Choosing the Court

Advocacy, hard evidence, and the Talmudic panel

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Preliminary working note. Comments welcome.

Abstract

A decision-maker who must act on information held by interested parties depends on what they can prove, not merely on what they say. Producing hard evidence requires a party's cooperation, surrendered before its content is known, and a custodian who will disclose it on the party's behalf; an aligned, party-appointed judge is such a custodian, a neutral or hostile bench is not. With two parties leaning opposite ways, the efficient arrangement is therefore a panel of two party-appointed custodians reporting to a neutral pivot: each certifies what favours its side, and between them they leave the state revealed, for the truth one party suppresses is the truth its opponent is glad to prove. The panel dominates a shared bench when the parties' conflict is large. We recover the Talmud's procedure for seating a court (Sanhedrin 3:1) – each party picks a judge and the two pick a third – and read the party-appointed judge as the trusted advocate the Gemara describes (Sanhedrin 23a), the arrangement Dewatripont and Tirole (1999) call advocacy. The accuracy of adjudication becomes a property of who is trusted to certify what.

1 Introduction

A decision-maker often must act on what interested parties know. They may simply tell her, and they will tell her what serves them; or they may prove what they know, placing hard evidence on the record. The first channel is cheap and, between parties who lean opposite ways, coarse. The second is decisive – a certified fact ends the argument – but it is not freely available. Producing hard evidence is an act the parties control, and they will produce it only on terms that serve them. This paper studies those terms, and the institution they give rise to when the parties who must produce the evidence pull in opposite directions.

The terms turn on a friction. A case is assembled before its contents are known. A party that opens its books and names its witnesses surrenders a record it can no longer control, and it does so in the hope, not the knowledge, of what the record will show. Two things then stand between the party's private knowledge and the court's file. The knowledge must be made *hard* – authenticated, so that a skeptical court will credit it rather than treat it as talk; and once hard, it must be *disclosed* selectively, held back when it wounds and produced when it helps. A

party cannot do either for itself: it cannot certify its own documents to a court that distrusts it, and it cannot commit, having built the case, to suppress what the case reveals against it. It needs a custodian who will do both – authenticate, and disclose in the party's interest. A judge of the party's own choosing is such a custodian. A hostile or neutral bench is not: it would authenticate the record and then disclose it against the party, so the party never surrenders it, and only cheap talk remains.

This is the work the Mishnah's procedure does. The Mishnah (Sanhedrin 3:1) provides that in a monetary suit "this one selects one judge and that one selects one, and the two of them select one more." Each party builds its case with a judge of its own – who holds and certifies what the party could never safely place before an unaligned court – and two such judges, leaning opposite ways, then sit before a neutral third. Between them they leave little hidden, for the realisation one party conceals is the realisation its opponent is glad to certify. The party-appointed judge is not an advocate smuggled onto the bench. He is the trusted custodian through whom a party's private knowledge is made hard and enters the record. The law reads the institution in just this way: each litigant chooses a judge who will advance his *zekhut* – his meritorious case – "to the extent the law allows," while a neutral third hears both sides and rules (*Shulchan Arukh*, *Choshen Mishpat* 13:1), and the Gemara defends the whole arrangement as the one through which "the true judgment emerges" (*yetze ha-din la-amito*, Sanhedrin 23a) – each judge to make his side's case, not to weigh it neutrally. The institution and its codification are set out in §2. Reading a procedure of the Talmud as a designed response to a strategic problem places the paper within a small program of such readings, after Aumann and Maschler (1985).[1]

Whether the parties accept a shared bench or resort to the panel depends on how far apart they stand. When their interests are close, a common court is trusted by both, the evidence each could prove there is nearly all the evidence there is to prove, and they share it to spare the cost of convening three judges. When their interests are far apart, no shared bench is trusted by both, the proof that goes unproduced on a compromised court is large, and the panel is worth its expense. Separate appointment is the equilibrium institution for bitter disputes. A litigant brings his own judge precisely when he most distrusts a shared forum.

