

Elections 2012 -A Jewish Perspective

Social Security **Finance** **Medicaid** **B"H**
Separation of Church & State **Environment**
Medicaid **Progressive** **Welfare**
Capitalist **Tax Cuts**
Subsidy **Wages** **Justice**
Wall Street **Deductions** **War**
School Choice **99%** **K Street** **Liberal**
Poverty **UNDOCUMENTED** **Equality**
9.9.9 **Socialism** **Reform**
Tax Policy **REGRESSIVE** **War**
Republican **CAPITAL GAINS** **Billionaires**
Justice **President** **Lobbyists 1%**
Legislation **Lobbyists** **Free Trade**

Nation-Building Welfare

Finance Reform

Fair Tax Redistribution

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Unions **Conservative** **TAX**
Fair Tax **Government** **Deductions** **Law**
War **Illegal Alien** **Wall Street**
Military **Subsidy** **Nation-Building**
Deficits **Medicaid** **State's Rights** **Regulation**
WAGES **Social Security** **Immigration**
Border **Bureaucracy** **Vouchers** **Poverty**
Loopholes **Moderate** **REGRESSIVE** **Defense**
K Street **Capitalism** **Entitlements**
Politics **Unemployment** **Benefits** **Undocumented**
Health Care

Campaign Financing

Is a campaign contribution considered bribery?

Is it ethical for lobbyists to financially back a candidate?



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considered bribery?

Is it ethical for lobbyists to financially
back a candidate?

By Rabbi Nochum Mangel and Rabbi Shmuel Klatzkin

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Introduction

In this course we examine the issue of campaign financing from the viewpoint of Torah. The Torah's wellsprings of insight and moral guidance can help us to fulfill our civic responsibilities with confidence and integrity in considering this complex issue.

Scripture tells us in clear and forceful language that bribery corrupts the system. When a person with power accepts gifts that were given in order to curry his favor, his vision is blinded, his judgments are skewed and people lose faith in the system.

There are many different aspects to the problem. Clearly, there must be no *quid pro quo*, the selling of justice and of power to the highest bidder. But the heart is hidden and even the impression of impropriety can damage the system, and cause people to despair of justice and lose trust in their government.

But what are the limits? Can one contribute to a PAC? Suppose a local judge gets married. Can one give a present without fear of impropriety?

We will follow cases and rulings in law, both in the modern American courts and in the halachic tradition. We will learn how we can insure that our institutions are held in the high esteem necessary for a healthy political system.

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Section I

Part A – A Bought Judge?

Case Study I

Brent D. Benjamin won his seat [as justice on the West Virginia Supreme Court] with the help of more than \$3 million from [a non-profit company set up as a PAC by] Mr. Blankenship, [CEO of A. T. Massey Coal Company,] but has refused to disqualify himself from cases involving Massey, and twice joined a 3-to-2 majority throwing out a \$50 million verdict against the company.

The United States Supreme Court is likely to announce this week whether it will hear...[the case of] whether the Constitution's due process clause requires Justice Benjamin to step aside in the \$50 million Massey case.

The case, *Caperton v. A. T. Massey Coal Company*, No. 08-22, has attracted supporting briefs from the American Bar Association and several other groups urging the court to hear the case.

“If the public believes that judges can be bought,” said Keith R. Fisher, a lawyer for the bar association, “that is really poisonous and undermines public confidence in an independent judiciary...”

Justice Benjamin did not respond to a request for comment. In a long opinion issued in July explaining his decision not to disqualify himself, he said he had judged the case on the merits

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and that only proof of a judge's actual bias, as opposed to the appearance of a conflict, requires recusal.

Massey has filed a brief urging the Supreme Court not to hear the case, calling the matter "a grand conspiracy theory." The Massey brief said the United States Supreme Court "has never adopted a 'looks bad' due process test."

The plaintiffs in the case are mining companies that say they were driven out of business by fraud committed by Massey. They are represented in the Supreme Court by Theodore B. Olson, a former United States solicitor general.

