

Money and Judges: Contours of Judicial Bribery in Medieval Jewish and Canon Law

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I. INTRODUCTION

Judicial ethics is a central concern of all legal systems. The law owes its viability to the courts that apply and enforce it, and the efficacy of the courts depends on people's willingness to submit their disputes to them and accept their rulings.² Judicial ethics laws aim to engender public confidence in the courts by assuring litigants that their disputes will be resolved by judges with professionalism, erudition, and integrity. During the middle ages, bribery was one of the main focuses of judicial ethics in both Jewish and Canon law. These systems in particular relied on the good will of their adherents for their own viability, and each took measures to earn that trust by trying to curtail the impression of judicial corruption that results from jurists taking money from the litigants they are judging.³

This paper explores the Jewish and Canon law prohibitions on judicial bribery during the medieval period. In discussing the *halakhic*, or Jewish law,⁴ doctrine, this paper draws on the Talmud, as well as rabbinic scholarship such as codifications and restatements of the law, and

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² 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 follow its mandates.").

³ See Richard H. Helmholz, *Money and Judges in the Law of the Medieval Church*, 8 *U. Chi. L. Sch. Roundtable* 309, 309-10 (2001) (examples of popular impressions of judges taking money during the Middle Ages).

⁴ See Robert Kirschner, *Rabbinic Responsa of the Holocaust Era* 4 (1985) ("Halakha is the collective rabbinic term for the prescriptive laws of Judaism. . . . Halakhah defined the course of day-to-day Jewish existence, and was in turn defined by it.").

responsa dating from the 10th century until the mid-16th century. In presenting the Canon law approach to judicial bribery, this paper relies principally on two articles written by Richard Helmholz in which the author surveyed and explicated various aspects of medieval Canon law judicial ethics.⁵

Part II of this paper explores the theoretical underpinnings that animated the rules governing judicial bribery in Canon and Jewish law during the Middle Ages. Part III next considers the substance of the Jewish and Canon law doctrines, focusing on how scholars within each system distinguished between permitted and prohibited payments to judges in order to leave open adequate avenues for judges to earn a living from their work. Finally, Part IV briefly discusses some of the procedural implications of a judge's taking a bribe in Jewish and Canon law, including a bribed judge's obligation to recuse himself from a case, and the legal effect of rulings he issued in violation of this duty.

II. JUDICIAL BRIBERY: THEORETICAL FOUNDATIONS AND ANIMATING PRINCIPLES

This Part explores the respective jurisprudential theories underlying medieval Jewish and Canon bribery law. Essentially, it asks the question: *Why* did these legal systems prohibit judicial bribery. For contemporary lawyers, judges, and scholars, the answer might seem obvious; the law prohibits bribery because bribes tend to bias judges in favor of the bribing party, leading to judge's making decisions based on personal preferences rather than the law, and undermining litigants' rights to a fair hearing by an impartial judge and a ruling consonant with accepted legal norms.⁶ In fact, however, maintaining impartiality was only one of the two bases for prohibiting bribery in medieval Canon law. An alternative theory held that bribery constituted the sin of simony, and was proscribed for that reason. Jewish law, however, offered an entirely different theory that held

⁵ See Helmholz, *supra* note 3, at 309; Richard Helmholz, *Canonists and Standards of Impartiality for Papal Judges Delegate*, 25 *Traditio* 386, 396-97 (1969).

⁶ See, e.g., American Bar Association Code of Judicial Conduct, Preamble, cl. 1 (2007); see generally Shlomo Pill, *Recovering Judicial Integrity: Towards a Duty-Focused Disqualification Jurisprudence Based on Jewish Law*, 39 *Ford. Urban L.J.* 511, 514-16 (2011).

prohibited was prohibited because it made the bribed judge a virtual party to the case he was deciding, thus negating the court's proper third-party arbitral role.

Part II.A explicates the two principle theories of judicial bribery offered by medieval canonists. Part II.B turns to explore the role-preservation rationale that animated Jewish bribery rules.

A. CANON LAW AND JUDICIAL IMPARTIALITY

Medieval Canon law prohibited judicial bribery. It was not the bribe itself that was problematic. A bribe was viewed as a proxy for the presence of a deeper substantive problem that the proscription of bribery aimed to prevent. Two principle theories seem to have animated Canon law rules governing the permissibility of judges receiving remuneration from litigants. One theory emphasized the necessity of judicial impartiality, and therefore condemned bribery because it would result in bias favoring the bribing litigant.⁷ Another theory prohibited bribery independent of its effect on judges' impartiality because by accepting payment for adjudicating a case a jurist committed the sin of simony, the sale of a holy thing.⁸

Several medieval canonists prohibited bribery because they viewed it as a form of simony.⁹ According to Richard Helmholz, Gratian wrote that judicial bribery amounted to the sale of justice and a fraud against God.¹⁰ On this view, justice was a gift of God, and a judge's task was to clarify and dispense God's justice.¹¹ Because justice belonged to God, the judge was to dispense it freely out of a genuine love for the actualization of God's will on earth rather than in return for corporeal gains. Bribery thus amounted to a judge's selling what belonged to God for his personal gain, the quintessential definition of simony.¹²

⁷ See generally Richard Helmholz, *Canonists and Standards of Impartiality for Papal Judges Delegate*, 25 *Traditio* 386, 396-97 (1969); Helmholz, *supra* note 3, at 315-19.

