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JEWISH LAW PERSPECTIVES ON JUDICIAL SETTLEMENT PRACTICE

Shlomo C. Pill*

I. INTRODUCTION

The classic adjudicatory paradigm of opposing attorneys facing off at trial before a judge and jury in order to receive a favorable judgment is an image long past. Increased litigation volume, and the added time and expense of modern litigation has resulted in a rich practice of judges working to broker settlements between litigants in lieu of formal adjudication.¹ Judicial settlement is the subject of much debate, however, and the diverse range of judicial practice in this area reflects the institutional, ethical, and jurisprudential uncertainties we still have regarding the propriety of judges facilitating settlements.² This paper offers a new perspective on the jurisprudential issues underlying judicial settlement practices by exploring the traditional Jewish law of judicial settlement practice.

Part II of the paper begins by reviewing the state of judicial settlement practices in American courts today. It starts with a brief history of alternative dispute resolution in the Federal courts and continues with a general overview of how judges work to facilitate settlements in practice. Part III next explores the jurisprudential roots of the debate over judicial settlement by presenting three principle approaches to the goals of the judicial process and the propriety of judges engaging in settlement. Part IV turns to the traditional Jewish law of judicial settlement. It begins by providing some necessary background about the Jewish legal system, discussing how Jewish law courts can resolve disputes through adjudication or settlement. This Part

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¹ Susan M. Gabriel, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 OHIO ST. J. ON DISP. RESOL. 81, 81 (1988).

² *Id.* at 89.

continues by exploring a jurisprudential argument about judicial settlement recorded in the Talmud, and then by reviewing some of the practical rules about when Jewish law judges may encourage parties to settle. Finally, Part IV concludes by inductively developing a Jewish law jurisprudence of judicial settlement.

II. JUDICIAL SETTLEMENT IN AMERICAN COURTS

This Part reviews the state of judicial settlement practice in American courts. Section II.a discusses the history and development of ADR processes, including judicial settlement, in the Federal courts. Section II.b then presents some general observations about what judges do in practice when working to settle cases.

A. *The History of Judge-Facilitated Settlement*

While Americans have been using Alternative Dispute Resolution Methods to resolve what may have otherwise been litigious conflicts since the earliest days of the republic,³ judicial settlement practice – judges taking an active role in the non-adjudicatory resolution of cases – has only gained prominence in the forty years since the 1976 Pound Conference drew attention to the potential of court-sponsored ADR methods.⁴ The Pound Conference was convened by the American Bar Association to address the “specter” of burgeoning trial and appellate dockets and the increasing financial and temporal costs of litigation.⁵ At the conference, Professor Frank Sanders advocated creating Dispute Resolution Centers where disputants might be directed to any number of appropriate resolution forums including courts, arbitration, and mediation.⁶ Sanders’ vision is now largely reality; over the past several decades partly on their own initiative but also in response to legislative directives, Federal and State courts have increasingly adopted court-sponsored ADR programs.⁷

³ See KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 11 (2000); Harold Baer, Jr., *History Process and a Role for Judges in Mediating their own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131 (2001).

⁴ See generally A. LEO LEVIN & RUSSELL R. WHEELER, *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (1979).

⁵ Frank E.A. Sander, *Varieties of Dispute Resolution*, in A. LEO LEVIN & RUSSELL R. WHEELER, EDs., *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65–66 (1979); see Floyd D. Weatherspoon, *The Impact of the Growth of ADR Processes on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789, 790–91 (2011).

⁶ See Sander, *supra* note 5, at 83–84.

⁷ See Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN’S L. REV. 77, 78 (2007); Baer, Jr., *supra* note 3, at 133 (“For the most part, [Sanders’] vision has become a reality.”). According to some accounts, ADR may account for the resolution of as many as two-thirds of civil cases in the United States. See sources cited in Sylvia Shaz Schweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 53 n.36 (2007).

The Pound Conference's call for court-sponsored ADR was echoed by scholars and judges throughout the 1980s,⁸ and led to several Federal legislative initiatives designed to improve the availability and effectiveness of alternative dispute resolution methods within the Federal judicial system.⁹ In 1990, Congress passed the Civil Justice Reform Act (CJRA), which required courts to implement a case management system incorporating ADR methods to reduce the delay and costs of litigating in the Federal judicial system.¹⁰ The CJRA was followed by the Alternative Dispute Resolution Act of 1998 (ADRA),¹¹ which mandates that all Federal courts implement court-sponsored ADR programs or evaluate and improve the programs they already have in place.¹²

Congressionally mandated court-sponsored ADR programs are complemented by the Federal Rules of Civil Procedure, which in several ways direct judges to facilitate the non-adjudicative settlement of cases on their dockets.¹³ Rule 16 authorizes judges to hold pre-trial conferences for the purposes of "expediting disposition" and "facilitating settlement" of the case.¹⁴ Rule 68, which sanctions parties who receive an adjudicatory resolution less favorable than one they might have received in a previously rejected settlement offer, further encourages case settlement.¹⁵ Rule 1, which instructs that the Federal Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action,"¹⁶ provides further impetus to judges to utilize Rules 16 and 68 to encourage and facilitate settlement resolutions rather than adjudicatory dispositions of cases.¹⁷

B. An Overview of Contemporary Judicial Settlement Practices

Judges employ a wide array of techniques to affect case settlement without adjudication.¹⁸ While this Section provides an overview of these methods of

⁸ See, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) (arguing that to fulfill their traditional roles, courts should be more open to alternative methods that will decrease the expense, time, and stress of dispute resolution).

⁹ Many States also moved towards court sponsored ADR during this period. See generally John V. O'Hara, *The New Jersey Alternative Dispute Resolution Act: Vanguard of a "Better Way"?*, 136 U. PA. L. REV. 1723 (1988); Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DIS. RES. 335 (2006).

¹⁰ See Civil Justice Reform Act of 1990, Pub. L. No. 101-160 §§ 102-103, 104 Stat. 5089-96 (codified at 28 U.S.C. §§ 471-82).

¹¹ Pub. L. No. 105-315, 112 Stat. 2993 (1998) (codified at 28 U.S.C. §§ 651-58).

¹² See 28 U.S.C. § 651(b)-(d).

¹³ FED. R. CIV. P. 16(a)(5).

¹⁴ FED. R. CIV. P. 16(a); see Fed. R. Civ. P. 16 advisory committee's note to 1983 amendment ("[S]ettlement should be facilitated at as early a stage of the litigation as possible.").

¹⁵ See FED. R. CIV. P. 68 advisory committee's note to 1946 amendment.

¹⁶ FED. R. CIV. P. 1.

¹⁷ See Sylvia Shaz Shweder, *Judicial Limitations on ADR: The Role and Ethics of Judges Encouraging Settlement*, 20 GEO. J. LEGAL ETHICS 51, 51, 57 (2007).

¹⁸ See, e.g., Daisy Hurst Floyd, *Can the Judge Do That? – The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 53 (1994); Baer, Jr., *supra* note 3, at 131.

affecting settlements, it is by no means exhaustive; judicial settlement practices are likely as diverse as the judiciary itself.¹⁹

Judge Baer neatly divides judicial settlement techniques into two categories. Some judges follow an evaluative approach in which the judge listens to each side's claims and arguments with an eye towards developing one or a number of reasonable compromise-based resolutions that the parties might adopt.²⁰ Others adopt a facilitative approach, which involves the judge aiding parties in developing their own solutions to the conflict based on mutual compromise.²¹ "Evaluative [judges] focus on obtaining a negotiated outcome . . . within the shadow of the law. . . . Facilitative mediators focus on helping parties obtain solutions to problems that maximize joint gains."²²

Within these two models there exists wide diversity in the mechanics of settlement practices.²³ Some judges, like Judge Baer, pursue settlement in a relaxed manner, meeting with litigants and their attorneys, discussing each side's case, holding joint meetings so that the parties can talk to and work with each other, and ultimately proposing a solution and creatively tweaking it to conform to each side's interests until a settlement is reached.²⁴ Other judges may take a more aggressive approach.²⁵ Instead of acting as a facilitative mediator, some judges "push" parties to settle by subtly reminding attorneys of the expense of adjudication, by invoking the specter of losing at trial, and by implying their own preferences by calling a settlement offer "reasonable" or fair.²⁶

Some judges may approach settlement a good deal more aggressively, however.²⁷ One judge, for example, "sometimes encourages litigants to talk settlement . . . by belittling the case with an observation like 'You don't want to go to trial with this!'"²⁸ Others use leverage they may have over attorneys or parties to bring litigants to a settlement.²⁹ Some judges are even known to employ settlement techniques considered unethical by many lawyers.³⁰ Such methods include giving advice to the lawyer with the weaker case to encourage the other side to settle; speaking personally to litigants without their attorneys to convince parties to accept settlement offers; giving favorable ruling to the party with the weaker case to

¹⁹ Floyd, *supra* note 18.