"Individuals and entities that have business before the courts of the United States must be assured that the judges who handle their cases handle them truly, squarely and fairly," Mr. Olson said.

Mr. Olson argued and won the leading decision in this area, *Aetna Life Insurance v. Lavoie*, which was decided in 1986. But that case established only that the Constitution can require judges with a financial stake in the outcome of a case to disqualify themselves. *Caperton*, by contrast, turns largely on whether millions of dollars in campaign support from an interested party creates an appearance of impropriety so strong that recusal is required.

Adam Liptak, "U.S. Supreme Court Is Asked to Fix Troubled West Virginia Justice System," *New York Times*, October 11, 2008

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Class Questions:

**What do you believe are the moral issues at stake in this case?
Do you believe that Benjamin should have sat on that case or
should he have recused himself?**

Share the reasoning behind your judgment.

**Suppose a gift were given a long time before there was any
notion that the giver would come before the recipient in court.
Do you think that fundamentally alters the ethicality of the gift,
or is it still troublesome?**

1a. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case... We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

*Supreme Court of the United States, CAPERTON v. A. T. MASSEY COAL CO.
Opinion of the Court (2009)*

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1b. Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any limited way. The Court's new "rule" provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

Supreme Court of the United States, CAPERTON v. A. T. MASSEY COAL CO. (2009). Dissent, Chief Justice Roberts

Part B - Jewish law

2a. Know, my son and my student, I have been pained by this text: *You should come clean before G-d and before Israel [Numbers 32:22].* These two obligations – coming clean before G-d, may He be blessed, and coming clean before His people Israel,

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are a double-heavy burden on our back. There is a much greater possibility of acquitting ourselves of the former, that is, our obligation to Heaven, than of the latter [i.e., our obligation to our fellow].

Chatam Sofer, Teshuvah 59

2b. Your princes are rebellious and companions of thieves. Everyone loves bribes and chases after payoffs. They do not judge the orphan nor hear the widow's cause.

Isaiah 1:23

2c. Do not take a bribe (*shochad*), for a bribe blinds the perceptive and spoils the words of the righteous.

Exodus 23:8

Do not bend justice; do not show favoritism; and do not take a bribe (*shochad*) for a bribe blinds the perceptive and spoils the words of the righteous.

Deuteronomy 16:19

What is the reason for the prohibition of *shochad*? Rava said, "Once a judge takes *shochad* from a litigant, he feels closer to him, as if [the litigant] were part of himself, and a person sees no wrong in himself.

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What does *shochad* mean? *Shehu chad* – that he is now one with the other person.

Ketuvot 105b

2d. One may not take a bribe. It goes with saying that one may not do so in order to pervert justice, but one may not take a bribe even to acquit the innocent; one would transgress a prohibition, for he is included within the general rule of one who takes a bribe...

Maimonides, Hilchot Sanhedrin, 23:1

Class Question:

Why do you think Jewish law would forbid taking a bribe even if it is to declare the guilty, guilty, or the innocent, innocent?

It Takes Two to Tango

3. Just as the one who takes a bribe violates a prohibition, so too does the one who gives a bribe; as it says, “Do not place a stumbling block before the blind.”

Maimonides, Hilchot Sanhedrin, 23:2

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Case Study II

In *Devar Shmuel*, Rabbi Shmuel ben Avraham Abuhav writes of a community member who, as part of the mitzvah of sending food gifts on Purim, sent food gifts to the local rabbinic judge. When this man had a court case before that rabbi, should we fear that that rabbi will be more receptive to him, and therefore be disqualified from sitting on this case?

Class Discussion

What do you think? Should this judge be disqualified from sitting on this man's case?

4a. There was a man who brought his first shearings to Rabbi Ishmael bar Elisha. The rabbi asked him where he was from and when he named the place, Rabbi Ishmael bar Elisha said, "And there was no other *kohein* between here and there to whom you could give it?"