⁸ See generally Helmholz, *supra* note 3, at 311-15.

⁹ See sources cited in JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS CIVILIANS AND COURTS* 389, n. 59 (2008). See Helmholz, *supra* note 3, at 311-12.

¹⁰ See Helmholz, *supra* note 3, at 311 (quoting Gratian "He who takes a reward in recompense perpetrates a fraud upon God.").

¹¹ See BRUNDAGE, *supra* note 9, at 384 (citing medieval canonists for the proposition that judges were understood to be God's special emissaries and ministers in the dispensation of justice).

¹² See Helmholz, *supra* note 3, at 311-12. This view was adopted by other canonists as well. See *id.* at 311 ("[According to] the Decretals Gregorii IX (1234) and the Liber Sextus (1298) . . . In

An alternative theory prohibited bribery because it resulted in judicial bias favoring the briber over his opponent. In Canon law jurisprudence, it was axiomatic that adjudicatory rulings should be based on the judge's view of what the law requires under the facts of the case rather than on the basis on the presiding judge's extra-legal preferences.¹³ Judges were therefore obligated to recuse themselves from cases in which their decisions would stem from personal bias.¹⁴ Bribery, an exchange of consideration between a judge and litigant, was understood to create a serious risk of bias, and was therefore prohibited. On this view, illegal bribery was merely a proxy for determining the presence of improper judicial partiality; the problem with bribery lay "in the corruption of the judge through a bribe, not on the simple fact that money . . . changed hands."¹⁵

B. JEWISH LAW AND THIRD-PARTY ADJUDICATION

Jewish law prohibits judicial bribery because a judge who receives consideration from a litigant becomes a virtual party to the case, thereby undermining the court's role as a detached, third party arbiter. Thus, while other doctrines in Jewish legal ethics insure judicial impartiality,¹⁶ the bribery rules aim to insure that judges maintain the required third-party vantage relative to the litigants and subject matter of each case.¹⁷

Jewish law requires adjudication to be a third-party process.¹⁸ Jewish tradition characterize God as *chessed*, "selfless actions calculated to impart good unto others."¹⁹ God's greatest act of kindness was His creating Man as a free-willed being capable of emulating the divine by choosing

order that justice should be rendered 'freely and with all purity,' it was unlawful for judges to take 'a charge or anything else' from the parties who appeared before them.").

¹³ See, e.g., 2 Hostiensis, *Lectura*, at 141 *va to* X2.25.5§11 (*quoted in* BRUNDAGE, *supra* note 9, 383) ("Note that a judge should be so impartial that he injures no one. Neither hatred nor favor, fear nor money should sway his judgment or cause him to do anything detrimental to a party. Accordingly, he should deny justice to no one . . . however detestable they may be . . . Let the judge keep fair play ever before his eyes.").

¹⁴ See BRUNDAGE, *supra* note 9, at 385.

¹⁵ Richard Helmholz, *Canonists and Standards of Impartiality for Papal Judges Delegate*, 25 *Traditio* 386, 396 (1969).

¹⁶ See Yosef Karo, *Shulchan Aruch: Choshen Mishpat* §§7-8, 12.

¹⁷ See generally Shlomo Pill, *Recovering Judicial Integrity: Towards a Duty-Focused Disqualification Jurisprudence Based on Jewish Law*, 39 *Ford. Urban L.J.* 511, 530-37 (2011).

¹⁸ *Id.*

¹⁹ *Id.* at 530.

to suppress his natural tendency towards self-interested action in favor of acting with *chessed*.²⁰ Jewish thought further maintains that the Torah, God's revealed will, instructs Jews as to what actions constitute *chessed* and which do not.²¹ Thus, Jewish law "functions primarily as a means of enabling its adherents to develop their humaneness through self-transcendence, by . . . instructing them to choose to adopt God's *chessed*-focused will as their own."²²

The transformation of Man from self-interested homo-sapien to selfless human being requires other-referentiality, the adoption of externally-dictated, rather than internally-devised behavioral norms and values.²³ In the Jewish tradition, choosing how to act based on one's own moral compass is an act of self-indulgence; however, making that same determination based on the command of an external authority – in this case, God – is a morally ennobling act of self-transcendence.²⁴ Thus, as a moralizing medium, Jewish law relies primarily on the *process* of Jews choosing to subjugate their naturally self-interested preferences to God's own value judgments embodied in the *halakha*.²⁵ As Maimoides notes in his seminal Jewish law codification, Mishnah

²⁰ See SAMSON RAPHAEL HIRSCH, THE NINETEEN LETTERS 64 (Joseph Elias, tran., 2d ed. 1995) ("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."); YEHUDAH LOEW, 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); see also 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."); Maimonides, Sefer Hamitzvos, *Positive Commandment 8*.