²⁰ See Baer, Jr., *supra* note 3, at 136.

²¹ See *id.* at 136–37.

²² Deborah R. Hensler, *In Search of Good Mediation: Rhetoric, Practice and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 259 (Joseph Sanders & V. Lee Hamilton, eds., 2001).

²³ See, e.g., James A. Wall, *Judicial Participation in Settlement*, J. DISP. RES. 25, 27–29 (1984).

²⁴ See Baer, Jr., *supra* note 3, at 137–42.

²⁵ Floyd, *supra* note 18, at 54.

²⁶ See *id.*

²⁷ See *id.*

²⁸ D. Marie Provine, *Settlement Strategies for Federal District Judges*, 1986 FED. JUD. CTR. 1, 25 (1986) <https://www.fjc.gov/sites/default/files/2012/StlStrt.pdf>.

²⁹ See Floyd, *supra* note 18, at 53–54.

³⁰ See *id.* at 55–56.

encourage the stronger litigant to settle; penalizing attorneys for not accepting reasonable settlement offers; and bad-mouthing recalcitrant attorneys to senior members of their firms.³¹

III. JUDGE-FACILITATED SETTLEMENT: A DEBATE OVER JURISPRUDENTIAL VALUES

Judicial settlement, in various forms, is widely practiced in American courts. Despite its actual prevalence, however, the propriety of judge-facilitated settlement is the subject of significant debate in the ivory towers of academia.³² Underlying the practical discussions about the ethical implications of judges facilitating settlements and courts' institutional capacity for effective settlement-promotion³³ is a deep-seated jurisprudential debate about what values our justice system ought to promote.³⁴ Positions on judicial settlement range from absolute condemnation on one end of the spectrum, to complete and indiscriminate approbation of the practice on the other, and a variety of more nuanced views falling somewhere in between.

This Part addresses the jurisprudential debate over judge-facilitated settlement practice by considering four values-based approaches to the issue. Section III(a) discusses what I call the “legal justice” view, which contends that judges never engage in facilitating settlements between litigious parties because the prime jurisprudential value of the court system is the resolution of cases in accordance with the law.³⁵ Section III(b) considers the opposite view that our justice system should strive to resolve conflicts in a manner that best promotes peace and reconciliation among parties.³⁶ Section III(c) next explores a middle-of-the-spectrum position that advocate for judges' discriminate use of settlement to promote utility. The “utilitarian” view maintains that judges should adjudicate or facilitate settlements based on which avenue of dispute resolution offers the most time and expense savings in each individual case.³⁷ Of course, the perspectives on judicial settlement

³¹ *See id.*

³² *See, e.g.,* Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891 (2006).

³³ *See, e.g.,* Floyd, *supra* note 18, at 57–82.

³⁴ *See generally* Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. L. ISSUES 1 (1989).

³⁵ *See, e.g.,* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359, 1386–90 (1985); Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

³⁶ *See, e.g.,* Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-taxonomies of Quality Arguments*, 66 DEN. L. REV. 335, 374–79 (1989); Baruch Bush, *supra* note 34, at 16–20; Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L. J. 1660 (1985).

³⁷ *See, e.g.,* Warren Burger, *Agenda for 2000 A.D. – A Need for Systematic Anticipation*, 70 F.R.D. 79 (1976); Burger, *supra* note 8, at 276 (1982); A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Plan, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); STEPHAN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 7–13 (2d ed. 1985); Lon Fuller, *Mediation: Its Forms and Functions*,

practices discussed here do not of course exhaust the full gamut of nuanced positions on the matter. Nevertheless, these four generalized categories fairly represent the main jurisprudential value-based concerns voiced by principle participants in the judicial settlement discussion.

A. *Legal Justice*

Many commentators oppose judges engaging in facilitating settlements because they maintain that the courts and judges must promote what I call here “legal justice” above all else. As used here, “legal justice” refers to those values established as legal norms through political and adjudicatory processes which represent society’s collective conception of proper social ordering.³⁸ Legal justice arguments against judicial settlement comprise several distinct strains of thought about the proper institutional roles of judges and courts and the goals of the adjudicatory process.

Some opponents of judge-brokered settlements begin with the premise that courts are quintessentially public institutions;³⁹ they use public resources to employ public employees to resolve conflicts based on public values in a public forum.⁴⁰ Adjudication, the courts’ principle responsibility, is thus a public function; its purpose is not to maximize litigants’ private interests, but “to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes.”⁴¹ When judges work to settle cases, then, they undermine the courts’ public adjudicatory function and betray their public trust.⁴² Settlement resolutions are not based, at least principally, on legal values, though the probable result of an adjudicatory disposition may certainly influence parties’ bargaining positions. Instead, settlements are founded on parties’ compromising their legal rights in order to further their other private interests.⁴³ Thus, by facilitating the settlement of cases, judges—in the interests of efficiency, private party preferences, or peace—allow

44 S. CAL. L. REV. 305, 333–39 (1971); Frank Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 120–24 (1977); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA. L. REV. 485, 486, 498–506 (1985).

³⁸ On this view, legal justice is the net product of legislative and adjudicatory processes’ evaluating and reconciling competing public and private values such as individual rights, economic utility, social cohesion, distributive justice, and others. The law, the end product of the competition between these values represents society’s collective judgment about how to best conceive and order the public good. Cf. Baruch Bush, *supra* note 34, at 4.

³⁹ See, e.g., Fiss, *supra* note 35.

⁴⁰ See *id.*

⁴¹ See *id.* at 1085.

⁴² Baruch Bush, *supra* note 34, at 5.

⁴³ See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* 40–94 (2d ed. 1991) (explaining that settlements are successfully reached precisely by parties setting aside their legal rights and focusing instead on their real interests in the dispute); Baruch Bush, *supra* note 34, at 5.

parties to leave court with their relationship structured not by the public law but by their own design.⁴⁴

Another common “legal justice” argument against judicial settlement considers that courts are not only in the business of “doing” legal justice in individual cases, but are also tasked with making legal justice in the sense of refining old and establishing new rules of public law.⁴⁵ One of the public goods provided by the adjudicatory process, then, is courts’ development of legal rules by deciding concrete cases.⁴⁶ By brokering settlements and nipping the possibility of adjudicatory resolutions to litigious matters in the bud, judges preclude themselves from fulfilling one of their chief functions. Settlements make the cases they resolve simply go away; the parties leave happy and the judge clears his docket, but a non-adjudicatory resolution misses the opportunity to further refine public legal norms by deciding a concrete case.⁴⁷

B. *Peace and Reconciliation*

For many judicial settlement advocates, law and justice are not synonymous.⁴⁸ Instead of finding jurisprudential ideals in legal norms, proponents of judicial settlement argue that the primary goal of dispute resolution processes should be to promote ideals like “reconciliation, social harmony, community, interconnection, [and] relationship.”⁴⁹ On this view, judge-facilitated settlement’s promotion of peace and reconciliation among disputants serves important private and public goods.

For some commentators, peace and reconciliation among litigants is a prime jurisprudential value because they see dispute resolution— even adjudication—as a fundamentally private process that should serve parties’ private good.⁵⁰ The traditional model of adjudication sees dispute resolution as a means of private conflict resolution, a way for individuals who cannot agree about what values should control their conflict or on how accepted values should be applied to a particular case to obtain a neutral third-party resolution based on mutually agreeable principles.⁵¹ On this view, the primary goal of dispute resolution is to achieve peace between litigants; the substance of resolution is secondary to its being mutually agreeable to

⁴⁴ See Fiss, *supra* note 35 (“[W]hen the parties settle, society gets less than what appears” . . . disputants may walk away from the settlement content and at peace “while leaving [legal] justice undone.”); Baruch Bush, *supra* note 34, at 4–6; *Id.* at 5 (“If private parties want to go to a mediator, let that be their decision as a matter of private choice. . . . As a matter of public policy [however], we cannot put private benefit over the public good.”).

⁴⁵ See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1978).

⁴⁶ See David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622 (1995).

⁴⁷ *Id.* at 2622–24.

⁴⁸ McThenia & Shaffer, *supra* note 36, at 1664–65.

