Lay People’s Advocacy and Resistance in Talmudic Adjudication Narratives

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This article analyzes depictions of Jewish lay people who advocate for their interests before rabbinic judges in adjudication narratives, a genre of brief case stories in the Babylonian Talmud (c. 200-550 CE). Adjudication narratives are distinguished by their portrayal of a specific judge’s hearing and ruling on the case, which grants the opportunity to portray dramatic interactions between litigants and judge. The extensive editing process of the Talmudic corpus, as well as the possibility that some of these narratives may have been composed as riffs on the same case, means it is difficult to ascertain how accurately they depict historical reality. However, narratives illustrating forum shopping, actions that change the facts of the case, interruption and finally, argumentation, each offer an opportunity to assess when and why tactics are effective for the petitioner. The stories suggest that tactics of lay advocacy are likely to be treated favorably by the Talmud’s authors when the petitioners’ actions support the authority of the judge and the traditions of rabbinic culture. Their inclusion in the Talmud also instructs future judges about the potential opportunities and challenges offered by lay people who advocate for their needs in court. Most important, perhaps, is that these adjudication narratives incorporate lay people’s concerns, and in some cases, their “backlash,” into Jewish legal reasoning, training, and tradition.

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INTRODUCTION

Among the thousands of case stories in the Babylonian Talmud, a few hundred depict nameless Jews, sometimes described only by their gender, their profession, or by another detail of their lives, such as being poor, an orphan, or a convert to Judaism. The stories establish the facts of their case, and then describe the person’s appearance before a rabbi (an “Amora,” who lived between c. 200-550 CE), who makes a judicial decision. Most such narratives depict no interaction between the petitioner and the rabbinical judge beyond the rabbi’s decision. But some portray the petitioners and the judge in dialogue, either before or after he renders his verdict. These rare narratives present people who are neither rabbis, nor relatives of rabbis, using their own arguments or actions to sway the judge in their favor. In a minority of such cases, the petitioners’ efforts work. The extensive editing process of the Talmudic corpus, as well as the possibility that some of these narratives may have been composed as riffs on the same case, means it is difficult to ascertain how accurately they depict historical reality.1 Nonetheless, the presence of the narratives within the Talmudic corpus reflects the Talmudic authors’ judgments of lay people’s advocacy, their capacity to operate within rabbinic judicial contexts, and the burdens and opportunities that lay person advocacy offers a court. The reason for including reports of dialogue between petitioners and rabbinical judges, particularly when the dialogue did not affect the judge’s ruling, is uncertain. It is an intriguing possibility, however, that these stories helped to train and sensitize later generations of judges about the kind of work they perform.2

1. ELIEZER SEGAL, CASE CITATION IN THE BABYLONIAN TALMUD: THE EVIDENCE OF TRACTATE NEzikIn 172-75 (1990). For the processes by which collections of case law transfer across cultures, and historical considerations to whether such stories originate in actual cases, see Sara J. Milstein, Making a Case: The Repurposing of “Israelite Legal Fictions” in Post-Deuteronomic Law, in SUPPLEMENTATION AND THE STUDY OF THE HEBREW BIBLE 161 (Saul M. Olyan & Jacob L. Wright eds., 2018).
2. SEGAL, supra note 1, at 177-90, discusses medieval reception of these stories as precedent. Generations of Babylonian rabbis studied collections of these cases and the editors of the Talmud...
This article analyzes depictions of lay advocates, who petition on their own behalf, in adjudication narratives of the Babylonian Talmud. Examining these narratives provides a better picture of the place and strategies of lay advocacy in relation to late antique rabbinic adjudication. In the narratives, lay advocates employ four primary strategies: (1) forum shopping, (2) changing the facts of the case through action, (3) interruption and (4) the employment of argumentation that echoes rabbinic argumentation in their internal legal debates. The article evaluates each tactic, using literary analysis to highlight the often overlooked, but important, dramatic and relational aspects of the interactions between judges and petitioners. The judge’s reception of a tactic, as well as the narratives’ reports of subsequent events, convey the Talmudic editors’ evaluation of these tactics’ efficacy. The article deduces aspects of the Talmud’s stance toward lay advocacy from the successes and failures of the petitioners. The stories suggest that tactics of lay advocacy are likely to be treated favorably by the Talmud’s authors when the petitioners’ actions support the authority of the judge and the traditions of rabbinic culture.

I. BACKGROUND

Today, the study of the methods that non-expert litigants may have employed towards rabbinic judges resonates with Jewish people who are subject to the jurisdiction of rabbinic courts, but suffer because they do not know the law, such as some Jewish people who divorce in the State of Israel’s rabbinical courts. In response, advocate-training organizations and hotlines offer help to mitigate women’s legal and cultural disadvantages in divorce proceedings before rabbinic judges, though men also receive help from such advocates.3

In the U.S., people who appear pro se and without legal training in many civil courts may encounter challenges that are reminiscent of the ways that

3. Ohr Torah Stone’s To’anot Rabbaniot Legal Advocacy Program trained female, Orthodox Jewish advocates to appear and argue before rabbinic courts on behalf of women in divorce cases. These advocates’ presence addressed the disparity in legal knowledge that can often disadvantage female petitioners in rabbinic family court. While that program no longer exists, other programs in Israel train male and female advocates for Israeli rabbinic courts. It may be worth noting, though, that there is a perception that such male and female advocates are more effective if they are also trained lawyers in Israel’s non-rabbinic legal system. For other initiatives that supply legal advice for rabbinic court proceedings, see YAD LA’ISHA: THE MONICA DENNIS GOLDBERG LEGAL AID CENTER AND HOTLINE, https://ots.org.il/program/yad-lisha-legal-aid-center-hotline; and THE CENTER FOR WOMEN’S JUSTICE, https://www.cwj.org.il/en. For a current accreditation program for women and men to become rabbinical court advocates, see https://www.ynrcollege.org/Pages/Studies/ProgramCourse.aspx?programid=45; and the Israeli governmental portal for accreditation and its national list of advocates, https://www.gov.il/he/Departments/Topics/toanim.
the Talmudic stories report non-experts addressing their situation in rabbinical courts. Indeed, an analysis of 1.2 million deportation cases involving detained and non-detained immigrants found that those “with attorneys fare better at every stage of the court process.” Unlike the Talmudic adjudication narratives, which primarily concern financial matters, in the U.S. the stakes may be life and death, as in some immigration cases. In common with the Talmudic cases, however, the petitioners have no right to counsel. Their grasp of the processes to which they are subject depends on the discretion and conduct of the judge.

Given the geographical, temporal, and cultural chasm separating the Talmudic narrators from us today, we certainly should not expect every story to correspond to a modern parallel, and my work treats the Talmudic stories on their own terms, not simply as representations of modern experiences. At the same time, there is a transhistorical commonality that has both analytical and moral import. Any society that recognizes legal expertise, has established legal institutions, and processes for judicial decision making, will necessarily put certain members of society in positions of power that flow from their legal expertise, and simultaneously exclude other members of society from that knowledge and power. Reading the stories from a literary critical perspective places the spotlight on those excluded and helps to recognize their creativity and subtle subversions of authority as they navigate their way through foreign terrain. This act of literary analysis and empathy is informed by observations of similar dynamics in our own times, and suggests exploring continuities between ancient legal thinking and contemporary efforts to supply people with legal knowledge to advocate successfully for themselves.

4. They are more likely to be released from detention if detained, more likely to seek relief from deportation and more likely to receive it. Karen Berberich & Nina Siulc, Why Does Representation Matter? The Impact of Legal Representation in Immigration Court, VERA INST. JUSTICE (NOV. 2018), https://www.vera.org/downloads/publications/why-does-representation-matter.pdf; Ingrid Eagly & Steven Shafer, Access to Counsel in Immigration Court, AM. IMMIGR. COUNCIL (SEPT. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. I am grateful to Jacob Lipton for these references.

5. The application Justfix, for example, provides tenants in New York with templates to document and file complaints about their landlords. I wish to thank Sondra Leftoff for this reference. The Right to Immigration Institute in Waltham, MA trains non-lawyers to be advocates for affirmative asylum applications. The Boston Immigrant Justice Accompaniment Network (BIJAN/Beyond) sends lay volunteers to accompany people to their immigration hearings, because lay people’s accompaniment and observation, even without legal expertise, changes the power balance in court. Massachusetts has also opened walk-in Court Service Centers which aim to help people without lawyers “navigate the court system.” Learn about Court Service Centers, MASS.GOV, https://www.mass.gov/info-details/learn-about-court-service-centers. I am grateful to Jacob Lipton for this reference. Narratives of non-experts advocating for themselves against judges’ rulings, and the ways in which some judges aid them, is complementary to contemporary research into resistance to laws in the U.S. context, such as in the work of Norman W. Spaulding, including Norman W. Spaulding, Compliance, Creative Deviance, and Resistance to Law, 1 J. PROF. LAW. 135 (2013) (describing the role attorneys may have in informing their clients about the risks and parameters of disobeying the law, as part of attorney-client privilege) and other of his writings that highlight resistance to law as part of the history of legal traditions, such as Norman W. Spaulding, The Historical Consciousness of the Resistant Subject, 1 U.C. IRVINE L. REV.
readings will engender a greater sensitivity to the challenges of the
disempowered in our contemporary legal structures, rabinic and otherwise,
and foster renewed cross-cultural conversation around lay people’s
experiences navigating legal processes.

II. THE STUDY OF CASE STORIES AMONG TALMUDIC NARRATIVES

The Babylonian Talmud, an Aramaic and Hebrew Jewish legal corpus
from central Mesopotamia of late antiquity (3rd- 6th c. CE), contains many
different types of narratives that enhance, challenge, and punctuate legal
discussions. This article focusses on the few hundred case stories identified
as “adjudication narratives,” because the judge’s verdict is part of the
narrative’s plot.6 Because the Talmud contains a wealth of extended
narratives and narrative cycles – folk tales, exegetical stories about biblical
figures, anecdotes about rabbis, their relatives and friends, in the study hall,
on the road, and in their homes – case narratives tend to be overlooked.
Their prevalence and stylistic similarity of one adjudication narrative to
another contributes to this. There are thousands of case stories apart from
Amoraic adjudication narratives, which vary only slightly in form,
including case stories from earlier rabbis (Tannaim) in Roman Palestine,
legal hypotheticals presented in case form, and accounts of case facts, which
are followed by comments of rabbis that are either creations of the Talmudic
editing process or accounts of debate in Talmudic Babylonia. While their
repetitive form and brevity render the majority of adjudication narratives
fairly dry, the examples in this article merit literary and legal analysis.
Readers of the Talmud often read such narratives merely as a set-up for the
legal comments that follow them. By contrast, this article maintains that the
narratives evince the interest of the Talmudic authors in the human stakes
of deciding law.

The drama which appears in some case narratives has been
underappreciated both by scholars who focused on the literary merits of
Talmudic narrative, and by scholars who focused on legal reasoning or
Talmudic law. Yonah Fraenkel, among the first scholars to focus on the
literary merits and structure of Talmudic narrative in academic scholarship,
excluded these kinds of narratives from having literary merit.7 He

677 (2011).
6. Defined by formal characteristics: the features “a person/thing came before Rabbi so and so, and
he ruled X,” with and without other dialogue, reactions, or extra case details. For discussion of data
collection see Lynn Kaye, Protesting Women: A Literary Analysis of Bavli Adjudicatory Narratives, 32
NASHIM: J. JEWISH WOMEN’S STUD. & GENDER ISSUES 131 (2018). Eliezer Segal discusses this
narrative form in SEGAL, supra note 1, at 22, 158-62, though he distinguishes the stories by their subject,
for example, man, woman, child, ox, contract. The formulaic features were sometimes added to such
case stories if they did not already have them. Id. at 160-61.
7. YONAH FRAENKEL, SIPUR HA’AGADAH: AHJUT SHEL TOKHEN VETSURAH [THE AGGADIC
NARRATIVE: HARMONY OF FORM AND CONTENT] 366 n.3 (2001). For an argument for the literary merit
of short narratives of rabbis, see Eliashiv Fraenkel, Meetings and Conversations of Sages in Stories...
considered them to be simply accounts of events as they had taken place. It is true that some of these cases may have happened. Eliezer Segal concluded from his study of case narratives in tractates concerned with tort law that some are reports of cases actually judged, transmitted by students or colleagues of the judges themselves, while others may have been invented. Irrespective of their historical facticity, however, this article insists that the literary form of these stories deserve examination in their own right. In particular, exceptional adjudication narratives, that is, those which include dialogue between judge and petitioner, dramatize the emotional tensions attendant in judging cases and in being subject to judgment.8

Case stories, including adjudication narratives of the Babylonian Talmud, Palestinian Talmud, and Mishnah, have contributed to research of the history of Jewish legal institutions, Jewish social history, women’s history, and the history of Talmudic composition for the past forty years. Scholars have used them to argue over whether Babylonian rabbis enjoyed closer relations to Palestinian rabbis or to their own non-rabbi Jewish neighbors.9

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Scholars have shown that contrary to some Talmudic dicta suggesting women would be shamed by being present in court, women did appear before Palestinian and Babylonian rabbis for judgments in their cases, and in some cases, showed strength and courage. Furthermore, individual judges’ preferences have been examined. For example, Rav Nahman, in Shulamit Valler’s view, showed neither protective preference for female petitioners in his court, nor negative bias against them. On the other hand, Jonathan A. Pomerantz has shown examples of how relatives of rabbis seem to get better treatment before rabbinic judges than Jewish petitioners without rabbinic connections. Adjudication stories also feed the histories of rabbinic institutions and accounts of rabbinic jurisprudence in Babylonia.