Our model places familiar objects in an unfamiliar setting. The certified channel is verifiable disclosure with a skeptical receiver (Grossman, 1981; Milgrom, 1981; Dye, 1985); the two opposed custodians before a neutral decider are the *advocates* of Dewatripont and Tirole (1999), and the state's revelation by adversarial certification is the logic of Milgrom and Roberts (1986) and Shin (1998). The residual, uncertified channel is cheap talk (Crawford and Sobel, 1982), coarse in proportion to the conflict. That a party's *alignment* with its custodian is what unlocks its evidence connects the paper to Antić and Persico (2020), who make conflict of interest a chosen instrument: here the instrument is the appointment of a custodian, and the Talmud supplies

[1]The program reads sugyot not as solutions to problems the analyst poses, but as institutions: procedures, precisely legislated and defended in argument, that respond to strategic problems of information, commitment, and division. A companion paper develops the program and applies it to the dissolution of partnerships.

both the micro-foundation – a party will certify only through a judge who discloses on its behalf – and the institution that results.

The setting is Talmudic, but the lesson is not parochial. Wherever parties choose their forum, and the forum must learn what only the parties can prove, the same forces operate. The evidence a party will put forward depends on who holds it, and the law's tolerance of party-appointed judges is not a lapse but a means of learning. Where adjudication forbids the parties their own custodians, it is thrown back on what opposed parties will merely assert, and the quality of justice falls.

2 The institution and its lineage

The name is the rule. The procedure is known by an acronym of its own founding clause. The Mishnah opens the law of monetary suits: "cases of money are tried by three; this one selects one judge and that one selects one, and the two of them select one more" (*zeh borer lo echad ve-zeh borer lo echad, u-sheneihem borerim lahem od echad*, Sanhedrin 3:1). The name of the institution, *zabla*, is the abbreviation of that clause's opening words, *zeh borer lo echad*: it is called after the very act – each party's selection of his own judge – whose rationale this paper recovers. What reads at first as a concession to partisanship is the provision that does the work, and the tradition fixed it in the name.

The limits of control. The Mishnah at once records a dispute over how far a party's hold on its judge runs. Rabbi Meir holds that either litigant may disqualify the judge the other has chosen; the Sages hold that he may not, a duly chosen judge standing unless shown disqualified on independent grounds such as kinship to a party. The codes follow the Sages, and the model says why this is the right rule. A judge a party trusts to hold and certify its evidence cannot be struck on the bare ground that he leans, for leaning – disclosing on his appointer's behalf – is precisely his use (Lemma 1); allow removal for partisanship and the certified channel closes. The dispute is over the right object: not whether a judge may be partial, but whether the productive partiality the panel depends on is itself a ground to dissolve the panel. The law protects it.

The Gemara's reason is the model's result. The Talmud states the purpose of the arrangement in a single phrase: "since this one selects one judge and that one selects one and the two select another, the true judgment emerges" (*yetze ha-din la-amito*, Sanhedrin 23a). The procedure is defended not as a truce between two partisans but as the route to an accurate verdict – which is the content of Proposition 2: two aligned custodians before a neutral pivot leave the state revealed. The codified law supplies the mechanism behind the Gemara's claim. Each party-chosen judge advances the *zekhut*, the meritorious case, of the litigant who chose him, "to the extent the law allows," while the third hears both and rules honestly (*Shulchan Arukh*, *Choshen Mishpat* 13:1); the truth emerges because each side's case is pressed by a judge

it trusts to press it, and what one will not raise the other will. That is the aligned custodian and the skeptical pivot of the model below, set down as a rule of court.

The codified design. The institution is settled monetary-suit procedure (*dinei mamonot*), codified in the *Tur* and in the *Shulchan Arukh* at *Choshen Mishpat* 13, and it binds: once each party has selected and the panel is seated, the choice cannot be unmade. The reading offered here is therefore not of a curiosity but of a standing legal institution, whose nearest modern descendant – the party-appointed arbitrator on a tripartite panel – is governed by the same logic (§6). It is, throughout, the procedure for monetary disputes; the capital procedure, whose design answers a different danger, is the subject of a companion paper.