⁴⁹ Baruch Bush, *supra* note 34, at 6.

⁵⁰ McThenia & Shaffer, *supra* note 36, at 1660, 1664.

⁵¹ See LON FULLER, *THE MORALITY OF LAW* 56 (1964); LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 12–15 (2001).

and truly settling the conflict between the disputants.⁵² Judge-facilitated settlement is desirable— even preferable— to adjudicatory resolution because settlement achieves the private reconciliation between disputants that dispute resolution should traditionally serve. When cases are resolved by adjudication there are winners and losers, rights and wrongs, and parties often leave court “whole” in a legal sense, but otherwise shattered and broken. Settlement, by contrast, “is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation.”⁵³

The peace and reconciliation judicial settlement achieves between parties is also lauded as a public jurisprudential good. Even if, as is the currently prevalent view, the adjudicatory process is not simply a means of resolving private disputes, but is a public function serving public ends,⁵⁴ judicial settlement is desirable because the peace and reconciliation it promotes are indeed public values.⁵⁵

In adjudication, litigants see only as far as their own respective self-interests and are prepared to vigorously expend time and money to enforce their legal rights. Concluding disputes with adjudicative judicial rulings does not change this; one party’s interests are upheld, the others’ remain unfulfilled,⁵⁶ and both walk away self-focused and bitter towards each other and those whose interests conflict with their own rightful entitlements.⁵⁷ Settlement by contrast, results in disputants transcending their own self-interest in order to reconcile their differences through concession and compromise.⁵⁸ By forcing parties to confront their conflict with each other and to work out a mutually agreeable solution to what simply amounts to a bad situation for both, the settlement process literally transforms disputants.⁵⁹ Through compromise-based settlement, disputants come to appreciate that interests are pluralistic, that right-and-wrong is not black-and-white, and that they can live and work together with those whose interests and values differ from their own for mutual gain. This realization, some advocates of judicial settlement assert, is a foremost

⁵² See generally Steven Ross, *Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 386 (1988).

⁵³ McThenia & Shaffer, *supra* note 36, at 1660, 1664.

⁵⁴ See, e.g. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282, 1285–88 (1976); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 185–86 (1958).

⁵⁵ Baruch Bush, *supra* note 34, at 6, 9–13.

⁵⁶ See John E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964).

⁵⁷ See Russel G. Pearce & Eli Ward, *The Obligation of Lawyers to Heal the Civic Culture: Confronting the Ideal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 16–25 (2011).

⁵⁸ See Baruch Bush, *supra* note 34, at 11.

⁵⁹ See *id.* at 6, 11–12.

public value,⁶⁰ and judges, as public officials should promote it by facilitating settlements.⁶¹

C. Utilitarianism

The notion that controlling the temporal and financial costs of adjudication is a principle jurisprudential objective for American courts is made explicit by Rule 1 of the Federal Rules of Civil Procedure, which directs judges to “secure the just, speedy, and inexpensive determination of every action.”⁶² This sentiment was echoed by Chief Justice Warren Burger, who argued that “justice is all about” providing “mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants.”⁶³ The utility of judicial settlement practices, which reduce the time and expense of adjudicatory litigation and clear court dockets, is thus a frequently cited justification for judges facilitating settlements.⁶⁴

Predictably, utilitarian arguments about judicial settlement are less enthusiastic about the practice than the peace and reconciliation-based views, but more approving than the legal justice position. The utilitarian view of judge-facilitated settlement is, well, utilitarian. Judicial settlement does not save time or money in all cases,⁶⁵ some disputes do not lend themselves to compromise-based resolutions for a variety of reasons, and in such instances, a judge’s attempt to broker a settlement would likely cost more in time and money than adjudication and might be futile altogether. The utility argument for judicial settlement thus contends for an active judicial role in settling some kinds of cases but not others.⁶⁶

Scholars have offered various criteria to assess in what kinds of cases judicially brokered settlements can be expected to offer net benefits over adjudicatory resolutions.⁶⁷ Adjudication may be most efficient, for example for cases characterized by a “highly repetitive and routinized task involving application of

⁶⁰ Baruch Bush, *supra* note 36, at 340–41, 376–77; Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1521–23, 1532–39 (1986).

⁶¹ See Arthur Kuflik, *Morality and Compromise*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW AND POLITICS 38, 48–54 (J. Pennock & J. Chapman eds., 1979); Cf. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

⁶² FED. R. CIV. PROC. 1.

⁶³ Burger, *supra* note 8, at 274.

⁶⁴ See Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L. J. 2663 (1995); Marc Galanter, “... A Settlement Judge, not a Trial Judge,” *Judicial Mediation in the United States*, 12 J. L. & SOC’Y 1, 2 (1985).

⁶⁵ See Galanter, *supra* note 64, at 8–10.

⁶⁶ See Baruch Bush, *supra* note 34, at 2–3; Burger, *supra* note 8, at 275–76.

⁶⁷ See Sander, *supra* note 37, at 120–24.

established principles to a large number of individual cases.”⁶⁸ Similarly, in cases involving multiple polycentric interests, where the process of hammering out a settlement could get mired in a quagmire of cross-cutting interests that evade any mutually agreeable resolution, adjudication may be the most efficient way to resolve the dispute.⁶⁹ In this last example, the divide between peace and reconciliation settlement advocates and utilitarian’s is most pronounced.⁷⁰ For reconciliations, the polycentric dispute is the quintessentially ideal case for judicial settlement since a compromise resolution is the only way to adequately address the interests and concerns of so many diverse parties.⁷¹ For utilitarian’s, by contrast, concerned primarily with the time and expense of various dispute resolution processes, multiparty disputes are more properly dealt with definitively through adjudication.⁷²

Cases well-suited for settlement on utilitarian grounds might be actions in which relatively little is at stake, financially, where litigation is spurred more by bruised egos and principle than financial incentives. In such circumstances, cases could be disposed of most effectively with the flexible remedies available in settlement processes. Similarly, efficiency is best served by settlement in cases in which litigants have an interest in maintaining amicable relations for future dealings. In such cases, parties have an incentive to resolve their conflict based on mutually agreeable compromise, and settlement can likely be achieved at less cost and in less time than adjudicatory results.⁷³

IV. JUDICIAL SETTLEMENT PRACTICE IN TRADITIONAL JEWISH LAW

Traditional Jewish law, or *halacha*, offers a jurisprudential alternative to the currently prevalent values-based models of judicial settlement in American courts. This Part develops a *halachic* jurisprudence of judge-facilitated settlement that strongly encourages judges to promote and execute compromise-based settlements instead of adjudicatory resolutions, but only insofar as the extra-legal justice offered by settlement does not undermine the *halachic* conception of legal justice.⁷⁴ The theory explored here is necessarily vague. Traditional Jewish law adjudication and legal processes differs in fundamental ways from the American system; the language, concepts, and processes of the *halachic* system often lack precise American counterparts and evade precise comparative parallels.⁷⁵

To ease comparative analysis, Section IV. a provides an overview of the Jewish legal system, including the adjudicatory processes of Jewish law courts, or *batei din*

⁶⁸ *See id.* at 118.

⁶⁹ *See id.*

⁷⁰ *Id.*

⁷¹ *See, e.g.,* Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 32–33 (1963).

⁷² *See Sander, supra* note 37, at 118.

⁷³ *See id.* at 121–24.

⁷⁴ MENACHEM ELON, *THE PRINCIPLES OF JEWISH LAW* 561–65 (1975).

⁷⁵ *See id.*

(singular, *beis din*). Importantly, this Section explains that in the *halachic* system, courts may resolve cases one of two distinct ways. First, *batei din* can adjudicate cases with *din* – law, that is, by formally deciding the matter based on an application of relevant Jewish law to the facts.⁷⁶ Second, courts may resolve disputes with *pesharah*—compromise, a settlement process based on mutual concession, and extra-legal principles of equity, fairness, and charity.⁷⁷

The following two Sections, IV. b and IV. c, turn to the substance of judicial settlement practice in *halacha*. First, Section IV. b explores a polycentric Talmudic debate over the propriety of judges facilitating settlements based on three different conceptions of the jurisprudential values of dispute resolution, which closely parallels the contemporary American discussion. Next, Section IV. c discusses the normative *halachic* approach to judicial settlement in practice, as set forth in principle codifications of traditional Jewish law.