²¹ See LAW, POLITICS, AND MORALITY IN JUDAISM 8 (Michael Walzer ed., 2008); Robert Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. Contemporary 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.").

²² Pill, *supra* note 17, at 532.

²³ See *id.* at 532.

²⁴ See *id.* at 533 ("When one performs a good act because his own conscious dictates he do so, his conduct stems from self-referential instinct; when he does the same act because it is commanded by an external moral authority, however, the performance becomes a self-transcending, moralizing act.").

²⁵ See Isidore Grunfeld, *Introduction lxxvii*, in SAMSON RAPHAEL HIRSCH, HOREB: A PHILOSOPHY OF JEWISH LAWS AND OBSERVANCES (Isidore Grunfeld, transl., 7th ed. 2002) ("If a person makes the will of God his own will, and fights" his natural self-centeredness "he develops his moral

Torah, it is important that the law is obeyed because it is God's command, rather than as a result of a person's own personal reasoning, judgment, and moral discernment.²⁶

The possibility of accepting externally declared legal rules is problematic in cases of interpersonal disputes where litigants often reasonably disagree about what God's law requires. In such instances, neither party is willing to accept the other's opinion about what the law requires, and even one was willing to do so, accepting the legal view of an opposing interested party would negate Jewish law's moralizing purpose because that conception of what the law requires would be self-referential. The Jewish adjudicatory process remedies this problem by providing disputants with a court's external, third-party determination of what God's law requires. Courts thus enable "self-focused litigants . . . [to] . . . transcend their personal priorities by adopting a court's disinterested judgment as their own standard [of conduct], thereby morally ennobling their conduct consonant with Torah ideals,"²⁷ and courts are able to fulfill this vital "precisely because they are not parties to the cases they decide."²⁸

Jewish law preserves the third-party institutional character of its courts by disqualifying judges who are in effect parties to the cases they are supposed to decide.²⁹ Bribery is one of the conditions that transform a judge from jurist to litigant, thereby compromising the courts requisite disinterested position.³⁰ The Talmud relates that bribery is called *shochad* in Hebrew because it

power although his action is not the conscience of his own moral discernment . . . For moral power and one's own moral discernment do not depend on one another.").

²⁶ See Maimonides, Mishnah Torah, The Laws of Kings and their Wars 8:11 ("Whoever accepts the Seven Noahide Laws, and is careful to observe them, is among the pious people of the nations of the world. . . . But this is only if he accepts and observes them because God has commanded them But if he does so due to his own reasoning . . . he is not one of the pious people of the nations of the world, nor one of their wise men."); see Aharon Lichtenstein, *Communal Governance, Lay and Rabbinic: An Overview*, in RABBINIC AND LAY COMMUNAL AUTHORITY 20 (Suzanne Last Stone & Robert S. Hirt eds., 2006) ("Action in response to the halakhic call is superior to the same act voluntarily undertaken.").

²⁷ Pill, *supra* note 17, at 534-35.

²⁸ *Id.*

²⁹ See generally *id.* at 538-43.

³⁰ Other conditions that compromise the third-party position of the court include a judge's financial interest in the outcome of a case, his being closely related to an interested party, and his having previously issued an advisory opinion on the matter at hand. See *Id.*

makes the judge and bribing litigant like one.³¹ Thus, a bribed judge is disqualified because the bribe makes him a party to the case, leaving him legally incapable of representing the third-party court in that case.³²

III. SUBSTANTIVE REGULATION OF JUDGES AND MONEY

In working to distinguish illegal bribes from permissible gifts and compensation, medieval canonists and *halakhic* scholars had to wrestle with several interrelated issues. The first concerned the logical implications of the various theories animating the prohibition on bribery. Canonists had to decide which payments to a judge constituted simony, and which were likely to result in judicial bias; Jewish decisors had to determine which exchanges between a litigant and his judge made the judge a virtual party to the case. The second consideration related to the relationship between bribery and procedural efficiency. If a payment was classified as a bribe it warranted the receiving judge's recusal.³³ Removing a judge, in turn, would result in procedural delays, adding time and expense to an already slow and costly litigation process. Because both Canon and Jewish law were concerned with making adjudication as quick and inexpensive as possible,³⁴ legal scholars had to define illegal bribes so as to adequately prevent the ills associated with paying judges while also taking care not to provide unnecessary ground for recusal, which could lead to procedural inefficiency and injustice.³⁵ Finally, jurists striving to define illegal bribery had

³¹ See Babylonian Talmud, Kesubos 105a. The Talmud takes *shochad* to be a conjunction of two words, *shehu chad*, which means "it unites" or "it makes several things one." See Pill, *supra* note 17, at 538-43.