The man replied: "I have a suit that is coming before your court, so I might as well bring it to you."

Rabbi Ishmael bar Elisha said to him: "I am disqualified from judging your case;" and he did not take the shearings either.

Ketuvot 105b

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4b. It is not just a bribe of money that they are forbidden to take. Even something such as making a point of greeting the judge is forbidden if he had not been already accustomed to do so. Similarly, to provide him with some sort of service is forbidden had he not already been accustomed to providing it, even some small service.

Aruch Hashulchan, Choshen Mishpat, Hilchot Dayanim 9:1

Class Discussion

Is there any significant difference between the case of Rabbi Ishmael and the shearings and the case of the rabbi who received the *mishloach manot*?

Does this change your opinion about how the verdict will come out in our case above?

5a. This is something that is given over to the human heart to discern, and the human eye can see what the local custom is...

In the case of the man who brought Rabbi Ishmael ben Elisha the first shearings, the reason that Rabbi Ishmael did not accept even though, as a *kohein*, it was due him, is because it was self-evident that the man was trying to establish a closeness with his judge. Had what the man had done not been so exceptional, but simply had reflected something normal and customary, it would have been permissible. But if there is any estimation that some

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improper intention is mixed in, a judge who fears Heaven should not accept it.

Rabbi Shmuel ben Avraham Abuhab, *Devar Shmuel* 191

5b. Judges are forbidden to accept gifts only if they clearly know that the giver will come before them in judgment the next day or any other day. If not, it is permissible.

Zochreinu Lechayim, Choshen Mishpat, Ot Daled 8

Section II

Applying Jewish Law

6a. If the plaintiff earlier sent a gift to the judge, before he brought suit against the defendant, the defendant cannot disqualify him unless the judge wants to recuse himself from that case because of super-legal piety (knowing that he has become close in his mind to the giver).

Shulchan Aruch Choshen Mishpat, Hilchot Dayanim 9:2

6b. A Talmudic maxim instructs with respect to the Scripture: "Turn it over, and turn it over, for all is therein." The Babylonian Talmud, Tractate Aboth, Ch. V, Mishnah 22 (I. Epstein ed. 1935).

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Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not.

The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution.

Alas, the quest cannot succeed--which is why some wrongs and imperfections have been called nonjusticiable. In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly.

The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.

Supreme Court of the United States, *CAPERSON v. A. T. MASSEY COAL CO.* (2009). Dissent, Justice Antonin Scalia

6c. *The defendant cannot disqualify* [the judge] even if at the time [the plaintiff] sent [the judge] the gift, it was well known what his claim was and that he would make it in court.

[The judge may recuse himself] *as a matter of super-legal piety* (midat chasidut)...This is only a matter of super-legal piety if he gave his gift to the judge privately. But if it was given in the presence of the other litigant, then it is certainly forbidden [for the judge to sit on that case] for it is certain that the other's claims will be shut down [i.e., he will lose all confidence that his

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claims will be heard fairly].

Rabbi Yehoshua Falk Katz, *SMA (Meirat Ainayim)* on *Shulchan Aruch Choshen Mishpat, Hilchot Dayanim 9:2*, notes 6 – 7

Section III.

The best government money can buy

Class Question:

Do you believe that the ethical issue present the Massey case is present for legislators and executives in government as well? Should they be allowed to vote or make policy on issues in which contributors to their campaigns have an interest?

7a. Next year's political landscape could be ... an election season in which at least \$6 billion is likely to be spent, more than \$700 million higher than 2008.

"The presumption is the gloves will be off in 2012," said Sheila Krumholz, a campaign finance analyst.

Jonathan D. Salant, "Election Spending to Exceed \$6 Billion Thanks Partly to Jim Bopp," Bloomberg, Sept. 21, 2011

7b. Bopp said his mission isn't about money; it's about free speech and inclusion in the political process. "We have the First

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Amendment,” he said. “The whole idea of that was to ensure robust participation by citizens in our democracy.”