Finally, Section IV. d pulls together the foregoing discussion to offer a *halachic* jurisprudence of judicial settlement. In an attempt to demonstrate how the Jewish law approach to judges brokering settlements between litigious parties can offer an alternative perspective on judicial settlement in the American context, I necessarily take some liberties in portraying *halachic* concepts to translate the Jewish law approach into terms useful to the contemporary American legal scene.

A. Introduction to the Beis Din System: Two Models of Adjudication – *Din* and *Pesharah*

Traditional Judaism is a primarily legal construct in which religious integrity is measured principally by Jews’ adherence to a comprehensive system of legal rules and principles that govern virtually every aspect of private and public life.⁷⁸ Jewish law courts, which give authoritative advisory opinions on questions of Jewish law, legislate local ordinances, and adjudicate disputes, are a central component of the Jewish law system.⁷⁹ Thus, the Torah instructs, “judges and court apparatuses shall you establish in all of your gates.”⁸⁰

As forums for dispute resolution, *batei din* may adjudicate cases in two different ways. Most conventionally, Jewish law courts proceed in *din*, or “law.”⁸¹ When proceeding in *din*, a *beis din* adjudicates a case by hearing parties’ arguments, taking evidence, determining relevant facts and law, and ultimately applying the *halacha* to

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See R. Samson Raphael Hirsch, 1 *Gesammelte Schriften* 83 [German] translated in R. SAMSON RAPHAEL HIRSCH, *HOREB: A PHILOSOPHY OF JEWISH LAWS AND OBSERVANCES* 247–48 (Dayan Dr. Isidore Grunfeld, transl., ed., 2d ed. 1968) (“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.”) [hereinafter *HOREB*].

⁷⁹ See ELON, *supra* note 74.

⁸⁰ *Deuteronomy* 16:18. For an overview of the *beis din* system see ELON, *supra* note 74.

⁸¹ See ELON, *supra* note 74.

the facts in reaching a strictly legal decision.⁸² *Din* is the default model for *beis din* adjudication; courts will proceed in *din* unless litigants agree otherwise.⁸³

Alternatively, *batei din* may proceed in *peshara*, or “compromise.” When proceeding in *peshara*, Jewish law courts resolve cases by brokering compromise-based settlements between litigants. The *peshara* process is well-summarized by Professor Bush:⁸⁴

B. Judicial Settlement and Jurisprudential Values: The Talmudic Debate

The Talmud records a lengthy debate among the Tannaim⁸⁵ regarding the legitimacy and propriety of *dayanim* facilitating, promoting, and executing compromise-based settlements of cases.⁸⁶ One view, posited by R. Eliezer b. R. Yose the Galilean, militates against any judicial role in compromise-based settlement because legal justice – dispute resolution in accordance with substantive Jewish law – is the primary jurisprudential goal of adjudication.⁸⁷ The second opinion, that of R. Yehoshua b. Korcha, strongly advocates for an active judicial role in settlement, arguing that peace and reconciliation among, and charity between disputants is a jurisprudential value placed above the primacy of substantive *halacha*.⁸⁸ Finally, R. Shimon b. Menassiah held that judicial settlement practice is essentially value-neutral; the propriety of judges engaging in facilitating settlement depends instead on litigants’ interests in a legal or compromise-based resolution as viewed from the perspective of the presiding judge.⁸⁹

i. Legal Justice

The first opinion recorded in the Talmudic debate over the propriety of judicial settlement practices is that of R. Eliezer b. R. Yose the Galilean.⁹⁰ In R. Eliezer’s view, it is *assur* – prohibited – for a judge to engage in brokering compromise-based settlements between litigants in lieu of an adjudicatory resolution based on

⁸² See *id.*

⁸³ See generally EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW (1990).

⁸⁴ Barruch Bush, *supra* note 34, at 33 n.73.

⁸⁵ See ENCYCLOPAEDIA JUDAICA 505–07 (Fred Skolnik & Michael Berenbaum et al. eds., 2d ed. 2007). Tannaim (singular, Tanah) refers collectively to the Jewish scholars of the first and second centuries, B.C. who recorded and compiled the text of the Mishnah, the work which forms the base upon which the Talmud provides explanation, discussion, and commentary. *Id.*

⁸⁶ See generally BABYLONIAN TALMUD, SANHEDRIN 6b; JERUSALEM TALMUD, SANHEDRIN 1a–1b. For a further discussion of this Talmudic debate, see CHAIM N. SAIMAN, HALAKHAH: THE RABBINIC IDEA OF LAW 111–25 (2018).

⁸⁷ See generally JACK N. LIGHTSTONE, YOSE THE GALILEAN: I. TRADITIONS IN MSHNAH-TOSEFTA (1979).

⁸⁸ See Jack Bieler, *The Qualifications of the Ideal Judge*, YAAKOV BIELER (Jan. 25, 2019), <https://yaakovbieler.wordpress.com/2019/01/25/the-qualifications-of-the-ideal-judge/>.

⁸⁹ See generally BABYLONIAN TALMUD, SANHEDRIN 6b.

⁹⁰ See generally LIGHTSTONE, *supra* note 87.

substantive Jewish law because courts' exclusive responsibility is to give meaning to *halachic* legal values by ordering litigants' relationships in accordance with the strict dictates of the law.⁹¹ On this approach, compromise-based settlements may be preferable to adjudicatory resolutions for several reasons, but they are beyond the proper institutional purview of the courts and the professional role judges.⁹²

The Talmud records R. Eliezer's view as follows:⁹³

R. Eliezer b. R. Yose the Galilean said: "It is prohibited to execute a settlement; a judge that brokers a compromise-based settlement is a sinner, and one who praises such a judge blasphemes before God, as it says, 'He who supports one who settles through compromise scorns God' [Psalms 10:3]. Rather, let the law pierce the mountain, as it says, 'For the judgment belongs to God.' And so said Moses: 'let the law pierce the mountain.'" Aaron, however, would make peace between man and his fellow, as it says, "The true Torah was in his mouth, and wrongness was absent from his lips; he [Aaron] walked with Me in peace and uprightness, and brought many back from wrongdoing" [Malachi 2:6]. [The Talmud then proceeds with two alternative homiletic interpretations of the verse in Psalms 10:3, which emphasize that one who receives an unlawful benefit blasphemes and scorns God.]

R. Eliezer's jurisprudential view of the goal of adjudication is exemplified by his refrain, "let the law pierce the mountain . . . For the judgment belongs to God."⁹⁵ For R. Eliezer, preserving the rule of law – God's law, the *halacha* – is the courts' paramount goal. The *halacha* is God's law, and the way in which it orders parties relationships is God's conception of how human interactions should be regulated. To reject the rule of law in favor of a settlement based on compromise is therefore blasphemous, as if to imply that the parties' assessment of their interests and ordering their relationship is somehow superior to God's law.⁹⁶ "A judge that arbitrates a compromise under such circumstances insinuates that the compromise settlement is more [just] than the appropriate ruling based on the laws of the Torah."⁹⁷ R. Eliezer

⁹¹ See Bieler, *supra* note 88; Haim Shapira, *The Debate Over Compromise and the Goals of the Judicial Process*, 26–27 DINE ISR. 183, 209 (2009).

⁹² See generally Shapira, *supra* note 91, at 209–11.

⁹³ BABYLONIAN TALMUD, SANHEDRIN 6b; JERUSALEM TALMUD, SANHEDRIN 1a–1b.

⁹⁴ One Talmud manuscript reads, "as it says, 'for the judgment belongs to God.'" *Deuteronomy* 1:17. See Shapira, *supra* note 91, at 205 n.42.

⁹⁵ BABYLONIAN TALMUD, SANHEDRIN 6b.

⁹⁶ R. Eliezer b. R. Yose the Galilean's use of the word "blaspheme" in connection with settlements is instructive in this respect. See Shapira, *supra* note 91, at 205 n.42. The same descriptive is applied to Jews' litigating disputes with other Jews in gentile courts. See BABYLONIAN TALMUD, GITTIN 88b; *Rashi on Exodus 21:1*, SEFARIA, https://www.sefaria.org/Rashi_on_Exodus.21.1?lang=bi (last visited May 2, 2020) (s.v. *lifneihem*) (stating that a Jew who litigates in gentile court "profanes the name of God and gives honor to the name of idols"). Commentators explain that the practice of litigating in gentile courts under gentile law rather than in *beis din* is considered blasphemous because it implies the supremacy of man-made legal systems and norms over divinely ordained and inspired ones. See NESIVOS HAMISHPAT, CHIDUSHIM 26:4; URIM VETUMIM, URIM 26:4. Similarly, R. Eliezer's view on judge-brokered settlements indicates that court-sponsored dispute resolutions based on litigants' mutual consent and compromise is blasphemous because it implies the supremacy of human ordering over God's law. See Shapira, *supra* note 91, at 209.