³² See Yonasan Eibeshutz, Tumim 37:1 and sources cited therein (reasoning that a bribed or financially interested witness or judge cannot truly be categorized as disqualified because due to their connection to the matter they were "never within the legal definition" of a witness or judge).

³³ See BRUNDAGE, *supra* note 9, at 389; Yosef Karo, Shulchan Aruch: Choshen Mishpat 13:7-9 (describing procedures and burdens of proof for removing a presiding judge).

³⁴ See BRUNDAGE, *supra* note 9, at 449-51 (describing a form of summary procedure instituted in Canon law courts in recognition of the need to make the process of adjudicating civil actions more efficient and streamlined); Yecheil ben Asher, Arbah Turim: Choshen Mishpat 1:2; 13:3-6 (urging judges not to impose excessive costs on litigants by employing unnecessary scribes or other court officials).

³⁵ Cf. See BRUNDAGE, *supra* note 9, at 443-46.

to grapple with the practical need of judges to earn a living from their work while also preventing the evils associated with judicial bribes.

Part III.A explores some of the ways in which medieval canonists developed a nuanced bribery doctrine that addressed these concerns. Part III.B explains the same with respect to Jewish law scholars.

A. ILLEGAL BRIBERY AND APPROPRIATE GIFT-GIVING IN MEDIEVAL CANON LAW

Medieval canonists developed a complex doctrine to distinguish between an illegal bribe and a permissible gift or compensation. The doctrine did not consist of a comprehensive set of rules, but rather an array of often conflicting factors that might be considered in deciding whether any particular exchange of consideration between a litigant and judge was permitted. These factors represented the imperfect results of an attempt to balance the three competing concerns related to defining judicial bribery.

On the view that bribery prohibited bribery as a form of simony, canonists distinguished between payments compensating judges for doing justice, and payments offered for other reasons.³⁶ Because Canon law defined simony in terms of the parties' intent to buy and sell a holy thing, canonists identified illegal bribery by reference to the apparent intentions of the parties. A payment best explained as a purchase of God's justice was illegal, but a payment apparently offered "out of the donor's liberality,"³⁷ or as a gift signifying respect for the judge's office was permitted.³⁸ Thus, judges could not take payments for performing their judicial duties, but could accept compensation for travel expenses or other costs related to their, since such payments were

³⁶ See Helmholz, *supra* note 3, at 316.

³⁷ Panormitanus, *Commentaria Super Quinque Libros Decretalium*, ad X 3.1.10, no. 10 (1517) (*quoted in* Helmholz, *supra* note 3, at 316 (2001)); see also BRUNDAGE, *supra* note 9, at 390 ("Judges . . . could also accept token gifts (*xenia*), provided that these were offered freely and spontaneously.").

³⁸ See Helmholz, *supra* note 3, at 316.

clearly not made to purchase justice.³⁹ Similarly, judges could not accept valuable gifts,⁴⁰ but could accept food and drink, items they “could readily consume within a short time,”⁴¹ and incidental gifts because such offerings were understood to be mere social conventions rather than the purchase price for God’s justice.⁴² Despite these permitted forms of remuneration, judicial bias remained a separate concern. Thus, judges could only accept non-bribe gifts if both parties participated equally in the giving, lest the acceptance of a gift from only one litigant result in bias.⁴³

The view that prohibited bribery as an incidental measure to prevent judicial bias permitted forms of payment that were unlikely to “influence the judge’s mind.”⁴⁴ Thus whether a particular exchange between a judge and litigant was a bribe was a highly fact-specific determination; no objective, fixed sum “turned a gift into a bribe.”⁴⁵ Instead, determining whether a gift was a bribe entailed considering the objective value of the gift and its relative worth in comparison to the wealth of the litigants and judge, local customs concerning gift-giving and court procedure, as well as other factors.⁴⁶ Canonists thus held that a judge could accept equal gifts from each litigant in a case because such offerings were unlikely to result in bias favoring one party,⁴⁷ and also that large gifts were prohibited while small offerings were generally permissible.⁴⁸

³⁹ See BRUNDAGE, *supra* note 9 at 389-90 (“[J]udges-delegate were entitled to claim compensation from the parties for modest travel expenses . . . [and] they could claim compensation for casualty losses if, for example, they were robbed or one of their horses died while they were on the road to hear a case, or if the illness of one of their attendants required them to tarry away from home longer than anticipated.”).