This article takes the research in a new direction and relies on source material and questions that have not been explored in existing scholarship. Whereas much of the scholarship of adjudication narratives cited above restricted itself to one order, Neziqin (Damages), this article draws on a survey of adjudication narratives from the entire Talmud. And whereas other scholars have addressed brief case narratives along with lengthy tales, this article works exclusively with adjudication narratives to present an important vista onto forms of resistance and agency ascribed to legal non-professionals, and the way that those actions shape Talmudic legal theories.


13. HANINA BEN-MENACHEM, JUDICIAL DEVIATION IN TALMUDIC LAW: GOVERNED BY MEN, NOT BY RULES (1991); HESZER, FORM FUNCTION, supra note 8; 3 NEUSNER, supra note 9, at 280 and passim (“There can be no doubt whatever that the rabbis’ theorizing was based upon a wide range of practical experience in enforcing the law.”); Isaiah Gafni, Ma-asei beit din be-talmud ha-bavli: tsivrot sifrutiyot ve-hashlakhot historiot, 49 PROC. AAJR 23 (1982); Kalmin, supra note 8; Grossman, supra note 8.
of judging and law-making. In this regard, the formulaic nature of the short narratives offers advantages. Whereas long, meticulously constructed Talmudic narratives each have their own form and structure, adjudication narratives, by virtue of their generic and repetitive form, establish expectations for how judgments are supposed to go, against which diversions from these norms can be measured.

In short, whether or not these narratives preserve facts of cases that were actually decided, they exemplify the Talmud’s representation of oppositional, non-expert voices in the creation of law through judicial decision-making. The purpose of including such narratives in the Talmud might have been didactic, to exchange warnings, commiserate, inspire, and portray best practices for rabbinic judges. But whatever the reasons for their inclusion, these narratives model Talmudic-era understanding of advocacy by non-professionals in a legal context, which is still important today in Jewish and other legal contexts.

III. LAY PEOPLE’S LEGAL KNOWLEDGE

As described, historians of Jewish late antiquity reconstruct the relations between rabbis and other Jews in Babylonia, as well as in Palestine, in reference to these stories. For them, it is important to establish whether the narratives are meant to represent cases that actually happened, or if they are “fictionalized” or stylized for argumentative or legal theoretical purposes. Regardless how such an adjudication narrative began its life, whether as a case that was decided, or a derived variation on a received case, or an original composition by Talmudic editors; and regardless of whether the lack of names was an intentional decision to streamline the stories, an accidental outcome of transmission, or due lack of interest in the biographies of non-rabbinic figures, the result is a series of narratives that depict Jews who are neither rabbis nor their relatives, who seek justice before rabbinic judges.

14. SEGAL, supra note 1, at 177-90 (discussing medieval reception of these stories as precedent and the challenges in knowing for sure what they prove since the judges do not give reasons for their decisions).


16. It was once suggested to me that perhaps these stories of unnamed petitioners could have actually been stories of rabbis as petitioners in an original form, and that in the course of transmission, their names were lost. How could I be sure that these were depictions of lay people before judges? It is possible that the authors or transmitters of adjudication narratives left out the names of petitioners because they deemed them legally immaterial. Yet Richard Kalmin’s research indicates that this is
The petitioners argue, in the main, without reference to rabbinic laws. But they do show some knowledge of rationales for rules and perhaps familiarity with procedures and some arguments. How might a person who is not a legal expert, nor a relative of a rabbi, acquire this knowledge? It is reasonable to suggest that non-experts could have some knowledge of the law despite lack of formal instruction, either from their own prior cases or those of acquaintances, or from living near rabbis and watching what they do and how they speak. Jonathan A. Pomeranz argues that civil law topics were excluded from Babylonian rabbinic public instruction in the *pirqa*, and that the superiority of rabbinic legal knowledge made it possible for rabbis to exploit their advantages over non-experts.17 However, formal instruction is not the only way for Jews to learn about rabbinic court.18 For example, Catherine Heszer writes that since Palestinian rabbis had professions, their business partners and co-workers would “have experienced their halakhic views and moral values” and consequently rabbis would have had to be mindful of how they behaved in public.19 That kind of interaction may lie in the background of the case of the innkeeper below.20 While exposure to rabbis in Palestine and Babylonia would vary by person and locale, it seems possible that Jews could pick up useful legal information from rabbis they met.

They may have also learned about rabbinic law from other lay people. Consider a contemporary U.S. example of sharing legal information among non-experts. In his analysis of the United States rules permitting a low-income tenant to withhold rent if a landlord refuses to repair their home, David A. Super notes that landlords are more likely to comply with the requirement to repair their properties if more tenants know about and assert their right to habitability. But “who might provide this information . . . is an open question.” He concludes, “ultimately, awareness of the warranty depends heavily upon tenants learning about it through word-of-mouth. And the likelihood that tenants aware of the warranty will pass that information along likely depends on how useful the warranty has seemed to them,” in other words, whether their assertion of rights achieved their unlikely. He found it more likely that characters who were ordinary people in Palestinian rabbinic narratives are transformed into rabbinic characters in Babylonian narratives; he did not find a tendency of rabbinic characters losing their names and titles as their tales moved from Palestinian rabbinic circles to Babylonian Jews. RICHARD LEE KALMIN, JEWISH BABYLONIA BETWEEN PERSIA AND ROMAN PALESTINE 82-83 (2006).


18. “Court” in this article refers either to the context in which individual rabbis decide cases or to a gathering of three rabbinic judges to do the same, rather than a structure or location.

19. Heszer, Between Rabbis, supra note 9, at 10.

20. BABYLONIAN TALMUD, Hullin 132b.
desired outcome.\textsuperscript{21} This example of winnowing and sharing legal information by non-professionals suggests another way that late antique Jews of Babylonia could have had familiarity with rabbinic arguments or procedures. If other Jews found some success asserting certain arguments or taking certain actions, that information might have travelled. But word of mouth legal information can be imperfect, and unsuccessful arguments might be repeated by many people. When reading narratives involving lay people taking actions and making arguments in rabbinic court, there may be some familiarity or exposure to rabbinic traditions or procedures, but such knowledge is not presumed to be uniform, accurate or predictable.

IV. LAY PEOPLE’S TACTICS

Thirteen adjudication narratives, chosen from the several hundred involving unnamed petitioners for their depiction of argument and action in rabbinic court, demonstrate four tactics that lay people might use to affect their cases before rabbinic judges. These tactics are forum shopping, changing the facts of the case through action, interrupting the proceedings with tactical, respectful disobedience, and legal argumentation. I focus on these tactics because either they appear in more than one narrative (though usually not more than a handful at most), or because they resonate with contemporary U.S. legal contexts, offering opportunities for cross-cultural comparison. These tactics are also chosen because sometimes they result in a favorable result for the petitioner, though they may also be unsuccessful. My previous research analyzed adjudication narratives that depict (mostly) unnamed lay people protesting, cursing or weeping in front of a judge in response to their verdict.\textsuperscript{22} Those responses did not typically change a judge’s decision, though they might have prompted a reaction in the story. By contrast, the Talmud presents these four tactics as potentially successful. Petitioners who are conciliatory to the judge and deferential to his authority are treated well, as are those that promote the virtue of rabbinic judges over other judges. Petitioners and tactics that overtly challenge a judge’s authority, are (perhaps unsurprisingly, given the stories’ editors) treated as less effective.

A. Forum Shopping

One tactic for avoiding the consequences of adverse legal rulings is choosing another court, a move that is recognizable among many legal traditions in contexts of legal pluralism.\textsuperscript{23} In the U.S. context, forum

\begin{itemize}
  \item 22. Kaye, supra note 6, pp. 137-146.
  \item 23. ALEXANDER KAYE, THE INVENTION OF JEWISH THEOCRACY: THE STRUGGLE FOR LEGAL AUTHORITY IN MODERN ISRAEL (2020) explains the history of medieval and modern rabbinic attitudes
\end{itemize}
shopping often refers to the possibility of a litigant choosing between various state courts, or between state courts and federal courts. Scholars have suggested theoretical justifications, and even advantages, of this possibility in the U.S. context. These include the idea that concurrency helpfully empowers the litigant, while giving the government more opportunities to address a problem if one forum did not do so satisfactorily. The competition of multiple legal fora for litigants also imposes checks and balances on the power of courts, mirroring the separation of powers among the branches of government.

In Talmudic narratives, forum choice is generally a question of which Jewish judge will adjudicate, rather than a choice among alternative legal traditions or networks of courts, such as Sasanian state courts and rabbinic judges. By the beginning of the seventh century, the Sasanian empire in which the Babylonian rabbis operated had developed a complex criminal legal system based in Zoroastrian traditions. Under the overall jurisdiction of Sasanian law, Babylonian rabbis operated with some autonomy on civil matters, though they also recognized the authority of Sasanian law, as reflected in the Talmudic principle, “the law of the kingdom is the law.”

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26. The Aramaic phrase, attributed to the third-century Babylonian sage Shemuel is dina demalkhuta dina, and it appears in BABYLONIAN TALMUD, Bava Batra 54b, 55a, and BABYLONIAN TALMUD, Bava Qama 113a. Maria Macuch, Jewish Jurisdiction within the Framework of the Sasanian Legal System, in ENCOUNTERS BY THE RIVERS OF BABYLON: SCHOLARLY CONVERSATIONS BETWEEN JEWS, IRANIANS AND BABYLONIANS IN ANTIQUITY 154-55 (Uri Gabbay & Shai Secunda, eds., 2014).
Rabbis acting as mediators and adjudicators in Sasanian Babylonia echoes the options for dispute resolution in pre-Sasanian Persian, at least as they are portrayed by later Zoroastrian scholars. Sasanian criminal law developed from a less formal structure in which chosen third-parties adjudicated disputes, according to Maria Macuch.  

The relative independence of rabbincial adjudication may explain why Persian judges and courts are not depicted within Talmudic adjudication narratives as an alternative legal forum, despite Sasanian state courts in interest in governing “the proper management of property.” The Sasanian government granted autonomy to rabbis or other Jews to judge disputes. This omission may also reflect a preference among Talmudic authors not to emphasize alternate sources of authority.

Rabbinic stories depict individual rabbis whose influence extends to their town or village. Local Jews might approach them to adjudicate, and usually in the story there is no sense of another rabbi who could act as judge in the vicinity. However, rabbis acting as judges do sometimes refer to the conflicting legal views of their colleagues, or to a conflicting legal tradition, which they know to be upheld by a contemporaneous rabbi in a different locale in Babylonia. The narratives do not generally indicate the extent to which the petitioners had a free choice of rabbinic or other adjudicators, or if they might have been compelled to appear before a certain rabbi by the other party, or even, perhaps, social group pressure. It is difficult to determine the extent to which lay people seeking adjudication from rabbis might have been prepared with knowledge of their prior rulings, since the “choice” of rabbis to whom the person turns is presented without narrator comment. Narratives also refer to Jews seeking a judgment before the Exilarch, a political leader in the Jewish Babylonian community, as opposed to local rabbis, who probably acted independently of the Exilarch’s authority, despite the Exilarch’s considerable judicial power.