⁹⁷ BABYLONIAN TALMUD, SANHEDRIN 6b n. 2 (Artscroll ed. 2009).

thus invokes the example of Moses, the quintessential Jewish judge, to demonstrate that when disputants submit their case to a court for resolution based on *halachic* norms, a judge may not broker a compromise in place of a legal disposition – even when adjudication will be costly and time consuming, when “the law must pierce the mountain.”⁹⁸

Even on this view, the primacy of legal justice is not absolute. R. Eliezer juxtaposes his reference to Moses’ judging in accordance with legal norms with a mention of Moses’ brother, Aaron, who “would make peace between man and his fellow.”⁹⁹ R. Shlomo Yitzchaki, a foremost medieval commentator on the Talmud explains the reference to Aaron as follows: “Since he [Aaron] heard the dispute between them *before they brought the case to court*, he pursued them to make peace between them [by brokering a compromise-based settlement].”¹⁰⁰ Thus, on R. Eliezer’s view, settlements are not all bad; to the contrary, Aaron is praised for executing settlements between disputants.¹⁰¹ The problem with settlements is when they are brokered by judges, judges who are professionally tasked with resolving cases based on *halachic* norms, judges who imply the deficiency of God’s law when they resolve cases through party-centered compromises.¹⁰² Tosfos, a collection of medieval commentaries on the Talmud further explicates this point: “Since Aaron was not a judge, and since cases were not brought to him – but to Moses – for adjudication, it was certainly permitted for him [to broker compromise settlements between disputants].”¹⁰³

ii. Peace and Charity

The second Talmudic view on the jurisprudential suitability of judicial settlements is that of R. Yehoshua b. Korcha.¹⁰⁴ R. Yehoshua disagrees with R. Eliezer’s condemnation of judge-facilitated settlements, and maintains that it is a *mitzvah* – an obligation – for judges to resolve cases by facilitating compromise-based settlements between disputants.¹⁰⁵ For R. Yehoshua, courts’ principle jurisprudential objective should be to promote peace and reconciliation among and charitable relations between litigants.¹⁰⁶ To be sure, cases need to be resolved, and when parties’ differences cannot be amicably reconciled, the conflict must be firmly

⁹⁸ See RASHI TO SANHEDRIN 6b:2 (s.v. *assur livtzoah*); RASHI TO SANHEDRIN 6b:3 (s.v. *aval Aaron aoheiv shalom v’rodef shalom*); Shapira, *supra* note 91, at 209.

⁹⁹ BABYLONIAN TALMUD, SANHEDRIN 6b.

¹⁰⁰ RASHI TO SANHEDRIN 6b:3, *supra* note 98; see Shapira, *supra* note 91, at 209–211.

¹⁰¹ See Shapira, *supra* note 91, at 209–11.

¹⁰² See generally *id.*

¹⁰³ TOSAFOT to *Sanhedrin* 6b (s.v. *aval Aharon*).

¹⁰⁴ MASORET AKIVA, AKIVA TRADITION, A TORAH PUBLICATION OF FARBER HEBREW DAY SCHOOL – YESHIVAT AKIVA 1 (Farber Hebrew Day School, Vol. 2 2017), <https://www.farberhds.org/wp-content/uploads/2019/04/Torah-Journal-2017-1.pdf> (last visited Jan. 27, 2020).

¹⁰⁵ BABYLONIAN TALMUD, SANHEDRIN 6b; JERUSALEM TALMUD, SANHEDRIN 1:1.

¹⁰⁶ BABYLONIAN TALMUD, SANHEDRIN 6b; JERUSALEM TALMUD, SANHEDRIN 1:1.

adjudicated according to the strict letter of the law. Nevertheless, legal adjudication should be a weapon of last resort; God first desires that people live peaceably and charitably with each other, and orders their relations in accordance with the law only when they fail to do so on their own.¹⁰⁷

The Talmud records R. Yehoshua's position as follows:

R. Yehoshua b. Korcha said: "It is a *mitzvah*, an obligation, to broker compromise-based settlements, as it says, 'Execute truth and legal judgments of peace in your gates' [Zacharias 8:16]. [How can there be 'legal judgments of peace'?] Isn't it the case that wherever there is legal justice there is no peace, and wherever there is peace there is no legal justice? What kind of justice also contains peace? I would say it must be judicial settlement. Similarly is says about [King] David: '[When he sat in judgment] David administered justice and charity' [2 Samuel 8:15]. [How could David administer justice *and* charity?] Isn't it so that wherever there is legal justice there is no charity, and wherever there is charity there is no legal justice? What kind of justice also contains charity [as the verse implies]? I would say it must be compromise settlement."¹⁰⁸

Thus, for R. Yehoshua, the jurisprudential aim of court-sponsored dispute resolution is not legal justice. Instead, the primary objective of court processes is to promote peace among and charity between litigants.¹⁰⁹ As R. Yehoshua points out, charity and peace are indeed incompatible with strict legal justice; the former contemplates reconciliation and extra-legal magnanimity while the latter entails winners, losers, and often fails to resolve the underlying issues.¹¹⁰ Some measure of justice, however, can be realized in concert with charity and peace, through the process of judicial settlement, which promotes peace by flexibly addressing and resolving the litigants' dispute, and which affects charity by leaving neither party entirely liable nor entirely successful.¹¹¹

After presenting R. Yehoshua's view, the Talmud further clarifies the distinction between R. Yehoshua and R. Eliezer by offering two explanations of how on R. Eliezer's legal-justice view of adjudication King David could mete out both justice and charity.¹¹² The first explanation suggests that David meted out legal justice by adjudicating cases in accordance with the strict dictates of the law, but did charity by "repaying [the losing party] from his own treasury."¹¹³ An alternative view, which best exemplifies R. Eliezer's legal-justice conception of dispute resolution, explains that it was precisely through his meting out strict legal justice that David did charity:

¹⁰⁷ See generally Shapira, *supra* note 91, at 211–13.

¹⁰⁸ BABYLONIAN TALMUD, SANHEDRIN 6b; JERUSALEM TALMUD, SANHEDRIN 1:1.

¹⁰⁹ Indeed, according to the Mishnah, the values of peace and charity are proportionally related: "The more charity, the more peace." MISHNAH, AVOS 2:7.

¹¹⁰ *But see*, BAIS YOSEF, *Choshen Mishpat* 1:1 (proposing that ideally legal adjudication promotes peace because litigants should "remove the dispute from between them, and accept the court's judgment with a favorable disposition").

¹¹¹ See Shapira, *supra* note 91, at 223.

¹¹² BABYLONIAN TALMUD, SANHEDRIN 6b.

¹¹³ *Id.*

“He did legal justice [for the winning party] by restoring his property, and charity [for the losing party] by removing wrongful gains from his hands.”¹¹⁴ These homiletic interpretations highlight the gulf between R. Yehoshua and R. Eliezer. For R. Yehoshua, law and justice are not synonymous; the *halacha* offers one kind of justice, but another, superior form of justice that promotes the meta-*halachic* ends of peace and charity, is offered by judicially-brokered compromise-based settlements. For R. Eliezer, by contrast, law *is* justice, and the consequences of a legal adjudication represent all the positive values courts ought to promote.¹¹⁵

i. Parties’ Interests

The third view on the jurisprudence of judicial settlement, that of R. Shimon b. Menasiah, sees judge-facilitated settlement as inherently value-neutral.¹¹⁶ For R. Shimon, the primary jurisprudential objective of court-sponsored dispute resolution is disposing litigious suits in a manner consistent with the parties’ interests.¹¹⁷ Settlement *per se* is neither obligatory nor prohibited; it is a form of dispute resolution that judges might decide to pursue or not at their own election, provided their choice is consistent with the litigants’ interests as objectively viewed from the perspective of the presiding judge.

The Talmud records R. Shimon’s position as follows:

R. Shimon b. Menassiah said: “Two people come before you for judgment. As long as you have not heard their arguments, or once you have heard their arguments but do not yet know towards which side the law tends, you are permitted to say to them, ‘Go and reach a compromise-based settlement.’ However, once you have heard their arguments and you know which way the law tends, you may not say to them, ‘Go and reach a settlement.” Of this it says, ‘Water is released at the start of judgment; abandon it before the case becomes clear’ [Proverbs 17:14] – until the law is revealed the judge may abandon it, but once it is revealed he may not leave it.¹¹⁸

Thus, for R. Shimon, the propriety of judicial settlement does not turn on the value of the practice itself, but on the point in the adjudicatory process at which it is employed. As long as a judge does not yet have a clear idea of which party will prevail in an adjudication, he may try to broker a settlement. At that point, the litigants are uncertain about how they will fair if the case is litigated to decision, and each therefore has an interest in reaching a compromise-based disposition. Once a judge can tell “which way the law tends,” however, he cannot facilitate a settlement.