⁴⁰ See *id.* at 390 (referring to gifts of robes, books, or silver vessels).

⁴¹ *Id.*; see also Helmholz, *supra* note 3, at 317.

⁴² See Helmholz, *supra* note 3, at 316.

⁴³ See BRUNDAGE, *supra* note 9, at 390.

⁴⁴ Helmholz, *supra* note 3, at 316.

⁴⁵ *Id.* at 317.

⁴⁶ See *Id.*; Helmholz, *supra* note 15, at 396-97.

⁴⁷ See Helmholz, *supra* note 3, 320 (If both sides gave something to a judge [Hostiensis] speculated, money might not pervert [the judge’s] judgment.”); Helmholz, *supra* note 15, 397 (“If both sides give small gifts to the judges, those gifts do not have any necessary influence on the outcome of the case.”).

⁴⁸ See Helmholz, *supra* note 15, at 397 (referencing the view of William of Drogheda).

In defining the scope of prohibited bribery, canonists also considered the need to provide judges with a means of earning an adequate livelihood from their work. The need to assure adequate avenues of judicial compensation was likely not a serious problem for much of early medieval history. According to James Brundage, most Canon law jurists did not ascend to the bench until after having already enjoyed a profitable career as an advocate, or having otherwise “accumulated enough benefices and other appointments to support himself comfortably.”⁴⁹ Additionally, until at least the mid-twelfth century, the caseload of ecclesiastical courts was fairly light, and the vast majority of cases were handled directly by bishops and other ecclesiastical officials,⁵⁰ whose holdings provided them with substantial revenue, rendering the issue of judicial compensation largely moot.⁵¹

As the size of the professional judiciary increased, and more jurists without adequate external sources of income ascended to the bench, the need for permissible avenues for judicial compensation grew. The two dominant theories of Canon bribery law suggested that litigants could compensate judges for their labor – as distinct from paying them for dispensing God’s justice – and that judges could receive forms of remuneration that were not likely to produce bias. Thus, canonists held that judges could recover for the costs they incurred while judging cases because “no man can be compelled to use his property for the benefit of others.”⁵² This led to more general approval of judicial compensation on the theory that “it is not just for a man to labor without reward.”⁵³ Such payments did not amount to simony because they compensated judges for their physical and mental labor rather the justice they dispensed, and they did not raise concerns about judicial bias, since typically each litigant would contribute an equal amount.⁵⁴

Some canonists also permitted litigants to compensate judges if in a particular locale it was customary for them to do so. The fact that such payments were regularly made as a matter of course rebutted any presumption that an exchange of funds between a litigant and his judge constituted

⁴⁹ BRUNDAGE, *supra* note 9, at 391-92.

⁵⁰ *See id.* at 373.

⁵¹ *See* Helmholz, *supra* note 3, at 318.

⁵² *Id.* at 317.

⁵³ *Id.* at 317, 320.

⁵⁴ *See id.* at 320.

simony or would result in bias.⁵⁵ Canonists also suggested that while payments made upon a judge's demand would constitute bribery, a judge's receipt of a voluntary payment made by a litigant was not prohibited.⁵⁶ This distinction established that "justice would not have been sold [or the judge's impartiality affected] . . . unless the money was something like a quid pro quo demanded by the judge as the price of his learning and his consideration."⁵⁷ Finally, legal writers suggested that the canons and decretals prohibiting bribery might be applied more permissively to judges in need of livelihood; wealthy judges who could survive without being paid for their work were almost categorically prohibited from accepting any remuneration from litigants, but poor jurists whose livelihoods relied on gifts from litigants were able to accept limited offerings.⁵⁸

B. THE SCOPE AND LIMITS OF ILLEGAL BRIBERY IN MEDIEVAL JEWISH LAW

Medieval Jewish law maintained an expansive definition of prohibited bribery that included virtually any conveyance of money, goods, or services from a litigant to a judge. This broad scope was a logical consequence of Jewish law's prohibition bribery in order to preserve courts' third-party vantage; on this view, *any* exchange between a judge and a litigant bound the two together, making the judge a virtual party to the case. The general *halakhic* rule was thus a categorical prohibition on virtually all valuable donations from a litigant or other interested party to a presiding judge.

In medieval Jewish law, bribery included virtually all valuable goods or services conveyed by an interested party to a judge while the donor's case was docketed in the judge's court.⁵⁹ Even relatively invaluable or intangible gifts could also constitute bribery.⁶⁰ Thus, the Talmud records that Jewish judges held themselves disqualified in numerous seemingly innocuous circumstances, such as were a litigant brushed a feather from a judge's robes, where a party kicked some dirt to cover spittle that lay at the judge's feet, and where a litigant who was also the judge's sharecropper

⁵⁵ *See id.* at 319-20.

⁵⁶ *See id.* at 320.