3 Model

Merits and parties. The merit of a case is $\theta \sim U[0,1]$, known to the parties and not to the court. A verdict is an action $a \in \mathbb{R}$; the accurate verdict is $a = \theta$. The plaintiff L prefers higher verdicts and the defendant R lower: L's ideal is $\theta + b$ and R's is $\theta - b$, with $b > 0$ the *conflict*, and each party's loss is the squared distance of the verdict from its ideal.

Two channels. A party conveys what it knows in one of two ways. It may *talk*: costless, unverifiable messages, informative only as interests align (Crawford and Sobel, 1982). Or it may *prove*: place on the record a hard, authenticated certificate of θ. Hard evidence of θ exists with probability $\rho \in (0,1)$, independently of θ – so that the absence of a certificate carries no news about the state; when it exists it can be certified, and a certificate cannot be forged or falsified.

The custodian friction. Certification is not something a party does alone. Building the case is an ex-ante act – cooperation surrendered before θ is known – and what it yields must be (a) *authenticated* by an officer the court trusts, and (b) *disclosed* at that officer's discretion. We call such an officer a *custodian*. A custodian *aligned* with party i discloses a certificate when it favours i and withholds it otherwise; a *neutral* custodian discloses whatever exists; a *hostile* custodian discloses when it harms i. A party cooperates ex ante – surrenders the case – only if the custodian's disclosure policy serves it.

The pivot. The officer who rules is a neutral pivot who has commitment to a verdict rule and is *skeptical*: facing nondisclosure, it forms the posterior mean of θ given that nothing was certified, and rules accordingly (Grossman, 1981; Milgrom, 1981; Dye, 1985).

Institutions. A *shared bench* is a single neutral court the parties hold in common: it authenticates and rules, but is nobody's aligned custodian. The *panel* (*zabla*) seats two custodians, one appointed by each party and aligned with it, reporting to a neutral pivot, at convening overhead

$K > 0$. In stage 1 the parties consent to a shared bench or fall back to the panel; in stage 2 they communicate, evidence is disclosed, and the forum rules.

4 Alignment and the production of evidence

Everything turns on who will certify what. The friction makes certification available only on an aligned channel.

Lemma 1 (Cooperation requires alignment)**.** *A party surrenders its case – and so makes certification possible – only to an aligned custodian. On an aligned channel the party certifies the realisations it would choose to reveal and conceals the rest; on a neutral or hostile channel it withholds cooperation and only cheap talk remains.*

Proof. Cooperation is chosen ex ante, before θ, and yields a certificate the custodian discloses to suit his own rule. An aligned custodian discloses exactly the realisations the party would itself choose to put on the record against the nondisclosure verdict, and conceals the rest – the party's own preferred disclosure rule – so cooperating delivers the value of selective disclosure and weakly dominates withholding; the party cooperates. A neutral custodian would disclose θ whatever it is, stripping the option to conceal unfavourable realisations; a hostile custodian discloses precisely when it harms the party. Against either, cooperation lowers the party's payoff, so it withholds, no certificate is produced, and only cheap talk remains. □

The Lemma is what makes the appointed judge matter, and it locates precisely why a party needs a judge rather than disclosing for itself. Self-disclosure fails on two counts the custodian repairs. First, a document a party produces about itself is talk until an officer the court trusts authenticates it; the aligned judge supplies that authentication. Second, even authenticated, a party that has built its case cannot credibly promise to suppress what the case reveals against it once a skeptical court demands it; the custodian, disclosing under his own committed rule, can. The aligned judge is the device through which a party's knowledge becomes both hard and selectively withheld – neither of which the party can achieve alone.

Proposition 1 (A shared bench is starved)**.** *On a shared neutral bench neither party has an aligned custodian, so by Lemma 1 neither certifies, and the verdict rests on cheap talk alone, coarse in proportion to the conflict b. A bench aligned with one party does no better than to certify that party's favourable tail while the other is reduced to talk.*

Proof. A shared bench has a single disposition. If neutral, it is aligned with neither party; by Lemma 1 neither surrenders its case, no certificate is produced, and the pivot rules on the two parties' cheap talk, whose most informative equilibrium is the coarse interval partition of Crawford and Sobel (1982), with residual variance increasing in the conflict b. If instead the shared bench leans toward one party, only that party is served by an aligned custodian and

certifies its favourable realisations; the other, facing a custodian who would disclose against it, withholds and talks – it cannot route around the leaning bench, since authentication itself runs through the officer it distrusts (Lemma 1). Either way at most one tail of θ is ever certified. □

5 The panel reveals

The panel seats an aligned custodian for each party. The realisations L will certify and those R will certify are exactly complementary, and between them they cover the state.