¹¹⁴ *Id.*

¹¹⁵ See EIN YAAKOV, *Sanhedrin* 6b (explaining that according to R. Eliezer, “when a judge imposes strict legal judgment, he by default succeeds on promoting peace and truth,” indicating that peace and reconciliation among litigants is not an independent adjudicative value, but is wrapped up in courts’ law-based conflict resolution); Shapira, *supra* note 91, at 211–13.

¹¹⁶ BABYLONIAN TALMUD, SANHEDRIN 6b.

¹¹⁷ *Id.*

¹¹⁸ *Id.*; JERUSALEM TALMUD, SANHEDRIN 1:1.

From the judge's perspective, the winning litigant no longer has an interest in pursuing a settlement; to the contrary, his interest lies in obtaining an adjudicatory resolution to the case.¹¹⁹ The judge therefore cannot be a party to brokering a settlement because doing so would undermine the courts' principle jurisprudential goal of resolving disputes consistent with both parties' interests.¹²⁰ As long as both litigants have an objective interest in settling, the judge may participate in settling the case based on mutual compromise; once one party no longer has an interest in settlement because he is likely to prevail in adjudication, the judge cannot facilitate a compromise resolution.¹²¹

The Talmud further develops R. Shimon's view by comparing judicial settlement to judicial recusal.¹²² If a judge is confronted by a dispute between two individuals, the Talmud states, one "gentle" and the other "harsh and dangerous," the judge may recuse himself out of fear of the dangerous litigant so long as he does not "know towards which side the judgment tends."¹²³ Once he discerns the correct legal resolution of the case, however, the judge cannot step down because the Torah cautions, "[judges] shall not fear on account of men."¹²⁴ A judge may step down until he senses how he will likely rule because until that point the litigants do not have an interest in *this judge* resolving their dispute based on *his particular* view of the law and facts; the disputants have come to court for *an* adjudicative ruling, but not for *any particular* decision by a particular judge. Once the presiding judge has a sense of "where the law tends," however, he can no longer recuse out of fear.¹²⁵ At that point, the parties' interest – specifically the winning party's interest – in *this judge's* particular view on how to decide the case vests, so to speak, and the judge cannot step down without denying the litigants a judicial resolution consistent with their interests.¹²⁶

The Talmud applies the foregoing reasoning to explain R. Shimon's view on judge-facilitated settlement. According to R. Shimon, judges may work to settle cases until they know which litigant will likely prevail on the law because at that point the litigants have no vested interest in a particular adjudicatory result; to the contrary, each has a real interest in settling the matter rather than risk losing in court.¹²⁷ Once they sense which party will prevail, if the case is litigated, however, judges may no longer broker settlements because now the expected winner has a

¹¹⁹ See Shapira, *supra* note 91, at 213–16.

¹²⁰ See *id.*

¹²¹ See generally *id.*

¹²² See *id.* at 214.

¹²³ See *id.* at 214–216.

¹²⁴ *Deuteronomy* 1:17; see generally BABYLONIAN TALMUD, SANHEDRIN 6b.

¹²⁵ See Shapira, *supra* note 91, at 213–16.

¹²⁶ See *id.* at 222–27.

¹²⁷ See *id.* at 213–16.

vested interest in obtaining an adjudicatory disposition, and a settlement would no longer reflect his interests.¹²⁸

C. Judge-Facilitated Settlement in Halachic Practice

In practice, the *halacha* was settled by combining the three competing views on judicial settlement posed by the Talmud.¹²⁹ Judges are obligated to try to broker a settlement between litigants throughout the adjudicatory process, even after they know “which way the law tends.”¹³⁰ Judges are prohibited, however, from brokering compromise settlements after they issue a *halachic* ruling in the case, though non-judicial actors are encouraged to continue trying to get the disputants to reconcile their differences by facilitating a settlement.¹³¹

Following R. Yehoshua b. Korcha’s view, the *Shulchan Aruch*, the principle codification of the *halacha*, instructs that a judge is obligated to try to push litigants to settle their dispute based on mutual concession and compromise.¹³² Indeed, “any *beis din* that succeeds in executing a settlement is praiseworthy.”¹³³ Maimonides similarly taught that “a judge must strive in all cases to broker a settlement between the parties. If he can refrain from adjudicating a case to verdict his entire life, constantly facilitating fair settlements between disputants – how wonderfully pleasant that is!”¹³⁴ Commentators explain that a judge should explain to litigants why a settlement based on compromise is really in their best interests; he should be able to identify and speak to each party’s interests – “to speak to their hearts” – and to thereby bring them to compromise.¹³⁵

Judicial settlement is not unilaterally desirable, however. Based on R. Shimon’s view in the Talmud, the *halacha* recognizes that at some point in the adjudicatory process the law-based resolution of the case becomes too concrete, and therefore a judge cannot broker a settlement without implying the inferiority of God’s law.¹³⁶ Unlike R. Shimon, however, who placed this dividing line at the point where the judge knows “which way the law tends,” the *halacha* instructs that a judge should continue trying to broker a compromise until he issues his ruling.¹³⁷ Once the court renders a verdict, it must “let the law pierce the mountain.”¹³⁸ The *Shulchan Aruch* thus instructs:

¹²⁸ See *id.* at 222–25.

¹²⁹ ELON, *supra* note 74.

¹³⁰ *Id.*

¹³¹ See *id.*

¹³² See SHULCHAN ARUCH, *Choshen Mishpat* 12:2.

¹³³ *Id.*

¹³⁴ MAIMONIDES, *Introduction to the Talmud*.

¹³⁵ SEFER ME’IROS EINAYIM (SMA), *Choshen Mishpat* 12:7.

¹³⁶ See Shapira, *supra* note 91, at 219.

¹³⁷ See *Generally id.*; ELON, *supra* note 74.

¹³⁸ See TOSEFTA, SANHEDRIN 1:2–3; MAIMONIDES, MISHNAH TORAH, *The Laws of Sanhedrin* 22:4; see also ELON, *supra* note 74.

When should a judge pursue settlement? Only until the case is decided – even though he has heard their arguments and knows which way the law tends, it is his duty to broker a settlement. After the case is decided, however, and he says ‘this party is liable and this party is exonerated,’ he may not broker a settlement between the litigants.¹³⁹

Thus, *halachic* practice incorporates elements of all three judicial settlement opinions recorded in the Talmud. Judicial compromise is praiseworthy and obligatory, but only to an extent.¹⁴⁰ Once the parties’ interests in a particular legal resolution have been solidified by an adjudicatory ruling, the judge may not pursue settlement.¹⁴¹ Instead, legal justice must prevail – “let the law pierce the mountain.”¹⁴²

D. *The Jurisprudence of Judicial Settlement in Jewish Law*

The *halachic* practice of judicial settlement represents an amalgam of disparate Talmudic views on the propriety of judges brokering compromise-based settlements between litigants. Each of these Talmudic approaches evinced a particular jurisprudential view on the goals of dispute resolution and the adjudicatory process. *Halachic* practice, which incorporates elements of each of these views presents yet another jurisprudential conception of settlement and dispute resolution, this one grounded in the moralizing nature of traditional Jewish law and the importance of self-transcendence and other-referentialism.¹⁴³ This conception of the roles of disputants and judges in dispute resolution suggests an alternative to those models of judicial settlement practice currently prevalent in American courts.

In explaining this unique *halachic* jurisprudence of judicial settlement, this Section begins by explaining that Jewish law’s principle objective is to empower its adherents to morally ennoble themselves through self-transcendence. Next, this Section explores how this moralizing aim plays out in the context of adjudicatory dispute resolution. Finally, this Section explains how the contours of *halachic* judicial settlement practice support this moralizing jurisprudential scheme.

In Jewish tradition, God is characterized by his self-transcendence, his tendency to act selflessly for the benefit of others.¹⁴⁴ God gave the greatest expression his

¹³⁹ SHULCHAN ARUCH, *Choshen Mishpat* 12:2.