Jonathan D. Salant, op cit

Optional reading:

The one certainty about campaign finance laws is that all of them are, and ever will be, written by incumbent legislators. Were Congress to write laws establishing government financing of campaigns, Congress would be uncharacteristically parsimonious, setting the government funding low enough to handicap challengers to well-known and entrenched incumbents.

Happily, such laws will never be written because voters, those puzzling nuisances, do not want a new entitlement program — welfare for politicians. We know this because every year Americans have a chance to check a box on their tax returns to give \$3 — without increasing their tax liability — to fund presidential campaigns. More than 90 percent refuse to do so.

Perhaps they object to funding candidates they oppose. Who knew?

George Will, “Super PACs can’t crown a king,” *Washington Post*, February 22, 2012

7c. More than a century ago the “sober-minded Elihu Root” advocated legislation that would prohibit political contributions

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by corporations in order to prevent “the great aggregations of wealth, from using their corporate funds, directly or indirectly,” to elect legislators who would “vote for their protection and the advancement of their interests as against those of the public...” In Root’s opinion, such legislation would “strik[e] at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government...” The Congress of the United States has repeatedly enacted legislation endorsing Root’s judgment.

Opinion of the Court, *McConnell V. Federal Election Commission* (SCOTUS, 2003)

Campaign contributions as *shochad*

8a. Those congregational worthies who have been appointed to attend to the needs of the many or of individuals are considered to be just like judges. Therefore, one may not seat among them anyone who would be disqualified by his misdeeds from acting as a judge.

Rema, Choshen Mishpat, Hilchot Edut 37:22

8b. It is not only a judge who is forbidden to take a bribe,

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but anyone at all who takes public office or who transacts the public's business -- even though they are not rendering decisions in Torah law, they are still forbidden to incline the matter in one way or another because of their love or hate of the people involved; how much the more are they forbidden to take a bribe...

Aruch Hashulchan, Choshen Mishpat, Hilchot Dayanim 9:1

8c. It is also reasonable to say [that police are forbidden to take bribes], since the police are the ones who enforce the judgment of the courts and if they were to take bribes from those being judged, they could spoil the outcome and cause it not to come into effect...And perhaps that is the simple meaning of the Torah verse, "Do not take a bribe, for a bribe blinds the eyes of the wise" – by the police taking bribes, the judgment of the wise will be spoiled.

Harav Shmuel Chaim Rosenblum, *SHuT Bechorei Shachar*, 14

8d. According to Jewish law, any judge, elected public official authorized to make decisions, or appointee who serves as an advisor to a public official who accepts benefits from someone who will be affected by a decision he will make is forbidden to decide in that matter. This prohibition applies even to a benefit that was given before the matter came for a decision.

However, if we are dealing with a benefit that would have been

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given to him even had he not been likely to make a decision on a matter affecting the giver directly, it is permissible for the official to decide the issue.

Harav Shelomo Ishon, "Benefit Given to Government Officials,"
Techumin 26

Class Exercise:

Given the broad understanding of *shochad* that has been set forth in our readings, make the best case you can for applying the prohibition of *shochad* to a modern election.

The Selection of Rabbis

9. You asked regarding what to do if there is strife in the congregation and they are unable to come to a consensus in choosing leadership – one says this way, one says that. Because of the division of hearts, the sense of daily sacrifice is lost and the attitude of harsh judgment has taken over; there is neither truth nor peace...

What seems correct to me is that all taxpayers should be assembled and all should accept a blessing that they will voice their opinion for the sake of heaven and for the good of the city and then they will follow the majority.

Hagahot Maimoniot, Hilchot Tefila uNesi'at Kapayim

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10. To avoid ... scandals, Abramoff recommends that all those who lobby the government, receive federal contracts or otherwise benefit from public funds be barred from making political contributions or providing gifts to those in power.

R. Jeffrey Smith, "In Jack Abramoff's memoir, 'Capitol Punishment,' an unrepentant reformer?" *Washington Post*, Dec. 9, 2011

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