Proposition 2 (Mutual certification reveals)**.** *In the panel both channels are aligned. Whenever hard evidence exists, the realisation favours one party, who certifies it; so θ is revealed with probability ρ, and the pivot rules $a = \theta$. On the complementary event – no evidence, probability $1 - \rho$ – the pivot rules the skeptical posterior mean. The verdict is fully accurate wherever proof is available and neutral elsewhere. The argument rests on hard certificates, not on cheap-talk punishments: unlike cheap-talk revelation, which is fragile (Battaglini, 2002), certified disclosure does not depend on delicate equilibrium constructions.*

Proof. Let m_0 be the pivot's posterior mean on the nondisclosure event. The aligned L-custodian discloses a certificate iff it raises the verdict, i.e. iff $\theta > m_0$; the aligned R-custodian discloses iff $\theta < m_0$. Hence whenever a certificate exists – probability ρ, independent of θ – some custodian discloses it for every $\theta \neq m_0$, and θ is certified and revealed; the pivot then sets $a = \theta$. Nondisclosure occurs only when no certificate exists, an event of probability $1 - \rho$ that is independent of θ, so the posterior on it is the prior, $m_0 = \mathbb{E}[\theta] = \frac{1}{2}$, which is consistent and well-defined. There the pivot rules $a = \frac{1}{2}$. The verdict's residual variance is thus $(1-\rho)\,\mathrm{Var}(\theta) = (1 - \rho)/12$, independent of the conflict b. □

The contrast with the shared bench is the heart of the matter. A shared bench learns only what opposed parties will assert; the panel learns whatever can be proved, because each party holds a custodian who will prove what helps it, and what helps one is what the other would bury. Adverse interests, which poison cheap talk, are exactly what drive two-sided certification: the panel turns the conflict from the obstacle into the engine.

6 The choice of institution

The parties choose the cheaper forum that serves them. By Proposition 2 the panel yields each party a verdict of residual variance $(1 - \rho)/12$ at convening cost K; by Proposition 1 a shared neutral bench – the only one both parties accept – yields the coarse cheap-talk variance $V(b)$, increasing in the conflict b.

Proposition 3 (Zabla for polarised disputes)**.** *The panel is chosen iff $V(b) - (1 - \rho)/12 > K$. Since the information lost to cheap talk on a shared bench, $V(b)$, increases in the conflict b, there*

is a threshold $b^\star$ above which the parties resort to the panel and below which they share a bench: separate appointment is the equilibrium institution for bitter disputes, and a litigant brings his own judge precisely when he most distrusts a shared forum.

Proof. Only the neutral shared bench is acceptable to both parties, since any leaning strictly worsens the disfavoured party; there each party bears the coarse-talk variance $V(b)$ (Proposition 1). The panel reveals the state whenever evidence exists and rules neutrally, leaving residual variance $(1-\rho)/12$ (Proposition 2) and costing K. Both prefer the panel iff $V(b) > (1-\rho)/12+K$; as V increases in b, there is a unique $b^\star$ solving the equality, and the panel is chosen iff $b > b^\star$. □

Remark. The account turns on cooperation being ex ante. Were a party to choose cooperation already knowing θ, it would certify favourable facts to any bench that could authenticate them, a single skeptical bench would obtain the same two-sided certification as the panel, and the appointed judge would be redundant. The claim is therefore precise: the party-appointed custodian matters when a case must be built before its contents are known, which is the ordinary condition of litigation.

Remark. The procedure is monetary-suit procedure (*dinei mamonot*); it is not the seating of a capital court, and we do not extend it there. Its lesson is about adjudication under party-held, provable information, and it travels to any forum – arbitral panels with party-appointed arbitrators are its closest modern instance – in which the litigants supply both the evidence and, in part, the judges.

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