¹⁴⁰ MAIMONIDES, MISHNAH TORAH, *The Laws of Sanhedrin* 22:4.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Shlomo Pill, *Recovering Judicial Integrity: Towards a Duty-Focused Approach to Judicial Disqualification Based on Traditional Jewish Law*, 39 FORD. URB. L. REV. 511, 534–35 (2012).

¹⁴⁴ 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*.”’); R. MOSHE CHAIM LUZZATTO, 1 DERECH HASHEM 2:1 (“Behold, the very purpose of [God’s] creating [the world] was to confer from His goodness unto his creations.”).

characteristic *chessed*¹⁴⁵ when he created Man. God created Man “in His own image,”¹⁴⁶ and endowed him with God-like creativity and free will,¹⁴⁷ and instructed him to use these abilities to harness the natural world to perform *chessed* for others.¹⁴⁸ When Man heeds this call and selflessly acts to benefit others, he emulates God himself, making himself truly and morally human.¹⁴⁹ By giving man the power (though not the license) to act contrary to His will, God subjugated his own interests, so to speak, for Man’s benefit, because Man’s decision to abide by God’s will is morally meaningful and ennobling only if he also has the power to reject God’s instruction.¹⁵⁰ The Talmud thus teaches that Man becomes “a partner with God in the ongoing work of Creation” by transcending his natural self-centeredness and instead using his talents for *chessed* in accordance with God’s will.¹⁵¹

The Torah, which includes legal rules and principles that govern every aspect of public and private Jewish life, teaches how to fulfill this *chessed*-imperative in practice.¹⁵² Jews fulfill their *imitatio dei* obligation by transcending their baser

¹⁴⁵ The Hebrew word, “*chessed*,” connotes self-transcendent and other-referential actions or character traits. Thus, an act of *chessed* is a performance focused on imparting good unto others rather than on accruing benefit to one’s self. Similarly, a *chasid* – one who is characterized by *chessed* – refers to a person whose very being is imbued with a feeling of self-transcendence and a drive to do for rather than receive from others. See HOREB, *supra* note 78, at 247–48 (“[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.”).

¹⁴⁶ *Genesis* 1:27; cf. R. ELIYAHU DESSLER, 1 MICHYAV M’ELIYAHU 32 (1997) (“The power of giving is the greatest of God’s characteristics . . . and with this characteristic He created Man, as it says: ‘In God’s image was Man created,’ [Genesis 1:27].”).

¹⁴⁷ 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).

¹⁴⁸ See *Genesis* 1:28, 2:15 (“And God set a goal for them [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, COMMENTARY ON THE PENTATEUCH, *Genesis* 1:28 (s.v. *v’kivshuha*); see also R. SAMSON RAPHAEL HIRSCH, THE NINETEEN LETTERS 62 (Joseph Elias, trans., ed., 1995) (“God created [Man] . . . to be, so to speak, a ‘partner in the work of creation,’ [Babylonian Talmud, Shabbos 10a], able to direct the forces that make up our world and free to choose how to use this power.”).

¹⁴⁹ HIRSCH, *supra* note 148, at 64 (“Since God’s world is built . . . on lovingkindness, man’s duty to follow God and imitate His ways is discharged, in the first place, by doing acts of kindness.”).

¹⁵⁰ 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); HOREB, *supra* note 78, at p. xliii (“What makes us into pious souls” is our striving “to perfect the world through the [*chessed*-focused] reign of [God].”).

¹⁵¹ 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 BABYLONIAN 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 (n.d.); see generally R. MOSHE CORDOVERO (1522–1570), TOMER DEVORAH, ch. 5–6 (n.d.) (discussing Man’s duty to emulate God’s characteristics).

¹⁵² See R. SAMSON RAPHAEL HIRSCH, 2 COLLECTED WRITINGS 207 (Marc Breur, et al, eds., 1997) [*hereinafter* Collected Writings] (“The Law [of the Torah] . . . establishes God’s will as the motive and measure of man’s ennoblement.”); HOREB, *supra* note 78, at 219–20 (“[God] has announced His justice to the world [in the laws

instincts and choosing to act in accordance with the Torah's *chesed*-oriented norms instead.¹⁵³ The Jewish law system thus functions primarily as a means of enabling its adherents to develop their humaneness by choosing to adopt God's *chesed*-focused will as their own.¹⁵⁴ The *Midrash* thus posits that "[t]he Torah's laws were given to the Jews for the sole purpose of refining their social interactions."¹⁵⁵

As a moralizing medium, the Torah relies principally on the process of Jews' choosing to transcend their naturally self-referential instincts in favor of God's own value judgments as revealed in the Torah.¹⁵⁶ In other words, it is the process of self-transcendence culminating in a conscious choice to submit to God's will that is morally ennobling.¹⁵⁷ When one acts on his own conscious, his conduct stems from self-referential instinct; when that same act is done as the mandate of an external moral authority, however, the performance becomes a moralizing act.¹⁵⁸ The Talmud thus teaches, "one who is commanded to act and acts is greater than one who acts similarly but of his own accord,"¹⁵⁹ 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."¹⁶⁰ Maimonides similarly taught, "[i]t 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."¹⁶¹

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. & REL. 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).").

¹⁵³ See Maimonides, *Letter to Yemen*, quoted in LAW, POLITICS & MORALITY IN JUDAISM 8 (Michael Walzer, eds., 2006) ("If [man] could only understand 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."); see also Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 308, 309–11 (1961).

¹⁵⁴ This concept is illustrated by the following Talmudic 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" [Isiah 42:21]. BABYLONIAN TALMUD, MAKKOS 23b. R. Shlomo Yitzchaki, an 11th 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 *Rashi to Makkos 23b*, SEFARIA, https://www.sefaria.org/Rashi_on_Makkot.23b.1?lang=bi (last visited May 3, 2020) (s.v. *L'zakos es Yisrael*).

¹⁵⁵ MIDRASH RABAH, LEVITICUS 13:3.

¹⁵⁶ See HOREB, *supra* note 78, 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.").

¹⁵⁷ *Id.*

¹⁵⁸ Aharon Lichtenstein, *Communal Governance, Lay and Rabbinic: An Overview*, in RABBINIC & 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.").

¹⁵⁹ BABYLONIAN TALMUD, AVODA ZARA 3a.

¹⁶⁰ BABYLONIAN TALMUD, BERACHOS 17a.

¹⁶¹ MAIMONIDES, MISHNAH TORAH, *The Laws of Kings* 8:11.

The *beis din* dispute resolution process, too, takes place under the aegis of the *halacha's* overarching jurisprudence of moralizing self-transcendence and *chessed*.¹⁶² Jews' self-transcendence in favor of God's will is typically unproblematic in the private sphere.¹⁶³ Jews study the *halacha*, self-apply the Torah's laws to their lives, and consult their rabbis when they are unsure how to conduct themselves under Torah law.¹⁶⁴ Other-referential adherence to God's law is more problematic in the public sphere where related parties often reasonably disagree about how the *halacha* structures their relationship.¹⁶⁵

Take, for example, an ordinary tort case. Flames from D's backyard BBQ pit set fire to P's garage, which, along with the car inside it, burns to the ground. P demands payment for damages, claiming that the *halacha* holds D liable for the damages caused by his fire.¹⁶⁶ D disputes P's claim, arguing that under the applicable *halachic* rules he is not liable for any of the damages because he took reasonable care in building and using his BBQ pit,¹⁶⁷ and that in any case he cannot be held liable for damage to the car because while he may have been able to anticipate liability for damages to the garage, he could not have anticipated liability for the car concealed inside it.¹⁶⁸ P counters that the law does not consider D's precautions adequate and that he is also liable for the car because he should have reasonably anticipated that a garage might contain a car.¹⁶⁹ Both P and D are attempting to order their relationship in accordance with God's will as revealed in the *halacha*. Because they are embroiled in a dispute in which each has a significant personal stake, neither party's view of the law is truly self-transcendental; each is *using* the law to support his own self-interest, and each disputant's adhering to his own conception of the *halacha* here would fail to achieve Jewish law's moralizing goal.

The problem is solved by the *beis din* dispute resolution process. When parties cannot agree about how to order their relationship in accordance with God's law, they turn to the court—a disinterested third-party decisor of Jewish law—to tell them what the *halacha* requires.¹⁷⁰ From its objective vantage, the court can provide the parties with what they are unable to give themselves—a non-self-interested determination of what the law requires under the circumstances. By accepting the *beis din's halachic* judgment, each party transcends his own interest in the case and

¹⁶² Pill, *supra* note 143, at 534.