27. Maria Macuch, A Zoroastrian Legal Term in the Dēnkard: Pahikār-rad, in I RAN QUESTIONS ET CONNAISSANCES 77, 80-86 (Philip Huyse ed., 2002). A summary of Persian law from the pre-Sasanian period, presented in the ninth-century Dēnkard, distinguishes between litigants who take their dispute before a judge and those who “do not (hold) a dispute before a judge” and prefer instead to resolve the dispute by retaliation, ranging from threats to physical violence. Macuch’s analysis of this text indicates that resolving a dispute “before a judge” could describe a range of scenarios before the advent of state courts in the Sasanian empire, and these scenarios included a single judge, or a set of judges, who had “the competence to give a legal decision regardless of the willingness or unwillingness of the opponents to reach a settlement.” People could also bring a dispute before a group of three righteous men acting as mediators, or to a set of witnesses. The key is that this process took the injury to the broader community for resolution rather than using kin-based retaliation.


29. Babylonian Talmud Mo’ed Qatan 16a details rules of summons in cases of potential excommunication, upon which medieval commentators expanded. Rabbi Yom Tov of Seville (Ritva) derives from the Talmud’s comment on 16a that only the court may summon a person to answer for an excommunicable offense, not the harmed party.

In Talmudic adjudication narratives depicting lay people, forum choice is depicted as beneficial if the litigant selects a rabbinic judge over another judge like the Exilarch. However, when the petitioner’s shopping undermines judicial authority, such as by challenging one judge with the opinion of another rabbi, the petitioner does not succeed. The first narrative to be considered in detail depicts two legal authorities who render judgment: the Exilarch and the rabbi, Rav Nahman. Both of these judicial forums operated according to some form of Jewish law. The case involves a person who damaged the fruit tree of another. The question is how to calculate the value of that tree for the purposes of assessing monetary compensation to the tree owner. The two judges calculate the damage suffered by the tree-owner differently. Rav Nahman’s decision concludes the narrative, suggesting its superiority over the Exilarch’s. In this instance, choosing a different court was to the advantage of the offender, who would pay less compensation to his fellow.

A man cut down his fellow’s date tree. Some say: A man cut down three of his fellow’s (date trees). He came before the Exilarch. He said to him, “I saw those, and there were three trunks and they were worth a hundred zuz. Give him thirty-three and a third.” He said, “Why should I come to the Exilarch who judges according to the law of the Persian (palm)?” He came before Rav Nahman. He said to him, “Out of sixty (meaning, assess the damage in relation to the loss of value of an area sixty times its size).”

The story appears after a discussion of assessing the damage that an animal might cause to another person’s property by eating its produce. Rather than assess the value of the lost fruits to decide the amount of compensation, rabbis offer variations on a standard for calculating damage to land, many of them calculating damage at a discounted rate starting with the price of a large tract of land, for example, sixty times the area of a small, standardized planting area (a “place of a se’ah”). They then assess the
undamaged value of a “place of a se’ah” within that larger tract, and finally assess the change in value of the “place of a se’ah” due to the animal having eaten a row or patch of produce.\(^{32}\) In this context, Rav Nahman links the calculation of the monetary compensation for human damage to trees, with that of animal damage to fields and orchards, perhaps a novel approach. By focusing on the value of a piece of land as a proportion of a larger plot, whereas the Exilarch focused on the value of the tree itself, Rav Nahman’s method for assessing damages results in paying lower compensation for the tree.

The story exhibits considerable agency for the anonymous litigant, who puts aside the Exilarch’s judgment and petitions a different authority. It is also noteworthy that the story is told from the perspective of the offender, and not the damaged party. The narrative does not explain why he, rather than the tree owner, who was presumably bringing the claim, is empowered to choose the judge and therefore the method of assessing the damages that he owes. One could imagine a different story in which the other party to the case, the tree owner, hears that his opponent went first to Rav Nahman, and in response sought out the ruling of the Exilarch instead. However, the story appears in its Talmudic context, illustrating how an influential rabbi applied the sixty-times value rule for compensation of human damage to trees, and as such its perspective works well in the broader legal context.

While the offender’s criticism of the Exilarch’s decision is often translated, “Why should I come to the Exilarch who judges according to Persian law,” there is actually little evidence that the Exilarch applied different law from that of rabbis like Rav Nahman. My translation follows Geoffrey Herman’s analysis of this story, which concludes,

Even if there is reason to assume that Jewish judges, and in particular those who were subordinate to the Exilarchate, knew the Sasanian laws, the “laws of the kingdom,” and took pains not to differ too far from them – there is no basis for the view that the Exilarchal judges judged according to Persian law, and not Jewish law (however these were defined at the time).\(^{33}\)

The Exilarch charged the offender for damaging a more costly tree than the offender thought he should be responsible for. Herman, drawing on medieval commentaries, explains that the Exilarch judged that the offender owed for destroying a “Persian palm,” while Rav Nahman judged the

\(^{32}\) A se’ah is a grain measure and a “place of a se’ah” is 2500 square cubits. Medieval commentators debate whether a “place of se’ah” refers to the area in which it is possible to plant a se’ah of seed, or from which one expects to harvest that amount. See Tosafot, BABYLONIAN TALMUD, Bava Qama 58b, s.v. “shamin.”

\(^{33}\) Herman, supra note 28, at 208. SHAI SECUNDA, THE IRANIAN TALMUD: READING THE BAVLI IN ITS SASANIAN CONTEXT 97 (2014), reads the story the same way, and see his bibliographical and textual references, id. at 197 n.64, that some copyists corrected their texts towards the reading “Persian law.” SEGAL, supra note 1, at 72-73, discusses the reception of this narrative among later sages.
damages in compensation for destroying a “Aramean palm,” which was less valuable. This is not an example of a Jewish layperson choosing between Sasanian Persian law and rabbinic rulings.\textsuperscript{34} Rather, it is a competition between the Exilarch and Rav Nahman as individual judges, and perhaps an opportunity for the editors of the Talmud to make a rabbi appear to be a better judge, or more popular among Jews, than the Exilarch. In any case, the narrative displays successful forum shopping by a lay person, who rejects one judgment and seeks another, resulting in a lower payment for damages.

In other narratives, choosing a rabbi who is likely to apply the law in a sympathetic way to one’s case is deemed reasonable if recommended by a rabbinic judge. It is deemed ineffective, however, if the petitioner shops for a judge in a manner that highlights the inconsistency of two rabbinic views or suggests that the application of a more stringent interpretation is arbitrary. In those situations, the rabbinic judges portray the law as inflexible, which bolsters the reputation of rabbinic norms as fair and resistant to manipulation. In BT Mo’ed Qatan 16b, an adjudication narrative begins with an unnamed Torah scholar disparaging a woman for being too bold because she did not show him deference in a public thoroughfare. The story uses the term “follower of the rabbis,” (tsurba merabanan) whose etymology is unclear, but which Michael Sokoloff explains based on its literary contexts as “a member of an intermediate scholarly class between the common people and the scholars.”\textsuperscript{35} The Talmud portrays the woman as concerned that the rabbinic follower may have ordered her to be excommunicated. Or maybe she is being urged to seek further clarification because of social pressure.\textsuperscript{36} She seeks a ruling about the meaning of the man’s condemnation from a different, and prominent Torah scholar, Rav

\textsuperscript{34} Elsewhere in the Babylonian Talmud there is a reference to “the law of the Persians.” It is found in a discussion of rules related to guaranteeing a loan, and it also involves Rav Nahman. BABYLONIAN TALMUD, BAVA BATRA 173b. See Maria Macuch, “This is the Law of the Persians” – An Allusion to the Sasanian Law of Surety in the Babylonian Talmud, IRAN NAMAG, Summer 2016, xviii; SECUNDA, supra note 31, at 93-109. Because that passage does not include relevant examples of lay advocacy, it is not central to this discussion, except to note that the Babylonian Talmud does show familiarity with Sasanian legal norms, occasionally comparing them to rabbinic rules and incorporating certain Persian legal terms into their discussions. See, for example, Yaakov Elman, Samuel’s Scythe-handle: Sasanian Mortgage Law in the Bavli, in 7 IRANO-JUDAICA: STUDIES RELATING TO JEWISH CONTACTS WITH PERSIAN CULTURE THROUGHOUT THE AGES 129 (Geoffrey Herman & Julia Rubanovich eds., 2019); Yaakov Elman, “Up to the Ears “ in Horses’ Necks (B.M. 108a): On Sasanian Agricultural Policy and Private “Eminent Domain,” 3 JEWISH STUD. INTERNET J. 95 (2004); Maria Macuch, Allusions to Sasanian Law in the Babylonian Talmud, in THE TALMUD IN ITS IRANIAN CONTEXT 100 (Carol Bakhos & M. Rahim Shayegan eds., 2010); Maria Macuch, An Iranian Legal Term in the Babylonian Talmud and in Sasanian Jurisprudence: dastwar, in 6 IRANO-JUDAICA: STUDIES RELATING TO JEWISH CONTACTS WITH PERSIAN CULTURE THROUGHOUT THE AGES 126 (Shaul Shaked & Amnon Netzer eds., 2008); and Maria Macuch, Iranian Legal Terminology in the Babylonian Talmud in the Light of Sasanian Jurisprudence, in 4 IRANO-JUDAICA: STUDIES RELATING TO JEWISH CONTACTS WITH PERSIAN CULTURE THROUGHOUT THE AGES 91 (Shaul Shaked & Amnon Netzer eds., 1999).

\textsuperscript{35} Michael Sokoloff, A DICTIONARY OF JEWISH BABYLONIAN ARAMAIC OF THE TALMUDIC AND GEONIC PERIODS 956 (2002).

\textsuperscript{36} My thanks to Marinka Yossifon-Halpern for this suggestion.
Nahman. On the previous folio, the Talmud deduces that even a disciple of a rabbi can impose some sort of excommunication if he is insulted. The longer passage in which the story appears displays some confusion between words for excommunication and their typical lengths of punishment in Babylonia (one, seven, or thirty days). The Talmud concludes that the word “neziphah” refers to a single day of excommunication in Babylonia, which is illustrated in the following adjudication narrative.\(^{37}\)

A woman was sitting on a path and had spread her legs and was winnowing barley groats. A follower of the rabbis went and passed by and she did not bow down before him. He said, “How brazen is this woman!” She came before Rav Nahman. He said to her, “Did you hear a ban from his mouth?” She said to him, “No.” He said to her, “Go and observe for yourself one day of excommunication.”\(^{38}\)

This story appears in tractate Mo’ed Qatan, and preceding it are a series of narratives in which rabbis impose excommunication upon themselves and one another (16a-b). Directly preceding the story of the woman winnowing is a story of two Babylonian sages, Mar Uqba and Shmuel, and their negotiation of proper honor in their mutual interactions. When Mar Uqba did not speak to Shmuel as they walked together, Shmuel took offense, and Mar Uqba imposed a day of excommunication upon himself as punishment. In this context, Rav Nahman’s imposition of a single day of excommunication and Mar Uqba’s imposition of the same, both support the Talmud’s statement that an unspecified excommunication is a single day among Babylonian Jews.

The story of the woman winnowing, alongside the longer narrative of the two Torah scholars, also amplifies the Talmud’s concern with respect for the superior social position of Torah scholars, and some friction in establishing priority among sages. But the juxtaposition of these two stories leaves open different interpretations of the woman’s behavior. Is she like Mar Uqba, imagined by the narrators to have repented her rudeness, and approaching Rav Nahman of her own accord for judgment? Or is she summoned to appear by a rabbinic follower, though this pressure is not narrated in the story? The rabbinic follower is depicted as certain that he takes social precedence and deserves deference. The story of Mar Uqba and Shmuel, by contrast, is animated by the two sages showing one another honor, exchanging the superior position in judgement and in study, and

\(^{37}\) Valler, supra note 10, at 119 suggests that the woman did not know how to interpret what the Torah scholar said to her. Valler sees in this story an independent female figure portrayed as confident and independent enough to seek clarification of her legal circumstances from a judge.

\(^{38}\) Babylonian Talmud, Mo’ed Qatan 16b. The base text for translation, MS Columbia 294-95, as well as MS Oxford Opp. Add. fol. 23; MS Vatican 108 (a similar phrase, difficult to read); MS Vatican 134; and MS Munich 95 include the activity she was performing, while the printed editions Venice, Pisaro and Vilna lack the phrase. The order of the verbs “went” and “passed by” varies in manuscripts, but this is not a significant difference for the story.
includes self-excommunication as a tool of repentance and showing social deference. Together these stories emphasize the importance of excommunication as a tool of maintaining social hierarchy and rabbinic figures as honored people in that hierarchy.

