cir. 1989); Richard K. Neumann, Jr., *Conflicts of Interest in* Bush v. Gore*: Did Some Justices Vote Illegally*, 16 GEO. J. L. ETHICS 375, 440 n.375 (2003) ("Where an appellant complains that a trial judge who should have recused himself granted or denied a summary judgment, or made another decision that is reviewed on appeal de novo anyway, it may be particularly appropriate to treat the failure to recuse as harmless because de novo review prevents any harm that a biased judge could inflict.").

355. *See* Pierce v. Pierce, 39 P.3d 791, 799 (Okla. 2001) (holding that the issuing judge's bias is no reason to vacate an otherwise substantively just decision); *supra* notes 137–138; *see also* Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 386 (W. Va. 1995) (holding that violation of the recusal standard "involving only the appearance of impropriety does not automatically require a new trial").

356. *See supra* notes 318–27.

Substantive appellate review only corrects actually biased rulings grounded in judges' personal prejudices. It fails to ensure an integrious judiciary, however, because it does not examine or correct allegedly biased judges' erroneous decisions not to recuse. A duty-oriented system should therefore review and sanction judicial misconduct using judicially-sponsored discipline commissions.[357] The commissions should be organized by state bar or judicial associations or informally by judges themselves rather than by the government, and they should be staffed by sitting or retired judges well-attuned to the pressures and nuances of judicial practice. The committees' actions would then symbolically and actually stem from the duty-conscious, self-disciplining members of the judiciary themselves rather than from the government. In examining a judge's allegedly wrongful failure to recuse himself, disciplinary commissions could flexibly review the facts surrounding the complaint, and in crafting appropriate sanctions, consider the nature and extent of the judge's misconduct, his culpability, his response to the commission's investigation, and his past reputation and record.[358] Independent, flexible, and integriously firm disciplinary commissions might thus police judges' integrity in a way that inspires public confidence in the courts, fosters judges' personal and professional integrity, and protects litigants from actually partial judging.

CONCLUSION

Judging is a human endeavor, and biased judging, at its core, is a human problem. "As the face of every person is unique, so too are their thoughts and minds different."[359] The issues arising from our concern for impartial judging and judge disqualification are as varied as the diverse personalities that comprise our judiciary. No system,

357. *See* McKoski, *Reestablishing*, *supra* note 273, at 300 (2010); *see also* Ronald J. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301 (2011) (advocating the appointment of an inspector general for the Federal court to oversee and enforce judicial integrity). Discipline commissions are currently employed by Federal and State courts, though these bodies suffer from a number of serious criticisms. *See generally* Miller, *supra* note 238, at 467–69; Stemple, *supra* note 350, at 75.

358. *See In re* Coffey's Case, 949 A.2d 102, 115 (N.H. 2008); CYNTHIA GRAY, AMERICAN JUDICATURE SOCIETY STUDY OF STATE JUDICIAL DISCIPLINE 81–82 (2002); *see also In re* Deming, 736 P.2d 639, 659 (Wash. 1987) (listing ten factors to be considered by review boards in determining the appropriate punishment for judicial misconduct). *See generally* McKoski, *Reestablishing*, *supra* note 273, at 302–03.

359. MIDRASH RABBAH, NUMBERS 21; *see also* BABYLONIAN TALMUD, BERACHOS 58a.

however well designed, can fully account for the variables of individual conduct. To be effective, recusal law cannot, as it does now, rely on systemic restraints on partial judges. Addressing the problem of biased judging must begin at the bottom by engendering actual judicial integrity on a human level. The Torah's universal aspirational call, "[*t]zedek, tzedek tirdof* [justice, justice shall you pursue]!"[360] cannot be legislated, but must be adopted and internalized by judges imbued with a solemn sense of purpose, duty, and self-awareness. Perhaps Judge Kozinski put it best:

> Ultimately, there is no choice but to trust the judges. . . . [W]e'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life—obligations that each judge has the unflagging responsibility to police for himself.[361]

360. *Deuteronomy* 16:20.

361. Kozinski, *supra* note 292, at 1106.