⁵⁷ *See Id.*

⁵⁸ *See id.* at 317-18 (2001); *see also* BRUNDAGE, *supra* note 9, at 389.

⁵⁹ *See* Yosef Karo, Shulchan Aruch, *Choshen Mishpat* 9:1-2.

⁶⁰ *See* Yosef Karo, Shulchan Aruch, *Choshen Mishpat* 9:1-2; Yechiel b. Asher, Arbah Turim, *Choshen Mishpat* 9:1 ("Not only is financial bribery prohibited, but even verbal bribery.").

delivered the year's crop to the judge shortly before it was due.⁶¹ Drawing on these Talmudic examples, some medieval authorities held that a judge was disqualified if a litigant said "good morning" to him or offered other salutations or compliments, unless such comments were typical between the specific judge and litigant.⁶² Jewish law also disqualified judges who borrowed household goods from neighbors who were also parties to a pending case.⁶³

One of the most telling illustrations of Jewish bribery law's concern for maintaining courts' third-party institutional vantage is the rule prohibiting a judge from receiving equally valuable gifts from each of the litigants appearing before him.⁶⁴ Although such even-handed donations were unlikely to result in improper bias for one party, they were nevertheless held to be illegal because the bribed judge would become a virtual party to the case.⁶⁵ Medieval authorities also stressed that bribery included a party's giving something of value to a judge in exchange for the judge's rendering a verdict that was in any case legally correct.⁶⁶ *Halakhic* writers understood the biblical injunction against distorting the law to prohibit payments made to induce a judge to issue a legally

⁶¹ See Babylonian Talmud, Kesubos 105b.

⁶² See Maimonides, Mishnah Torah, *The Laws of the Sanhedrin* 23:3; Yosef Colon Trabatto, Responsa Maharik § 16. *But see* Tosfos to Kesubos 105b (s.v. *Lo*) (ruling that offering salutations does not fully disqualify the receiving judges, though the judge should nevertheless voluntarily remove himself from the case).

⁶³ See Yosef Karo, Shulchan Aruch, *Choshen Mishpat* 9:1 ("Any judge that borrows something is disqualified from judging the lender.").

⁶⁴ See Babylonian Talmud, Kesubos 105a.

⁶⁵ See Yehoshua Falk, Drisha to Arbah Turim, *Choshen Mishpat* 9:1; Yehoshua Falk, Sefer Meiros Einayim 9:2; *see also* Pill, *supra* note 17, at 542.

⁶⁶ *See, e.g.*, Yechiel b. Asher, Arbah Turim, *Choshen Mishpat* 9:1 ("A judge must be very, very cautious not to take any manner of bribe, even to find in favor of the party who is legally in the right.").

incorrect decision.⁶⁷ In order to avoid textual redundancy, the separate proscription on bribery was thus taken to prohibit even payments made to secure a legally correct ruling.⁶⁸

Facilitating judicial compensation presented a somewhat harder problem for *halakhic* scholars than it did for canonists because in Jewish law, the exchange of value itself constituted a bribe. Jewish law scholars thus could not provide judges with a means of earning a livelihood from their work by identifying types of payments that did not constitute the substantive ills bribery was supposed to prevent; in Jewish law, bribery was the ill. Jewish scholars therefore had to develop methods of paying judges that would not make the receiving judge a party to the case.

The Talmud suggested that judges could be compensated with equal payments from each litigant.⁶⁹ Medieval authorities confirmed this rule, but held that such payments could only be used to compensate a judge for wages from his regular employment that he lost while adjudicating a case, provided his regular job was well-known. Thus, the preeminent restatement of medieval Jewish law provided:

All the rulings of a judge who is proven to have taken a bribe are void . . . However, if he only took payment for his lost time, it is allowed – provided it is apparent to everyone that he is only taking money for his lost time, such as when it is known that he has another job to do during the time that he is judging a case and he told the litigants, “Pay me the my lost wages for the time I spend judging your case”; and also provided that he takes equal amounts from each of the litigants.⁷⁰

This avenue for permitting judicial compensation was seriously limited because the conditions to be satisfied in order to permit a payment likely foreclosed this route of compensation for most judges. A judge’s full time job might not be well known, and his regular rate of compensation was

⁶⁷ See Babylonian Talmud, Kesubos 105a:

“And you shall not take a bribe” [Exodus 23:8]. What is Scripture teaching us; if it is telling us that a judges should not wrongly exonerate the liable party or wrongly find against the party with the more meritorious legal claim, but Scripture has already instructed “Do not pervert judgement” [Deuteronomy 16:19]. Rather, it is teaching us that a judge may not take a bribe even to find for the party with the legally meritorious claim or to find against the legally liable party.”

See also Yoel Serkis, *Bayis Chadash to Choshen Mishpat* 9:1.