The narrative distinguishes between a nameless follower of rabbis and Rav Nahman, a rabbinic authority. Though the passing scholar thought she was disrespectful, and Rav Nahman supports his colleague, there are also elements of the narrative that show sympathy with the woman. It sets the scene with her on the path first, occupied with laborious activity. Granted, it is a pathway, and she is sitting on it, while he is using it to travel, but had the story begun with him on the way, and introduced her as an obstacle, the traveler might have been the central figure. The story also chooses to make the scholar an anonymous “follower” of the rabbis, which aids the disappearance of this character after the initial interaction. Rav Nahman’s question could suggest that the woman asked about the extent of excommunication practices that she should observe. If she thought the first rabbi had excommunicated her indefinitely, then turning to a different rabbi gave her a good result. She also may have recognized a hierarchical difference between the two men and chosen a recognized rabbinic figure to render a decision on what might have been careless speech of the other man. She shows deference to rabbinic authority by seeking a ruling, and perhaps, independence as well, by not seeking out the original rabbinic follower who cursed her. For our purposes, in the end, this is a story about rabbinic conduct in relation to other Jews inside and outside of courts. For lay people, it suggests that the rabbinic group is not monolithic, but it is also protective of the honor of its members. So, if one member of the rabbinic group treats a non-rabbi badly, asking another rabbi, particularly a more influential figure, could be beneficial, but the questioner should proceed cautiously.

The next story likewise displays petitioners seeking a second ruling. In this case, the second court is ineffective as an avenue for their wishes because of the second judge’s respect for his colleague, even if he would have ruled differently in the absence of an existing ruling. In the U.S. context, res judicata states that once a court has ruled on a case, none of the parties involved can bring it again to another judge. In post-Talmudic rabbinic law, though, no ruling is ever completely final; a monetary case


41. RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-20, 27-29 (AM. LAW INST.1982).
can be reopened if a party brings new evidence. This narrative displays a view that once a rabbi has given a ruling on a case, a second judge should not rule on the same case, (presumably absent new facts, though this is not explicit). The story concerns people living in Roman Palestine of the early third century, on the cusp between the Tannaitic and Amoraic rabbinic periods. Babylonian rabbis studied Palestinian case narratives as part of their education, and the Babylonian Talmud reports versions of the Palestinian traditions that differ from the Palestinian Talmud. This narrative is an example of Babylonian Talmudic editors incorporating a tradition from Palestinian rabbis about adjudication and changing it along the way.

In Babylonian Talmud Sanhedrin 29b, the case concerns the estate of a man renowned for his wealth, a “mouse who rests on dinars.” The fate of the estate is disputed because that man acknowledged debts when he died. In order for a creditor to be able to collect a debt without evidence (such as a bill), Talmudic law requires the borrower to acknowledge the debt before witnesses. In the absence of witnesses, verbal admissions of debts are weaker, because there are excuses that people can make to deny them afterwards, such as “I was joking.” Furthermore, some rabbis hold that a wealthy person might acknowledge fictional debts in order to make themselves appear to be poor, to deceive the general community.

Presumptions like these are a way to resolve cases of doubt. But the complication in this case is the time of admission – it was on the wealthy man’s deathbed. Does this suggest his admission could have been true and therefore is evidence in the creditors’ favor? What advantage could be gained by making himself appear poor at the end of his life?

They sued his children before Rabbi Yishmael, son of Rabbi Yosei. He said to them, “When we say a person is likely to make himself appear poor (literally, “not to make himself full”), this refers to when he is alive. But after death, this does not apply. Go and pay him half.” They paid half. [The creditors] came back and sued (for the other half) before Rabbi Hiyya. He said to them, “Just as a person is likely to make himself appear poor, thus he is likely to make his children appear poor.” [The children] said to him, “Let’s go and get back that half!”

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42. My thanks to Jennie Rosenfeld for bringing this point and contrast to my attention. Arthur Jay Silverstein, The Right of Appeal in Talmudic Law, 6 CASE WESTERN RESERVE J. INT’L L. 33, 37-41 (1973), presents six forms of appeal discussed in Talmudic and later rabbinic literature. His article harmonizes early rabbinic through medieval rabbinic sources in order to create a legal theory, which is an approach that is common in legal studies and less practiced in Talmudic scholarship. However, the sources and comparative discussion about appeal are valuable for both fields.

43. SEGAL, supra note 1, at 35.

44. Rashi, BABYLONIAN TALMUD, Sanhedrin 29b, s.v. “adam ‘asui” suggests they lie to avoid the evil eye.

He said to them, “No, the elder has already ruled.”

Rabbi Yishmael son of Rabbi Yosei reasons that while a person might lie about his own wealth in life, he would not lie about the estate he leaves to his heirs. The reason for awarding just half of the claim is opaque in the Babylonian Talmud’s version, but is clear in a parallel story in the Palestinian Talmud, where heirs are divided into minors and adults: only the adult heirs receive the money. Rabbi Hiyya holds a different presumption: a person might lie to make himself and his heirs appear poor. The story describes the creditors appearing before one judge, receiving partial payment, and then seeking further payment in the court of another judge, who, it turns out, actually holds a less sympathetic legal view. But, since there is already an existing decision, a form of res judicata prevents Rabbi Hiyya from overturning the first decision and allowing the heirs to take back what they had paid.

I see two lessons for petitioners seeking a second judgment arising from this narrative: first, shopping for favorable rulings is potentially futile. Indeed, a second ruling can sometimes be less favorable, not more so. In

46. Babylonian Talmud, Sanhedrin 29b. In the fifth sentence, MS Yad Harav Herzog has just “sued,” while the Venice and Barko editions and manuscripts Karlsruhe Reuchlin 22 and Munich 95, as well as the Vilna edition, add “for the other half.” Rashi, Babylonian Talmud, Sanhedrin 29b, reads “Let’s go and get back that half!” differently, with the Aramaic meaning literally “let’s go and return,” which in the voice of the children, not the creditors as above, means the creditors thought they should return the half they already collected to the heirs. Avraham Amir, Gilguleihem shel sippur avitui, 90 Tsion 260, 261 (1982), notes that Rabbi Meir Halevi Abulafia reads “Let’s go and return” as I do in the translation above, as the heirs’ speech. An alternative translation for the Rabbi’s last statement is “The elder has already given instruction,” as in Rubenstein, supra note 8, at 33. Rubenstein traces the movement of this phrase among several Talmudic narratives.

47. The story has a parallel in Palestinian Talmud, Shevuot 7:2, and Palestinian Talmud, Bava Qama 6:7. Amir, supra note 44, at 263-64, comparing the Babylonian and Palestinian versions, concludes that certain curious details in the Babylonian version, for instance, why Rabbi Ishmael son of Rabbi Yosei awarded claimants half of the money, are clarified by reference to the Palestinian Talmud. The story in the Palestinian Talmud is about a deposit of gold by a tenant farmer. There is a dispute between heirs of the tenant farmer, and heirs of his (also deceased) landlord, since perhaps whatever the tenant deposited was actually his landlord’s – could the tenant have really owned that much gold? The landlord’s children were, at the time, minors and adult heirs. The judge awards the gold to the heirs of the landlord. Half of the deposit is immediately returned to the adult heirs of the landlord, and the half due to the minor heirs of the landlord is to stay in deposit until they reach majority. The two versions of this case in the Palestinian Talmud and Babylonian Talmud diverge significantly enough that they end up as precedent for different laws. Overall, they are about two different financial disputes: a deposit and a debt. In the Babylonian Talmud, the reason for awarding half is not clear, and the necessity for two judges is likewise not clarified, while in the Palestinian Talmud the first judge dies and there is an expectation of time between two payments. In the Babylonian Talmud, a lesson from the story is that once a different judge has ruled, it stands and is not reversed, and thus the Babylonian Talmud version is a useful narrative for studying cases before different judges.

48. Shalom Albeck, Batei Din Bimei Hatalmud 134-35 (1987), discusses Talmudic norms for overturning previous decisions with brief reference to this case. Talmudic narratives reflect the idea that “a man could go before whichever sage or judge he wanted, and a man could go for the same matter before several sages and several judges.” Id. at 134. The Palestinian Talmud tells the story that the first judge died and then Rabbi Hiyya took up the case after his death. Amir concludes that the meaning of “the elder has already ruled” in Babylonian Talmud Sanhedrin is that the ruling stands at least for previous cases, if not for future cases. Id. at 166-67. Amir notes that elsewhere this statement means reversing a previous judgement.
this case the creditors did not lose, since the second opinion did not replace the first. But it would seem a worthwhile lesson that if another judge were to reopen a case, the result could always be worse. Second, do not expect a second judge to overturn the ruling of the first; he may decline to hear the case, deferring to the previous decision. For judges, the story emphasizes the importance of imbuing their courts with respect for the decisions of other judges, even those with whom they disagree.

By contrast with the mild reception the creditors receive in BT Sanhedrin 29b, the next story indicates that it is provocative for a layperson to try to change a judge’s decision by referring to another judge’s dissenting opinion. This is demonstrated in a story of a struggling innkeeper with priestly lineage, who receives advice from a rabbi named Rav Tavla. Rav Tavla is not a very well-known figure, appearing just twice in the Palestinian Talmud and only in this passage in the Babylonian Talmud.49 The innkeeper is having trouble making ends meet. Rav Tavla suggests the innkeeper enter into partnership with a successful non-priest Jewish butcher, which would give his business a boost. While Jews from the non-priestly castes must tithe their produce to support priests, priests themselves owe no such portions.50 Partnering with a butcher who is not a priest, reasons Rav Tavla, would help the inn, and the innkeeper’s priestly status would allow the new partner to avoid the “tax” liability of paying tithes. Rav Tavla has specialist knowledge that can materially improve a Jewish person’s circumstances, and his advice combines legal knowledge and business sense. The narrative leaves open whether we are to imagine the innkeeper seeking free advice from a judge at his table, or whether the rabbi sees the man’s struggle on a regular basis and solicits information in order to suggest a legal remedy. In any event, the innkeeper ends up before Rav Nahman, presumably under investigation for something like tax avoidance. Rav Nahman rejects his strategy, but the innkeeper does not readily accept the judgment. He cites Rav Tavla’s opinion, and then Rav Nahman rebukes him.

Rav Tavla’s innkeeper was a priest. He was suffering economic hardship. He came before Rav Tavla. “[Go] and become a financial partner with those non-priest Jewish butchers, since because of you they will be exempt from allotting priestly portions and will invite you into the partnership.” He came before Rav Nahman, and Rav Nahman obliged him to pay (priestly portions). He said to him, “But behold Rav Tavla exempted us!” He said, “Go, remove (priestly portions) and

49. Rav Tavla, so-called in the Babylonian Talmud, is Rabbi Tavlai in the Palestinian Talmud. ZACHARIAS FRANKEL, MEVO HA-YERUSHALMI 90 (1966). Frankel posits that he was a Babylonian who relocated to Palestine.

50. This is because priests are the intended recipients of many of the biblical tithes and set-aside portions and are not themselves obligated to tithe. 4 NEUSNER, supra note 9, 144-45, discusses Babylonian Talmud passages concerned with whether priestly gifts ought to apply in the diaspora.
if you do not, I will remove Rav Tavla from your ear!” 51

He (Rav Tavla) 52 went before Rav Nahman and asked, “Why did the Master do this?” He said, “When Rabbi Aha bar Hanina of the south came, he said that Rabbi Yehoshua ben Levi and all the sages of the south said, “For two-three weeks a priest-butcher is exempt from giving priestly portions, after that he is obligated.” “So let the ruling be according to Rabbi Aha bar Hanina?!” “That goes for when a priest has just arrived and does not yet have an established butcher’s stall, but if it is already established, the ruling is effective immediately.”