¹⁶³ *Id.*

¹⁶⁴ 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 WALK IN GOD'S WAYS: JEWISH PASTORAL PERSPECTIVES ON ILLNESS AND BEREAVEMENT* 54 (2004).

¹⁶⁵ See generally Pill, *supra* note 143, at 534.

¹⁶⁶ See generally SHULCHAN ARUCH, *Choshen Mishpat* 418.

¹⁶⁷ See ARBAH TURIM, *Choshen Mishpat* 418:1.

¹⁶⁸ See *id.* at 418:8.

¹⁶⁹ See *id.*

¹⁷⁰ QUINT, *supra* note 83.

instead acts based on his legal *obligations* to his opponent,¹⁷¹ thereby morally ennobling himself through self-transcendence in favor of God's will.¹⁷² Thus, when P and D bring their case to *beis din* and the court holds D liable for the garage but exonerates him with respect to the car, and thereafter, D pays for the garage, and P obviates his demand for payment for the car, both P and D morally ennoble themselves by transcending their self-interest and instead rendering to each other that which the *halacha* requires.

Legal adjudication is not the only way for P and D to morally ennoble themselves through self-transcendent *chessed*, however. Suppose D, knowing that P was in dire financial straits and feeling the weight of his Torah obligation to help others, did not contest P's demand for payment in the first place but immediately wrote a check for the value of the destroyed garage and car. D's actions would serve the moralizing ends of Jewish law even though they did not conform to his *halachic* obligation to pay for the garage and not for the car. D's decision is self-transcendental and *chessed*-focused; he is acting contrary to his own interests and beyond that which is legally required of him to fulfill his general Torah duty to act kindly and charitably towards others. Alternatively, suppose P, who had an insurance policy that would cover most of his losses and was aware that D had recently lost his job and probably could ill afford to cover the damages, decided not to demand payment for D in the first place. Once again, P's other-focused act of *chessed* would serve to morally-ennoble him, despite the fact that his decision not to seek remuneration is contrary to how the *halacha* would order his relationship with D. Finally, suppose that the parties do dispute D's liability for damages, but each side, recognizing its general duty to act kindly and charitably towards his fellow, compromises on his *halachic* claims in order to reach a mutually agreeable settlement. Once again, the litigants have morally ennobled themselves by transcending their own self-interest and strict legal entitlements in favor of acting charitably towards their opponent. This kind of extra-legal, *chessed*-focused conduct

¹⁷¹ The moralizing self-transcendence that accompanies each parties' compliance with the court's judgment is reinforced by the notion that Jewish law speaks in terms of duties towards rather than rights against others. 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). Adhering to the court's *halachic* decision is moralizing, therefore, because it doesn't involve each parties' receiving that which it is entitled to from the other, a self-referential act. Instead, executing a *halachic* judgment involves each party's giving to the other that which it is *halachically* obligated to offer, a self-transcendent, other-referential act of *chessed*. See Silberg, *supra* note 153, at 312–13 ("[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.")

¹⁷² See generally Pill, *supra* note 143, at 534.

between disputants is called in *halachic* literature “*lifnim m’shuras hadin*”—beyond the strict letter of the law—and is eminently considered and praised.¹⁷³

With this conception of the premier moralizing aim of Jewish law, the function of adjudicatory dispute resolution, and the value of extra-legal settlements between litigants in hand, the jurisprudence of *halachic* judicial settlement practice becomes clear. As R. Yehoshua b. Korcha argued in the Talmud,¹⁷⁴ settlement is a positive value; by settling their dispute, litigants transcend their personal interests and morally ennoble themselves through other-referential acts of *chessed* towards their opponents.¹⁷⁵ Since settlement is moralizing, judges are strongly encouraged to broker compromise-based resolutions between litigants.¹⁷⁶ After all, the whole focus of a Jewish law judge’s task is to enable parties to transcend their own interests through the court’s third-party legal judgment;¹⁷⁷ if that end can be accomplished directly through settlement, all the better. Thus, “[c]ompromise is the ideal legal solution, not strict adherence to legality.”¹⁷⁸

Judges cannot push litigants to settle after they have issued an adjudicatory ruling in the case, however.¹⁷⁹ Once the correct *halachic* resolution to the case has been determined by the third-party court, the disputants must abide by the law.¹⁸⁰ An individual would not be allowed to disregard an explicit *halachic* directive because he thinks the Torah’s general *chessed*-goal can be better achieved by some other course of conduct; doing so would be the epitome of the kind of self-referentialism the Torah expects man to destroy. Likewise, a judge may not reject a settled *halachic* verdict in order to broker a compromise-based settlement because doing so would amount to both the judge and the litigants’ elevating their own view of the good above that of God’s law.¹⁸¹ Thus, following R. Eliezer’s view,¹⁸² it is

¹⁷³ See, e.g., ARBAH TURIM, *Choshen Mishpat* 1:2.

¹⁷⁴ See *supra* Part IV.b.ii.

¹⁷⁵ See *supra* text accompanying notes 168–173.

¹⁷⁶ See *supra* Part IV.c.

¹⁷⁷ See *supra* notes 104–120 and accompanying text.

¹⁷⁸ R. Joseph P. Soleveitchik, *The Role of the Judge*, in SHIUREI HARAV: A CONSPECTUS OF THE PUBLIC LECTURES OF RABBI JOSEPH P. SOLEVEITCHIK 81, 82 (Joseph Epstein ed., 1974).

¹⁷⁹ See *supra* Part IV.c.

¹⁸⁰ See *supra* Part IV.c.

¹⁸¹ Worth noting is the fact that in large part the *halachic* system rejects the common-law notion that “the law” is out there somewhere just waiting for the erudite judge to find it. To the contrary, the Torah teaches that the *halacha* “is not in Heaven [R]ather, the law is very close to you; it is in your mouth and in your heart.” *Deuteronomy* 30:11–14. The *halacha* is established by those who have authority to decide it, and until it is authoritatively decided vague notions about what the law should be or how a case should be decided do not yet have the force of law. See generally 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). Settlement is thus appropriate as long as a case has not been fully adjudicated to verdict by the court. In theory, until the judge rules, the *halacha* says nothing on the matter, and a settlement cannot therefore be taken to denigrate God’s law. Once the case is decided, however, there is Divine law “on point,” and a judge may not reject the *halacha*’s imperative in favor of a compromise-based settlement.

¹⁸² See *supra* Part IV.b.i.

prohibited for a judge to broker a settlement once the court has reached a legal decision; at that point, the judge must “let the law pierce the mountain.”

Thus, the jurisprudence of judicial settlement in *halacha* is a moralizing one. The purpose of dispute resolution is to give litigants a forum for transcending their personal interest in a conflict, help them see the case in terms of their obligations to their opponents rather than their own legal rights and entitlement, and ultimately morally ennoble themselves by acting with *chessed* rather than self-interest. These aims can be achieved through legal adjudication, but settlement is preferable precisely because it is party-centered and involves litigants recognizing their duties to the other on their own instead of having those obligations declared to them by a court. For the judge, however, the law is and must be paramount; once determined, it cannot be ignored, and so a judge cannot engage in settlement after he decides a case on the law.

V. CONCLUSION

Judicial settlement has been a major feature of American court practice for over a generation. Still, there is a fierce debate about the jurisprudential propriety of judges engaging in settling rather than adjudicating their cases. Some decry the practice on the grounds that the judges’ job is to promote legal justice. Others encourage judicial settlement, claiming that judges should be working foremost at promoting peace and reconciliation between litigants. Pragmatists, however, see the judges’ role as using public dispute resolution resources as efficiently as possible and therefore advocate settlement in some cases while condemning it in others.

Traditional Jewish law offers an alternative perspective of the goals of dispute resolution and the appropriateness of judges brokering settlements. Jewish law sees self-transcendence, an individual’s ability to forego their own self-interest in favor of voluntarily acting charitably and kindly towards their opponents, is a primary jurisprudential value. Judicial settlement can further this goal and is therefore encouraged. Jewish law cautions, however, that as a legal professional, a judge’s first allegiance is to the law. Once a case is decided therefore, and the law as to that particular matter becomes established, the judge may not forsake a legal resolution in favor of a compromise-based settlement.

American views on law and dispute resolution are far removed from Judaism’s moralizing ideal. Nevertheless, the kind of self-transcendence and focus on the other that is so central to Jewish law, and which is encouraged by the Jewish law jurisprudence of judicial settlement may be a worthwhile aim. Certainly, it is food for thought in a still unsettled area of legal practice.