⁶⁸ See Babylonian Talmud, Kesubos 105a; R. Yehoshua Falk, *Sefer Meiros Einayim* 9:2.

⁶⁹ See Babylonian Talmud, Kesubos 105a; Yosef Karo, *Shulchan Aruch: Choshen Mishpat* 9:5.

⁷⁰ Yosef Karo, *Shulchan Aruch: Choshen Mishpat* 9:5.

even less likely public knowledge, thus proscribing this method of paying judges. Additionally, this model could only work if judges maintained other paying jobs in addition to their judicial work. During the middle ages, however, Jewish communities developed a highly organized system of relatively autonomous internal governance.⁷¹ The local *beis din*, or law court, was a major arm of the Jewish communal structure, and which was usually staffed by at least one full time *halakhic* decisor whose job it was to remain available to answer community members' religious personal questions and resolve their interpersonal disputes in accordance with Jewish law.⁷² By definition, this full time judge did not have another source of employment; he could therefore not be compensated using the Talmudic model, and an alternative method was required.

In response to this need, medieval Jewish scholars held that judges could be compensated by a communal fund set of for this purpose and supported through general taxes levied upon the local Jewish population.⁷³ Thus, Rabbi Yosef Karo, wrote in his 16th century restatement of Jewish law: "We are accustomed to establish for the court a public fund which distributes money for the judges' livelihood . . . and in this there is no violation of the laws of bribery, for the Jewish people are obligated to financially support their judges and scholars."⁷⁴ Rabbi Moshe Isserles, who wrote the principle gloss on Karo's work further advised that "it is best to collect the taxes for this fund [and disperse the funds to the judges] at the start of each year so that the judges should not feel any need to curry favor with any man [through their rulings]."⁷⁵

V. THE PROCEDURAL CONSEQUENCES OF JUDICIAL BRIBERY

⁷¹ See generally LOUIS FINKELSTEIN, *JEWISH SELF GOVERNMENT IN THE MIDDLE AGES* (1924).

⁷² See generally AARON M. SCHREIBER, *JEWISH LAW AND DECISION MAKING: A STUDY THROUGH TIME* 320-24 (1979); see also Moshe Sofer, Responsa Chasam Sofer, *Choshen Mishpat* §164 ("The community is obligated to select for themselves at least one person who will be available at all times to anyone who need to inquire about God's law so that such people may find him to answer their queries at any time, and the community must establish a salary for him to keep him sustained and in great honor.").

⁷³ See Yechiel ben Asher, *Arbah Turim: Choshen Mishpat* 9:4; see also See generally AARON M. SCHREIBER, *JEWISH LAW AND DECISION MAKING: A STUDY THROUGH TIME* 322-23 (1979).

⁷⁴ Yosef Karo, *Shulchan Aruch: Choshen Mishpat* 9:3.

⁷⁵ Moshe Issleres, *Rema to Shulchan Aruch: Choshen Mishpat* 9:3.

Rules prohibiting judicial bribery do little to improve the efficacy of and the public's confidence in the judicial system unless the system also provides for some means of enforcing those rules. Medieval Jewish and Canon law provided procedural consequences for bribery. These enforcement mechanisms focused on two main questions. The first issue addressed by these laws was the status of a judge who is proven to have taken a bribe. The second question concerned the status of rulings issued by a bribed judge that was not removed from a case before resolving it. Part IV.A discusses Canon law procedural responses to occurrences of judicial bribery, and Part IV.B explores the same issue from the Jewish legal perspective.

A. PROCEDURAL CONSEQUENCES OF BRIBERY IN CANON LAW

Ideally, medieval Canon law jurists were supposed to discipline themselves, and a judge who has accepted an illegal bribe was expected to voluntarily recuse himself from the case.⁷⁶ Relying on judges' self-enforcing ethics requirements in good faith proved to be ineffective in practice, however.⁷⁷ While the ecclesiastical court system did not maintain any systematic method for policing its judges, the Church relied on litigants complaining about judges' conduct to identify, investigate, and resolve allegations of judicial misconduct.⁷⁸

A litigant who believed his judge had taken a bribe could present a written exception to the court alleging that the judge had violated the rules against bribery.⁷⁹ Once the exception was filed, the challenged judge was barred from proceeding further on the underlying case, and had to step aside until the merit of the complainant's exception was determined by a panel of disinterested arbiters chosen by both parties.⁸⁰ If the investigators decided that the litigant's allegations of judicial bribery were well-founded, the challenged judge was removed from the case. If, however, the arbiters determined that the exception was without merit, the judge could resume the underlying proceedings, at times with detrimental consequences to the complaining party.⁸¹

⁷⁶ See Helmholz, *supra* note 15, at 386, 396; BRUNDAGE, *supra* note 9, at 385.

⁷⁷ BRUNDAGE, *supra* note 9, at 385.