The Talmud’s dialogue between Rav Nahman and his interlocutor, which follows the narrative with the innkeeper, suggests that Rav Tavla was only right to a point, and his solution for the innkeeper’s failing business could not continue for an indefinite period. Rav Nahman quotes an oral tradition attributed to a third century Talmudic sage, Rabbi Yehoshua ben Levi, to overrule Rav Tavla’s exemption of meat that is co-owned by an Israelite and a priest from priestly tithes. A butcher, even if he is a priest, is liable for tithes either immediately if he has an established business, or if he is a newcomer to the area, after a few weeks, to allow him to become established. Rav Nahman treats the meat owned by two parties, a priest innkeeper and an Israelite butcher, like the meat of a priest-butcher. The established business of the inn and of the Israelite butchers is similar enough to the established butcher’s stall. Rav Nahman’s ruling to the innkeeper also indicates that a rabbi respects another’s judgment to a point. It is possible that the innkeeper had already practiced his workaround for some time (two to three weeks) by the time Rav Nahman ruled, so Rav Tavla faced a different set of facts than Rav Nahman. Or, perhaps more likely, Rav Tavla was not aware of the oral tradition that Rav Nahman cited, and the second story explains why Rav Nahman’s judgment superseded Rav Tavla’s. This story hints at a hierarchy of rabbis, perhaps based in differential access to oral traditions, with Rav Nahman able to exert authority to remove another judge from an advising role. It also indicates that a lay person cannot rely on prior rabbinical advice to protect him from what appears to be a more authoritative judge overruling it.

Rav Nahman emphasizes his rebuke with a word play on the verb for

51. BABYLONIAN TALMUD, Hullin 132b. MS Vatican 122 is the base for translation. MS Vatican 120-21 has Rav Simlai instead of Rav Tavla. MS Firkovich 293 omits the phrase “he came before” Rav Tavla. A number of textual witnesses, MS Vatican 120-21 and early printed editions (Venice, Soncino, Toledo) omit “he came before Rav Nahman,” moving directly to “Rav Nahman obligated him.” The argument citing Rav Tavla’s judgment does not appear in MS Firkovich 293 and MS Oxford: Heb. e. 98/4, but the early textual witnesses do record the innkeeper arguing back something like “we/I am exempt!”

52. The Venice, Soncino and Vilna editions all identify “he” as Rav Tavla, seeking further clarification or explanation from Rav Nahman. The same is true for the Vatican 120-121 and Oxford Heb. e. 98/4 manuscripts. The remaining manuscripts all have just “he came,” or “he went” so the questioner could potentially be the innkeeper.
“removing” priestly portions from produce – “remove” the portions, despite your new partnership, or I will “remove” Rav Tavla from you! In other stories, there are far worse consequences for a petitioner who cites another rabbi’s different view in an attempt to sway a judge. In BT Nedarim 50b, an unnamed Jewish woman in Neharde’a challenges Rav Yehudah about whether his teacher would have ruled against her. The dialogue becomes fierce, and at the conclusion of the narrative, he excommunicates her, and she dies.

To conclude, the Talmud depicts forum choice as an effective tactic for lay people if their actions bolster the judging rabbi’s authority. More specifically, the stories depict Rav Nahman as a figure who holds greater legal authority than others in the rabbinic group, whether named rabbis like Rav Tavla, or those who are in the rabbinic ambit, such as the anonymous rabbinic follower who cursed the woman in the marketplace. This authority to overrule or to uphold the actions of other rabbis, though, is exercised with restraint: Rav Nahman prescribes a day of excommunication, upholding and specifying the application of the rabbinic follower’s pronouncement. He forces the innkeeper to sever his business partnership, but in a way that allows that Rav Tavla’s strategy might have been valid, but only for a limited time (interpreting the story with its postscript). In other contexts, the Talmud indicates that a prior ruling stands if no new facts are introduced. For example, the narrative of Palestinian rabbis ruling on an inheritance, in which heirs seek successive judgments, ends with the principle “the elder has already ruled.” These narratives suggest that there is some flexibility to seek another judgment – because a rabbinic ruling is not always final, and it would be useful to learn of a judge’s legal approach before judgment is sought and rendered. They also indicate, however, that forum shopping before a verdict, is different from seeking a second ruling. Although a more powerful judge may find a reason to overturn a prior ruling, it is not a powerful strategy for a non-expert to cite alternative legal perspectives to a judge.

B. Changing the Facts of the Case

Another way that non-experts affect the outcomes of their cases is to change the facts of the case, which can prompt the judge to rule differently. Changing the facts of the case means taking action that is legally significant, and which adds a new detail to the facts of the case. That happens in one of

53. That repetition of “remove” may be a happy accident here, since the expression “remove someone from your ear” also appears in a case having nothing to do with the verb “remove,” in the Babylonian Talmud, Ketubot 54b. Relatives of Rabbi Yohanan received a favorable ruling, but Reish Lakish threatened to “pull Rabbi Yochanan from their ears” unless they followed him. Both passages show the threat as a reaction against Jews benefitting from close relationships to rabbis. Textual witnesses to BT Ketubot 54b passage all include the phrase, but some spell the word for “ears” without a consonant “z,” e.g. Vatican 130.
the series of adjudication narratives of Babylonian Talmud Gittin 35a, all of which discuss widows seeking payment of their *ketubot* from the estates of their husbands which now belong to the heirs. Rabbinic marriage grants wives a financial settlement (*ketubah*) upon divorce from their husbands or in the event of widowhood. In the series of stories below, women are widowed, and seek to collect their settlement, but the women cannot prove that they did not receive an equivalent sum before their husbands’ death. This requirement is unusual in rabbinic norms of collecting debts. Usually, if there is no other proof, a creditor can take an oath and then collect the debt. The Mishnah proscribes that option for widows.54 The broader narrative passage and its gender disparity has been thoroughly examined in prior scholarship.55 My focus is how this particular narrative displays a successful tactic for resisting an adverse ruling by a person who is neither a rabbi nor a relative of one, and the narrative’s significance when considered in conjunction with other adjudication narratives elsewhere in the Talmud.

[She] came before Rav Huna. He said to her, “What can I do for you? Rav does not permit widows to collect their *ketubah.*” She said, “Isn’t the reason that I might have collected something from my *ketubah*? As the Lord of Hosts lives, I have not received anything from my *ketubah* at all!” Rav Huna said, “Rav agrees [she can take payment] when she jumps forward [takes the initiative and swears].”56

While other stories in this passage in Babylonian Talmud, Gittin 35a, show widows facing harsh consequences of protesting their verdicts, this woman succeeds. First, she reasons aloud the underpinning of the law, and explains that it does not apply to her. She says essentially, I do not dispute the rule, but the rule does not apply here. Second, she acts in a way that adds a new legally relevant fact to her case. She swears to the fact that she has never received payment. The action she took is against the Mishnah’s rules.

54. David Weiss Halivni, Meqorot Umasorot: Biurim Betalmud Leseder Nashim 537-38 (1968), notes that the Babylonian Talmud and Palestinian Talmud interpret the reason for the Mishnah’s ruling differently. The Babylonian Talmud argues the court cannot give a widow an oath because she may permit herself to lie to collect, while the Palestinian Talmud’s position is that even one who swears truthfully can be punished. The debate about whether a Jew is punished even for swearing truthfully, which would push rabbis to avoid administering oaths, is found in Palestinian Talmud, Shevuot 6:5 (37a), and in Midrash Rabbah, Vayyiqra Rabba 6:3.

55. One or more of the adjudication narratives in Babylonian Talmud, Gittin 35a, are analyzed by many scholars, including Aryeh Cohen, Rereading Talmud 153-92 (2002); David Weiss Halivni, Meqorot Umasorot: Biurim Betalmud Leseder Nashim 536-39 (1968); Ilan, Stolen Water, supra note 10, at 185-223; 3 Neusner, supra note 9, at 280-81; Richard Kalmin, The Babylonian Talmud: Between Roman Palestine and Persia 84-85 (2006); Beth A. Berkowitz, Reconsidering the Book and the Sword: A Rhetoric of Passivity in Rabbinic Hermeneutics, 17 Biblical Interpretation 167-68 (2009); Labovitz, supra note 9, at 9-10; Grossman, supra note 8, 112-14; Pomerantz, supra note 11, at 129-30, 194-95.

56. Babylonian Talmud, Gittin 35a. MS Vatican 130 was the base text for this translation. The manuscripts and early printed editions of this narrative are relatively uniform. MS Firkovich 187 reuses “collect” instead of the verb “benefit” for the widow’s declaration, and MS Vatican 140 reverses the order of two nouns, “anything” and “of my marriage settlement” with no semantic difference.
for how judges may act with regards a widow – they cannot administer an oath. She preempts the court by changing the facts of the case – she transforms herself from a widow who cannot give an oath about not having received prior payment, and for whom the court cannot administer such an oath, into a woman who has in fact sworn that oath (without the court’s prompting).

The story is ambiguous about how much knowledge of rabbinic procedures the woman demonstrates. Do the storytellers portray a woman knowingly circumventing a rule against the rabbis giving her an oath by swearing unprompted, or a woman serendipitously acting out of ignorance of the law, in a manner that allowed the rabbis not to punish her disobedience, but rather react to new legal facts? Depending on how one interprets the story, it is either an example of disobedience through a knowledgeable exploitation of a loophole, or it demonstrates the importance of lay people not knowing the ins and outs of the rabbinic rules so they can act innocently and genuinely, and thereby reset the game pieces in their favor, without being suspected of manipulation.

The Talmud’s portrayal includes the woman’s correct description of the source of suspicion against widows but gives no indication that she knew that if she did swear, it would actually override the Mishnah’s guidance not to give her an oath. The Palestinian Talmud’s version of this rule is “if she transgressed and swore, Rav Huna said, ‘her oath stands,’” indicating that the woman may have transgressed by swearing. This could suggest that her action is considered unfortunate, but nonetheless admissible, but it does not indicate whether she knew it was a circumvention of the Mishnah’s norms. Rabbi Asher ben Yehiel’s medieval commentary on the Talmud notes that in his time “there are those who teach women to “jump to swear,” perhaps based on this story. Apparently, 13th-14th century rabbis attempted to circumvent the Mishnah’s restriction on administering an oath to a widow by advising women informally that they should just swear they have not

57. PALESTINIAN TALMUD, Gittin 4:3 (45c). This and all references to the Palestinian Talmud are from the Leiden manuscript, MA’AGARIM: THE HISTORICAL DICTIONARY OF THE HEBREW LANGUAGE, https://maagarim.hebrew-academy.org.il. The Mishnah states that a woman can make a different kind of vow (neder), according to the preferences of the heirs, and that way prove she has not yet collected any of her settlement, but an oath (shevu’a) is treated differently. The Babylonian Talmudic context continues to seek out whether some oaths might actually be acceptable, just not ones spoken in a court, with their strict procedures. Rashi explains that her oath stands, suggesting that an oath was necessary for her to collect, and now that she has it, bypassing the rabbis who refused to administer it, it stands as proof she has not collected already. The question animating medieval interpreters Nahmanides and Rabbenu Hananel and those following them, is what Rav accepted – did he accept that once she had taken an oath, her oath was valid to allow her to collect (Nahmanides), or once she had “jumped” and taken an oath, the judge would accede and administer the oath that the Mishnah describes rabbis not administering to a widow (Rabbenu Hananel).

58. Tosafot Harosh, BABYLONIAN TALMUD, Gittin 35a, s.v. “modeh rav beqofetset.” Scholars debate whether he was editing tosafot commentaries that he had available or was more original in his comments. See Efrain E. Urbach, Ba’alei Hatosafot, 2 vols (Jerusalem: Mosad. Bialik, 1984), 1 at 207-208, 2 at 459-468, David Derovan, Asher ben Jehiel, in 2 ENCYCLOPAEDIA JUDAICA, 2 ENCYCLOPAEDIA JUDAICA 564 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).
received payment. If rabbis in Rabbi Asher’s time counselled women to swear without official sanction, they apparently thought that a woman’s foreknowledge of the action’s utility was not a barrier to its efficacy. They treated the “spontaneity” of her oath as a legal fiction, and her prior knowledge of how it should affect her settlement was irrelevant to the validity of her oath. Indeed, Rachel Furst has shown that, “in thirteenth-century Ashkenaz too . . . litigants possessed enough legal knowledge and courtroom savvy to know that certain claims and certain forms of evidence carried more weight in the rabbinic courts of their day than others.”

Instructions such as these may have contributed to that knowledge. In summary, subsequent rabbinic commentaries suggest that taking an oath was an action that a widowed woman could do only on her own initiative, to achieve her goal and collect a marriage settlement. There may have been rabbis in subsequent generations who coached women to do this, and perhaps it was an intention of the Talmudic editors who presented the story to suggest this remedy to future generations of Jewish jurists. Ultimately, whether or not the woman in the Talmudic narrative knowingly exploited a loophole or unwittingly stumbled into a legally significant action, the narrative exemplifies another kind of power a lay person may have in rabbinic legal proceedings: adding new facts to an ongoing case. Even if a person has some idea of how their unauthorized actions would reconfigure the legal facts, that does not prevent their effectiveness. If people discover a beneficial action, whether by accident, through legal advice or by word of mouth, they may be able to turn their case in a new direction.

A final note on the rhetorical comment, “what can I do for you?” Rav Huna initially positions himself as powerless before a more powerful legal authority. Beth Berkowitz calls this “hermeneutical stance . . . a posture of passivity in the face of the dictates of Torah.” She suggests that “the
rabbinic rhetoric of passivity, may actually be trying to displace another kind of passivity... a political passivity imposed by powerful imperial governments.”62 The trouble with the response, “what can I do for you,” when offered rhetorically by a judge, is that while he may not feel empowered to act, in a face-to-face dialogue with the widow he holds more legal power and knowledge. For a structurally powerful person to claim weakness allows him to avoid the responsibility of authority. Duncan Kennedy observed, “It is sometimes plain that judges experience themselves as constrained by the materials to reach particular solutions, even if they work in a medium saturated with ideology. But they always aim to generate a particular rhetorical effect through this work: that of the legal necessity of their solutions without regard to ideology.”63 This story is interesting because the woman actually answers the often rhetorical, “what can I do for you?” with a suggestion of what he can do for her: see that this rule does not apply to her.64

This narrative offers a hint to lay people, and also to judges, about the reciprocal relationship between judge and petitioner. There are ways in which the judge, while legally empowered to rule, is disempowered, in his view, by his position in the legal hierarchy. This may restrain his compassion, or actions stemming from sympathy to the petitioner, because of his duty to the procedure and accepted forms of rabbinic reasoning.65 Rabbinic judges may restrain themselves for the sake of a legal value (in this case, preventing false oaths), and such values conflict with and surmount the welfare of individual petitioners. The lay person, bound by neither hierarchical position, nor fidelity to prior rulings, can open a new direction for the judge by working with him to release a judge from his conflict between a legal value and the petitioner. Since the woman herself acted to change the facts of the case, a judge could remain faithful to the Mishnah’s principle.66

The tension between Rav Huna’s self-binding to the rules of the Mishnah, and his perhaps compassionate but bridled desire to help the widowed woman beyond the allowed mishnaic procedures, brings to mind two theories of law in Anglo-American jurisprudence. Each identifies a different motivation for how judges come to their rulings. Legal formalism sees legal

62. Id. at 174-75.
64. See generally Amihai Radzyner, “We Act as Their Agents” and the Prohibition of Judgment by Laymen: A Discussion of Babylonian Talmud Gittin 88b, 37 AJIS REV. 257 (2013), who examines a principle, which appears just twice in the Babylonian Talmud, that Babylonian rabbis act simply as litigants’ emissaries rather than as authoritative judges.
65. For more on this conflict in early rabbinic texts, see Halberstam, supra note 10, at 397.
66. Another way to think about this solution is that the woman’s action took upon her shoulders the potential metaphysical costs of a false oath and did not share that responsibility with a rabbinic judge. Once the oath has occurred, it is believable, so the rabbis can accept it as evidence that she is owed money.
interpretation as following procedure and precedent, even if the purportedly legally correct answer procedurally appears to oppose substantive justice. Legal realism argues that judges aim towards the outcome they see fit, marshalling whatever legal arguments or principles that allow them to justify that decision. As Rachel Adler noted, each of these approaches has been adopted by modern liberal proponents of Jewish law. It is not the case, that, for example, the form-focus of Legal formalism only serves conservative social interests. “Although legal formalism can result in extremely repressive decision making, it can also open up tremendous freedom for new and ingenious applications of legal categories, because any application, however unprecedented, can be proposed, as long as it is formally defensible.” Legal realism, on the other hand, emphasizing the discretion of judges to shape public policy in response to the realities that they see at work in the legal case, is not only a tool for adjudication, which is responsive to the particular needs of a litigant. In Adler’s words, “Given that decisors are chosen by the dominant group, who is likely to be selected to wield power, and whose social investments do such people protect?” It is this problem that Chaya Halberstam suggests as the reason that early rabbis in Palestine (i.e. before 250 CE), who were subjects of the Roman empire, opted for strict rule-based and procedure-focused decision making. Seeing themselves not as the powerful, but in fact experiencing law as “colonized provincials,” the early rabbis exceeded Roman and Hellenistic ideologies about the rule of law, minimizing the judges’ own values (such as a personal commitment to charity to the poor) or feelings (such as compassion) in decision-making. They thought that “the power of rule-bound systems was preferable to the power of unchecked individuals in positions of authority.”

The pull between individuals’ needs, as well as lay people’s values expressed in the form of popular movements on the one hand, and the benefits of fidelity to procedure on the other, are also two poles navigated by democratic constitutionalism, a theory of how courts, including the U.S. Supreme Court, can be both responsive to popular opinion and have faithfulness to the limits of the Constitution. As Robert Post and Reva Siegel observed, “it is no simple matter for courts to find ways of incorporating popular beliefs into the domain of legality, while at the time maintaining fidelity to the demands of professional legal reason.” Indeed, the rabbis of the early Roman empire acknowledged the limits of their

68. RACHEL ADLER, ENGENDERING JUDAISM: AN INCLUSIVE THEOLOGY AND ETHICS 30 (1998).
69. Id.
70. Halberstam, supra note 10, at 417, addressing Tosefta, Sanhedrin 1. See also BEN-MENACHEM, supra note 13, for a different view of early rabbinic texts’ portrayal of judicial discretion.
preference for limiting judges’ responsiveness with pity to the litigant who appears before them. “The ‘rule of law’ is understood to entail strict legal judgment: it may be a reliable mechanism for dispute resolution, but it may not result in a just society,” concludes Halberstam.\textsuperscript{72} In Babylonian Talmud, Gittin 35a, Rav Huna and the woman work together, each acting in their own realms, and bringing two sets of norms to meet in their dialogue and the judge’s subsequent decision. The judge remains bound by the Mishnah’s restriction, he cannot administer the widow an oath to help her prove that she has not collected her ketubah. But the woman anticipates his concern and responds to it, changing the facts of the case through her speech and her oath. In other words, they collaborate, deliberately or not, to allow him to maintain his fidelity to something reminiscent of legal formalism (by not administering a proscribed oath), but also to reach the outcome that pity and justice may dictate (allowing a widow to collect her ketubah). Their combined efforts free him to recognize her reliability and empower her to collect debt.

\textbf{C. Interruption}

While most of the petitioners’ actions happen in response a judge’s ruling, in the next narrative a woman interrupts the court proceedings, and the result is striking. After a woman respectfully disobeys a judge’s order to stand up in court, the judge asks her a different question than he might have otherwise. The woman achieves her goal: she avoids the unwanted marriage that awaited her. This narrative is part of a cluster in which rabbis release women who do not want to enter levirate marriages, a biblical tie that binds a childless widow to her husband’s brother for marriage.\textsuperscript{73} In this case, the widow is wealthy, and her late husband’s brother wishes to marry her. She does not wish to marry him. The judge listens to the woman and engineers a situation which precludes the brother from marrying her. A stylistic note: it is typical in Talmudic dialogue for speakers to refer to themselves in the third person.

A woman came before Rabbi Hiyya bar Abba. He said to her, “Stand, my daughter.” She said to him, “Say that her sitting is her standing. It is money that he sees in her and he wants to use up all that she has.” He said to her, “You do not wish (the marriage)?” She said to him, “No.” He said to [the man], “perform halitzah and by doing this you will marry her.” After he did halitzah he said to him, “Now she is forbidden to you (as a wife). Go and do a proper halitzah for her so she

\textsuperscript{72} Halberstam, \textit{supra} note 10, at 409.

\textsuperscript{73} Deuteronomy 25:5-10. See 3 Neusner, \textit{supra} note 9, at 277-78; Dvora E. Weisberg, LEVIRATE MARRIAGE AND THE FAMILY IN ANCIENT JUDAISM (2009) at 140-61. The narrative immediately following is about a female relative of a rabbi, though it does not include action by that woman on her own behalf.
can be free to (marry) anyone.”

This woman’s response to the judge’s initial order to stand, which is the way rabbinic proceedings begin, is to refuse to stand, thereby capturing the initiative in the legal procedure and diverting it. If she had obeyed the judge’s first request, she might never have had another opportunity to describe her prospective husband’s greed. She claims that the man only wants her money and will spend it all. The judge listens. He does not insist on continuing the proceedings but instead asks a clarifying question: do you wish to marry him? Seeing she does not, the judge tricks her prospective husband into releasing her from their bond. Without the rabbi’s cunning, and without her refusal at the beginning, the levirate marriage would have continued, fulfilling only the greedy brother’s wishes. The layperson’s tactic is to interrupt the flow of a routine legal process, while respecting the judge’s authority in that sphere. She says, in essence, “I do not show disrespect to you by remaining sitting, but I must ask you to pause here to

74. BABYLONIAN TALMUD, Yevamot 106a. MS Munich 141, the base for translation, as well as manuscripts Oxford Opp. 248 (367), Moscow-Guenzburg 1018, and Moscow-Guenzburg 594 have “a woman came.” Manuscripts Jerusalem-Michael Krupp, Moscow-Guenzburg 1017, Vatican 110-111, Munich 95 and the Pisaro, Venice and Vilna editions have “He who came” (hahu de’ətay instead of hahi iteta deʾətay), but the feminine is likely correct. The verbal form ‘ətay is a 3fs suffix conjugation form of a final aleph verb in Jewish Babylonian Aramaic, and early versions change the verb spelling to the 3ms. See SIEGAL, supra note 30, at 161-62. The Venice and Pisaro printed editions, MS Vatican 110-111, MS Oxford Opp. 248 (367), MS Moscow-Guenzburg 594, and MS Moscow-Guenzburg 1017 have some version of another line of dialogue, in which the judge says, “Do you know something about him?” and the woman replies “Yes.” The judge responds, “What is it?” and she tells him. Many medieval commentaries, for example the Tosafot, focus on this story with the question of whether standing for halittah is required. Rashi understands this refusal to be due to her being “ill or unable to walk.” Rashi, BABYLONIAN TALMUD, Yevamot 106a, s.v. “yeshivata zohi amidata.” Ritva, Commentary on Yevamot 106a, s.v. “amar lah biti ‘amodi,” explains the implications of that: she cannot physically stand. He continues that that because she has challenges in mobility, the man would only be marrying her for money. I think my reading of resistance due to financial exploitation is also reasonable. Rashi’s and Ritva assume that a man would not want to marry a woman who could not easily walk or stand, but that does not make it presumed in the Talmud’s circumstances. Another note on this sentence: the spelling of word for “say” and the word for “mother” are similar. Rabbi Shlomo Luria, Commentary on Yevamot 106a, s.v. “amrah leiaima/imah yeshivata,” cites two possible meanings of this statement, one that the woman is referring to herself, “thus shall you say about me” and the other is that the woman’s mother accompanied her to court, and the sentence should read “her mother said to him, ‘say that her sitting, etc.”’ The first option is strong because the mother’s presence is not expected in this context, and I translate it that way. Case stories sometimes do include details that do not have legal consequence, so one could translate “her mother,” as does WEISBERG, supra note 71, at 155.

75. PALESTINIAN TALMUD, Sanhedrin 3:5 (21b), “How do we judge? The judges sit and those being judged stand and the claimant speaks first.” This and all references to the Palestinian Talmud are from the Leiden manuscript, MA’AGARIM: THE HISTORICAL DICTIONARY OF THE HEBREW LANGUAGE, https://maagarim.hebrew-academy.org.il. The practice of litigants standing while judges sit is described in codified Jewish law of the early modern period. See SHULHAN ARUKH, Hoshen Mishpat 5:3-4 (portraying judges “sitting” in judgment); id. at 17:1 (dictating more flexibility, with the aim of ensuring parity among the litigants). “If one of them was dressed in expensive clothes and the other was dressed in contemptible clothing, [judges] say to the honorable one, either dress him like you, or dress like him.” One should not sit and the other stand. Rather both should stand, and if the court wishes to have them sit, they may. And one should not sit higher than the other, but one next to the other. This all applies to the petitioning, but when the verdict is given, ideally both [litigants] should stand.” Id. My thanks to Jennie Rosenfeld for these references.
hear relevant information. I seek your aid as a legal expert to achieve a just result for me.”