⁷⁸ See *id.* at 384-85.

⁷⁹ *Id.* at 385, 388.

⁸⁰ See Helmholz, *supra* note 15, at 389-90.

⁸¹ BRUNDAGE, *supra* note 9, at 385-87.

If a judge decided a case after having taken a bribe, medieval canon law maintained that the judge's ruling was not a legal nullity. A bribed judge remained a judge – albeit not a very honest one – and his rulings had to be obeyed until they were overturned by a higher tribunal on appeal.⁸² If an aggrieved litigant did take an appeal to a higher court alleging that the trial judge had been bribed, the appellate court might or might not overturn the lower court's ruling. This determination typically turned on the substantive correctness of the challenged disposition. Since bribery was prohibited either because it was sinful or because it tended to result in biased judging, a bribed judge's ruling would only be overturned on appeal if it was legally incorrect; the existence of a bribe itself did not provide an adequate reason to overturn a judge's otherwise legally correct decision.⁸³

B. PROCEDURAL CONSEQUENCES OF BRIBERY IN JEWISH LAW

The procedural effects of a judge accepting a bribe under medieval Jewish law were an outgrowth of the underlying theory that animated *halakhic* bribery rules. Jewish law held that a judge who accepted a bribe became a virtual party to the case. As a party to the suit, a bribed judge literally ceased being a jurist, and any actions he took in hearing the case could not be attributed to the court and were void.⁸⁴

Medieval Jewish law provided procedures for a litigant to challenge a judge he believed had taken a bribe. A litigant could present a motion alleging that the presiding judge had accepted a bribe. If the moving party supported his claim with the testimony of at least two valid witnesses, the judge was automatically disqualified from proceeding any further on the case.⁸⁵ Normative *halakha* does not create an organized hierarchical court system, and thus there was not always an internal mechanism in place to forcibly remove disqualified jurists from the bench.⁸⁶ Jewish law thus provided that the rulings of a judge disqualified for bribery are null and void; if a judge

⁸² See Helmholz, *supra* note 3, at 313.

⁸³ See Helmholz, *supra* note 3, at 313-15.

⁸⁴ See Pill, *supra* note 17, at 535.

⁸⁵ See Yosef Karo, *Beis Yosef: Choshen Mishpat 13:7* (referring to Babylonian Talmud, Sanhedrin 23a).

⁸⁶ See generally J. David Bleich, *The Appeal Process in the Jewish Legal System*, 34 Tradition 17 (1993) (exploring the lack of a hierarchical court structure in the Jewish legal system, and the consequential inability of courts to formally supervise each other's decisions).

wrongly refused to disqualify himself when required to do so, the aggrieved litigant in the case could simply choose to ignore any further proceedings before that judge. Not only did Jewish law invalidate the rulings made by a judge after he was disqualified, but the law even retroactively voided all the judicial actions taken by a judge from the time he accepted a bribe until the time he was ultimately disqualified.⁸⁷ This penalty was a particularly harsh means of discouraging judges from accepting bribes because Jewish law maintained that a judge who issued a patently incorrect ruling – which would include a decision issued under the influence of a bribe – must compensate the losing litigant for any losses he suffered as a result of the judge’s ruling.⁸⁸

VI. CONCLUSION

The Jewish and Canon law systems of the Middle Ages maintained sophisticated and nuanced doctrines governing judicial bribery that demonstrate many of the meta-characteristics expected in legitimate legal regimes. Both systems prohibited bribery for specific theoretical reasons. These theoretical foundations provided judges and litigants with an important degree of predictability about what kinds of payments did and did not constitute illegal bribery. Like any system that must work in the real world, however, Canon and Jewish bribery laws were not entirely divorced from practical considerations. By limiting the impact of their respective theoretical models in order to promote procedural efficiency and insure judges an adequate source of livelihood, the Jewish and Canon law doctrines insured that their bribery rules not only made jurisprudential sense to scholars in the university, but also worked for judges, lawyers, and litigants in the real world. Finally, both systems developed methods of enforcing bribery rules and punishing violations. Like the rules themselves, these enforcement methods represented a hybrid of theoretical consistency and practical necessity. By translating a theoretical model into practical regulations enforceable by logically consistent and practically efficient methods, the Jewish and

⁸⁷ See Yosef Karo, Shulchan Aruch: Choshen Mishpat 9:2. This rule merely created a presumption that all of the judges past rulings were issued under the influence of bribes. This presumption could be rebutted, however, upon proof that with respect to any particular decision the judge had in fact not accepted any illicit payments from the litigants appearing before him. *See id.*

⁸⁸ See Yosef Karo, Shulchan Aruch: Choshen Mishpat 25:1-3.

Canon legal systems of the Middle Ages engendered public confidence in their abilities to justly resolve disputes, thereby ensuring their viability.