The story appears in the Babylonian Talmud in a series of narratives exploring the extent to which improper or mistaken halitzah ceremonies, which break levirate bonds, are sufficient to free a woman from the marriage (M. Yevamot 12:3). This story indicates that misleading a man into halitzah does spoil the levirate bond, though it still requires a subsequent, proper halitzah to ensure complete severing of the relationship. In the Palestinian Talmud, the parallel story is part of a discussion pertaining to a different mishnaic rule (M. Yevamot 12:6), which states that when a couple who are eligible for levirate marriage approach the court, the judges should “offer him the advice which is suitable to him.”76 It is interesting that the Mishnah directs the court to advise the man and not the woman. Dvora Weisberg observes that, a ritual that, according to the Torah, allowed the [woman] to express her disgust (and that of the community) with a man who would not do his duty to the dead becomes a ritual chosen by the man himself as a way of discharging his obligation. While acknowledging the woman as the primary actor in the halitza ritual, the Mishnah insists that the decision to enact the ritual is the man’s.77

Both Talmudim78 appear to respond to this imbalance, offering stories of rabbis intervening to sever levirate bonds that would not be appropriate for the woman.79 The Palestinian Talmud gives examples of unsuitable couples, and concludes with: “the principle is: ‘whoever resists, listen to them’” (12:6, 12d).80 Its version of this narrative does not have the dialogue between the judge and the woman, but it ends with the rabbi applying to himself Jeremiah 4:22, “They are clever at doing wrong, But unable to do right;” perhaps expressing concern that he has been too clever by half.81 The Palestinian Talmud’s story emphasizes the power of a rabbi to instigate mistaken halitzah, and compunctions a rabbi may have about doing that.

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76. masi’in lo ’etsah hahogenet lo.
77. WEISBERG, supra note 70, at 137. See id. at 152-58 for a discussion of the passage in both the Babylonian Talmud and Palestinian Talmud.
78. Plural of Talmud.
79. See also MICHAEL L. SATLOW, JEWISH MARRIAGE IN ANTIQUITY 186-89 (2001); and TAL ILAN, JEWISH WOMEN IN GRECO-ROMAN PALESTINE 152-57 (1996).
80. kelalo sheldavar kol hame’aqev shom ’in lo.
81. PALESTINIAN TALMUD, Yevamot 12:6 (Jewish Publication Society trans. of the verse). The verse concerns the children of Israel, disparaging them for being foolish and not heeding God. HEINRICH W. GUGGENHEIMER, THE JERUSALEM TALMUD: THIRD ORDER NASIM: TRACTATE YEBAMOT, 524 (2004), says that it is Rabbi Hyya who applies the verse to himself. The Aramaic says only “he said about him,” so it is ambiguous, but Guggenheimer interprets the verse as the rabbi’s indirect expression of hesitation about his own conduct: he is cleverly able to ruin the halitzah, but is that the right way to handle things? The Palestinian Talmud story makes explicit Rabbi Hyya Bar Va’s ruse – he tells the levir that the woman does not want to marry him through yibum but rather through regular marriage, so he needs to do halitzah to free her from yibum and enable her to marry him in an ordinary way.
This connects with the discussion of legal formalism above, raising the question of the purpose to which a judge uses his creativity and expertise, towards or away from justice. The Babylonian Talmud’s version brings focus to the woman’s desires and her attempts to achieve her goals, and the role a judge might play through attunement and instigating halitzah.

The narrative instructs judges to pay attention to what may be initially invisible in a court case that comes before them, and to take heed of clues that well-intentioned petitioners offer them. This example is a reminder of the fact that a judge who listens can drastically change the outcome of a case in contemporary as well as ancient contexts. For example, too often in the repetitive bond or removability hearings in U.S. immigration courts, the judge speeds through the same scripted questions and the respondent appears to be a pebble carried along in a stream, without the legal knowledge or opportunities to change the direction in which they are heading. Yet when a judge slows down and diverts from their script, taking more time over the questions that they repeat thousands of times, they sometimes see an opportunity for the person to achieve a different outcome, whether it be asylum protection, or as I once witnessed, a case where a judge asked enough questions to realize that the person facing deportation may actually be eligible for U.S. citizenship through a parent. The Talmud’s portrayal of a judge pausing the ordinary proceedings, and inquiring about more details of this particular case, rather than treating the levirate marriage process as a routine, resonates with that contemporary example. In both cases, if a judge hews too closely to the hearing procedures and ignores signals from the petitioner, or overlooks a lacuna in a case, they may miss opportunities to turn the judgment into a chance for justice.

Robert Post and Reva Siegel’s formulation of democratic constitutionalism offers an avenue for thinking about the role of a lay person’s interruption or disobedience as a constructive part of making law. They argue that popular backlash against a court’s decision on the grounds that it betrays the Constitution “invigorates[es]” the U.S. legal tradition and reflects the people’s identification with the Constitution, and the fact that they recognize it as binding on themselves and on others. Democratic constitutionalism recognizes roles both for a professional judiciary to enforce constitutional rights, and for the public whose backlash, in Post and Siegel’s formulation, helps to guide as well as to legitimate U.S. judicial authority. Juries acting alongside judges is another example of distributing a role to lay people in the application of law in the U.S. One could offer a similar articulation for lay parties, such as the woman in the levirate

82. I am grateful to Jacob Lipton for this observation.
83. Post & Siegel, supra note 68, at 375.
84. Id. at 379.
85. I am grateful to Jacob Lipton for this observation.
marriage proceeding, who refuses an order, or others in the next section who argue against a judge’s decision. Their appeals to rabbinic norms, which they recognize as binding on themselves and on others, strengthen the authority of the rabbinic tradition in these narratives. Through their resistance to a certain decision or procedure, the Talmud actually portrays them identifying with rabbinic norms, strengthening their authority, because lay people expect that their sense of what ought to happen is possible in a rabbinic judgment.86

D. Argumentation

The Babylonian Talmud offers a few examples of unnamed Jewish men and women making arguments to change the judges’ minds, arguments recognized as relevant to rabbinic decision-making. The petitioners in the following four narratives do not display expertise in rabbinic oral traditions, as for example, some female relatives of rabbis might, when they cite oral tradition or reason like the rabbis do.87 Instead, the arguments are more basic, for example, providing information that the petitioner thinks ought to be legally relevant. One sign of being a nonprofessional in a legal context is being unfamiliar with or unable to communicate the facts of one’s case in a way that is legally “relevant” or persuasive to the judge. In the U.S., legal ethnographers John Conley and William O’Barr observed that in small-claims courts, the verbal arguments of legal non-experts were less effective than the statements of lawyers about the same facts.88 Furthermore, they showed that if claimants presented facts in an expected order, the outcome was better for them, irrespective of the merits of their claims. Arguing one’s case in reference to relationships or to fairness was less effective, even though it made sense to the petitioners. Details of the history of a relationship between litigants in a case may appear highly pertinent to a claimant but are often treated as legally irrelevant by the judge.

The disparities uncovered by Conley and O’Barr indicate that despite the principle that pro se litigants ought not be penalized for their lack of legal knowledge, speaking style still affects the reception of their claims. There have been efforts in the development of U.S. civil procedure to ensure that

86. Democratic constitutionalism is defined in opposition to two poles of authority. A juricentric focus on the courts, on one hand, which denies the importance of “public engagement” to guide legitimate judicial review, and “popular constitutionalism,” which seeks to take away authority from courts as much as possible. Post & Siegel, supra note 68, at 379. See generally Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).
87. See, for example, Judith Hauptman, The Talmud’s Women in Law and Narrative, 28 Nashim: J. Jewish Women’s Stud. & Gender Issues 30 (2015), as well as the author’s other scholarship on this topic, such as Judith Hauptman, Rereading the Rabbis: A Woman’s Voice (1998) [hereinafter Hauptman, Rereading Rabbis].
lack of legal knowledge not prevent a fair consideration of a written claim. The transition from strict “code pleading” towards the simpler “notice pleading” around the turn of the twentieth century represents one effort to reduce the disempowerment of litigants lacking effective, or any, legal representation. The transition is codified in the Federal Rules of Civil Procedure Rule 8(a)(2), which requires a simple claim, that, along with pretrial procedures and rules of discovery, ought to give respondents enough information to prepare a response. This principle, that legal procedural knowledge should not be a barrier to the success of one’s claim animates the decision in Conley v. Gibson, in which African American railway workers sued their union for not representing them fairly and racially discriminating against them. The union responded that the workers’ pleading was inadequate. The Supreme Court established that the standard for an adequate pleading was lower than the union had argued. The decision concludes, “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . .”

The ability of pro se litigants to comprehend proceedings and decisions that apply to them, and their resulting potential to make successful appeals, have also been the subject of recent debate about federal circuit courts. Judge Richard Posner, when he retired from the Seventh Circuit in 2017, reflected with dismay on the state of pro se litigation. Posner self-published a book criticizing the court’s treatment of pro se litigants, causing some controversy. He argued that the appeals of pro se litigants were hurried, and that they did not have the educational or other advantages necessary to comprehend the reasons for their denials. Decisions written in professional legal language, in Katherine Macfarlane’s summary of Posner, “are incomprehensible to pro se litigants.” Posner suggested that simple, everyday written English explanations accompany decisions, and that draft orders and memoranda, which contributed to judges’ decisions, also be provided to pro se litigants.

Both the Babylonian and Palestinian Talmudim wrestled with the boundaries that judges should observe if they see a winning case that suffers

89. 355 U.S. 41, 48 (1957). The Court has subsequently moved away from Conley’s “no set of facts” test in favor of a “plausibility” standard that imposes stricter pleading requirements on plaintiffs. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 US 662 (2009). However, Twombly and Iqbal still do not represent a complete return to code pleading.


92. Id. at 127.

93. However, in previous written opinions Posner acknowledged that, in contrast to European models of “proactive” judges, the U.S. court system is adversarial and it is not the judge’s role to advise the litigants, though they could be warned of “obscurer pitfalls of legal procedure.” Ball v. City of Chicago, 2 F.3d 752, 756 (7th Cir. 1993). Nonetheless, in his retirement, Posner reflected, “I didn’t think the pro se litigants were getting a fair break.” Macfarlane, supra note 88, at 114 n.8.
because the person themselves cannot successfully advocate. Away from Babylonian Talmudic discussions that center on a judge’s role in improving lay advocacy, however, we see the following four adjudication narratives in which unnamed Jews attempt relevant arguments, and judges either recognize them or cast them aside. The narratives suggest that it is good for a judge to listen to the content of amateur arguments. Judges should be able to change perspective and even change their decisions based on a lay person’s argument.

In the first example, people offer a series of what they think are legally relevant details, hoping to undo a sale. Eventually they hit upon a fact that the judge uses to invalidate the sale. The narrative appears in the context of the Talmud determining the conclusive moment of sale for orphans’ property. As a special category of minors, orphans’ interests are specifically protected by rabbinic law. These orphans live with a woman who is not a relative, from whom they receive shelter and food. Despite the fact that she is not their legal guardian, her provision for them allows her some control over their property, including the power to sell it. In rabbinic texts, there are formal actions of sale separate from payment. In other words, paying money for an object may not be the legal action that triggers a change in ownership. It is a formal action of sale, such as, in the case of an ox, pulling it along by a leash, which transfers ownership from buyer to seller. The following case addresses whether a sale can be reversed if the value of the article has increased during the time between the formal action of sale and payment. The woman, who is not the property owner, sells the orphans’ ox. After she completes the formal action of sale, but before she collects payment, the value of an ox has increased. The orphans’ adult relatives wish to void the sale, viewing it as against the interests of the orphans.

There were orphans, who were supported at the home of an older woman. They had an ox, which she took and sold on their behalf. Its value increased. Their relatives came before Rav Nahman and said to...

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94. BABYLONIAN TALMUD, Shevuot 30b instructs judges not to become advocates for petitioners, and medieval commentators and subsequent codes follow that instruction. E.g., MISHNEH TORAH, Sanhedrin 21:10; ARBA’A TURIM, Hoshen Mishpat 17:11. But note too that the Palestinian Talmud preserves a tradition about the Babylonian Rav Huna, who “opened” for a petitioner who did not know how to argue, based on Proverbs 31:8, “open your mouth for those who cannot speak.” PALESTINIAN TALMUD, Sanhedrin 3:8. Subsequent commentaries limit this teaching and harmonize it with the instruction for judges not to become advocates in court. For instance, Rabbi Joseph Karo rules that “if a judge sees an argument for one of them, and the petitioner is trying to say it but does not know how to assemble the words, or if he sees (the petitioner) struggling to save himself with truthful arguments, but because of anger they are eluding him, or if he is becoming confused because of folly, it is permitted to help him begin . . . but it is necessary to consider this matter greatly, so as not to become like advocates.” SHULHAN ARUKH, Hoshen Mishpat 17:9.

him, “How could she sell it?” He said to them, “It is taught, ‘Orphans that rely on a head of household [that head of household must pay tithes on their behalf].’ (M. Gittin 5:4).” (In other words, the Mishnah explicitly grants the woman power to dispose of orphans’ property for the purpose of tithing. This may imply that she did not need to be a formal guardian to be able to sell their property). “But behold it increased in value!” “It increased in value while in the domain of the buyer” (i.e., that is immaterial, it does not void the sale). “But behold [the buyer] has not taken the money!” He said to them, “In that case, Rav Hanilai son of Rav Idi’s tradition in the same of Shemuel applies: ‘Orphans are like consecrated property, they only sell with money.’”

Rav Nahman cites two different rules, and the editors of the narrative structure the dialogue around Rav Nahman’s statements. The narrative’s drama traces how the relatives manage to move Rav Nahman from ruling according to the first tradition to applying the second one instead. The narrator’s omission of “he said” and “they said” from the intervening dialogue creates quick movement and immediacy, contrasting with the slower pace in the beginning and ending citations. Through this dialogue, the relatives learn what is legally relevant, as do the story’s audiences. The narrative depicts a symbiotic relationship between the litigants and the judge, where they offer facts, and the judge interprets their legal impact. This is another form of collaboration between judge and claimant, adding to the earlier examples of the woman interrupting to avoid levirate marriage and the widow swearing to collect her marriage settlement.

In another adjudication narrative, a man responsible for protecting cattle argues against the judge’s verdict holding him liable for the loss of one of the animals. He claims the loss was unavoidable and not negligent, saying, “What could I have done?” This could be a powerful and recognizable legal argument. The very same passage of the Talmud stipulates that a hired guardian of property is responsible to pay the owners for loss due to negligence, theft and getting lost, but not in cases of unavoidable loss, when a person might argue, “what could I have done?” Moreover, the claim, “what could I do?” appears in the mouth of a rabbi excusing a shepherd from paying damages on the previous folio. There, a shepherd lost a sheep while herding by the banks of a river. The sheep slipped into the water and died. When the shepherd came before Rabbah to judge his liability, Rabbah

96. BABYLONIAN TALMUD, Gittin 52a. “Its value increased” appears at this place in the story only in the base text for translation, MS Vatican 130. MS Munch 95, MS Arras 88, and the Soncino, Venice, and Vilna editions omit it here, in the case details, but all include it in the principle later in the story, and it is possible that the phrase was added to the dialogue in virtue of the later citation.

97. These features could also indicate editorial additions, but the narrative result is the same.

98. BABYLONIAN TALMUD, Yevamot 106a.

99. BABYLONIAN TALMUD, Gittin 35a.

100. BABYLONIAN TALMUD, Bava Metzia 93a.

101. Scholars suspect this should be Rava, later sage, not Rabbah. SEGAL, supra note 1, at 81.
exempted the shepherd from damages to the owner, and commented, “What could he have done?” Here, though, Rav Papa rejects that same argument.

Bar Ada “Sequla” was leading animals across the bridge of Naresh when one animal pushed another, threw her into the water and she drowned. He came before Rav Papa, who ruled him financially responsible. [Bar Ada] said to him, “What could I have done?” He said to him, “You should have taken them across one by one.” He said to him, “Do you know any of your sister’s sons (Rashi: those among your people) that could take them across one by one?” He said to him, “People before you have already made that argument to me, and no one paid attention to them.”

Bar Ada first uses, knowingly or not, a prevalent rabbinic argument about culpability and preventability. Alternatively, the editors of the narrative restate his claim in a familiar rabbinic argument. Either way, he is attributed with a rabbinic argument for exemption from liability. When that does not work, Bar Ada strengthens this argument with a claim to superior knowledge of cattle herding, which should inform the judge’s sense of what is possible and impossible.

Neither his legal argument nor his field knowledge achieves Bar Ada’s aim. Rav Papa answers substantively; there was something he should have done to avoid the animal’s death. Bar Ada disputing Rav Papa’s suggestion of strategies to avoid the loss of an animal does not change the judge’s mind and the order of damages stands. Juxtaposed with the earlier adjudication narrative in which Rabba exempted the shepherd from damages, this story shows the limits of the defense “what could I have done?” for animal

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102. BABYLONIAN TALMUD, Bava Metzia 93a. The Talmud discusses cases of damage that begin with negligence, but after the negligent action by a guardian, the guardian encounters an unavoidable loss. The general approach is that in such cases, the guardian is liable for damage, even if the proximate cause of loss was unavoidable, because the initial steps taken were negligent. For a survey of Jewish law of guardians see Barukh Kahana, Shomerim, in HOQ LEYSRAEL: ‘ARIKH SHTATIT VE ‘ADKHANIT SHEL HAMISHPAT’ HA ‘IVRI (Nahum Rackover ed., 1999), http://www.daat.ac.il/daat/vl/kahana-shomrim/kahana-shomrim02.pdf. The claim, “what could I have done?” is linguistically close to the question in BABYLONIAN TALMUD, Gittin 35a, in which Rav Huna asks, “What can I do?” and as discussed there, the variation of tone and meaning of related phrases in the Talmud require full discussion that are beyond the scope of this article.

103. BABYLONIAN TALMUD, Bava Metzia 93b. Based on MS Hamburg 165. While all textual versions agree with the substance of one animal causing the death of another, there is some variation, such as omitting “she drowned” (MS CUL: T-S F 2(1).164, Escorial, Munich 95, Vatican 115 a, and Venice, Soncino and Vilna eds). For identification of Naresh, see AHARON OPPENHEIMER, BABYLONIAN JUDAICA IN THE TALMUDIC PERIOD 258-66 (1983). The Aramaic is not specific about who has made these arguments before Rav Papa. With Tosafot, I interpret the “others” to be litigants who were ordered to pay in similar circumstances, though other medieval commentators suggest it is rabbis protesting. Tosafot, BABYLONIAN TALMUD, Bava Metzia 93b, s.v. “’ibaei lakhla ‘aborei hada’ hada” connects Rav Papa’s suggestion, “you could have crossed them one at a time” with the anonymous Talmud’s use of the same phrase in BABYLONIAN TALMUD, Bava Qama 58a, where Rav Kahana is ascribed with the view that an owner is responsible to prevent their oxen pushing one another off a roof into a neighbor’s yard, because the owner should have ensured they crossed across one by one. The manuscripts and early printed editions differ on the spelling of “Sequla.” Some translate it as related to his profession or his place of origin. See SOKOLOFF, supra note 33, at 809.
It suggests that a judge’s opinion about what is possible and impossible in that work context takes precedence over the professional’s judgment. Perhaps Rav Papa discounted Bar Ada’s professional judgment because of the stakes for the man if he is found liable. Tzvi Novick distinguishes three possible approaches rabbis might take to areas of specialist knowledge that pertains to their rulings, but which they do not learn as part of their regular rabbinic training. These are: deference, meaning relying on someone with specialist knowledge, for example, in animal herding; specialization, in which the herder’s primary expertise is acknowledged, but the legal specialization is taken to supersede the herder’s authority; and finally, legalization, in which, according to Novick, specialist knowledge of experts outside of rabbinic tradition is discounted entirely.\(^{104}\)

It is not that rabbis must take any of these directions. Rather, these are logical possibilities, and Novick notes that rabbis might combine the options or find positions in between them.\(^{105}\) Elsewhere, Babylonian rabbis do cite and rely on herder’s specialist knowledge for their rulings, but Rav Papa does not do so here.\(^{106}\) To the question of how lay people might argue successfully in court, the narrative shows that even if a layperson makes a legally recognizable argument, or argues based on specialist knowledge, judicial judgment may supersede it.

While Bar Ada Sequla’s argument based on his own experience did not help him, there are other examples of petitioners citing their lived circumstances, and highlighting the unintended consequences of adverse rulings, which do change a judge’s mind. In a cluster of stories of unnamed women seeking divorce based on childlessness, judges accept women’s arguments of untenable personal consequences if they remain married to their husbands. The context for these narratives is Mishnah Yevamot 6:6, which exempts women from the obligation of having children, but includes the dissenting opinion of Rabbi Yehoshua Ben Beroqa who says that women, like men, are obligated to procreate because of the commandment to “be fruitful and multiply” (Genesis 1:28). Each woman says she will have no support in her old age without children, and in each case the judge grants them a divorce. The judges all agree with the Mishnah, that women have no obligation to procreate, but there are no grounds to grant divorce based on their husbands’ inability to sire a child. However, the judges accept that having no children will have adverse effects on these women. The narratives indicate that good rulings react to the impact of a law on people’s lives and are not just exercises in applying legal doctrine.

Like she, who came before Rabbi Ami. He said to her, “You are not

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105. Id. at 103.
106. For example, BABYLONIAN TALMUD, Sanhedrin 18b. See Novick, *supra* note 101, at 103-07.
obligated [to have children].” She said to him, “What will become of this woman?” He said, “In a case like this we certainly force [divorce].”

She, who came before Rav Nahman. He said to her, “You are obligated [to have children].” She said to him, “What will become of this woman?” He said, “In a case like this we certainly force [divorce].”

She, who came before Rav Nahman. He said to her, “You are not obligated [to have children].” She said to him, “Does this woman not need a staff in hand and a hoe for burial?” He said, “In a case like this we surely force [divorce].”

Shulamit Valler succinctly summarizes the reason why the women’s arguments worked: they “changed the rationale of the claim.” While the point of law (the obligation to bear children) may not apply, women’s future welfare is grounds for divorce in these cases. There is also a contrast between the basis of the judges’ rulings and the arguments of the women. The narratives contrast the rabbis’ citation of applicable law with the women’s appeals for sustenance, i.e., to the unintended consequences of the correct application of law. Judith Hauptman also points to the emotional content implicit in their advocacy. A woman’s “ability to describe her situation in poignant terms softens their opposition and brings about a decision in her favor.”

While the rabbis speak of obligation or lack thereof, the women argue about what following that ruling will mean for their lives. Through the curation and inclusion of these narratives in the Talmud, their claims become part of the rabbinic norms for divorce.

A different argument, which does not change an adverse ruling but does change a judge’s behavior, is displayed in two juxtaposed narratives in BT Bava Batra 60a-b. Unnamed respondents note that the judge’s conduct mirrors the actions with which they are charged. This argument questions

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107. BABYLONIAN TALMUD, Yevamot 65b. Based on MS Munich 141. Some other manuscripts and printed editions have added phrases, like the woman asking for her ketubah, and/or being told to go before she makes her case, see the Pisaro, Venice, and Vilna editions, MS Munich 95, MS St. Peterburg: Yevr. III B 497–498, MS Moscow - Guenzburg 1017, and MS Moscow - Guenzburg 594. Adding “in her old age” to “what will become of . . . ,” see the Vilna, Venice, and Pisaro editions, MS Munich 95, MS Vatican 110-111, MS CUL: T-S F 2(2).1,[R], MS St. Peterburg: Yevr. III B 497–498, MS Oxford Opp. 248 (367), MS Moscow - Guenzburg 594, and MS Moscow - Guenzburg 1017. Perhaps reading it as a scribal error, due to there being two stories involving Rav Nahman and the similarity in claim between the first and second story, the Vilna, Venice and Pisaro printed editions omit the second Ra Nahman story.

108. VALLER, supra note 10, at 116.

109. HAUPTMAN, REREADING RABBIS, supra note 84, at 137-38.

110. FONROBERT, supra note 8, at 25-26, describes Talmudic strategies that limit women’s abilities to use rabbinic law to advance their preferences about sexual contact in the context of marriage. She observes that this is “a symptom of the rabbis or redactors anxiety about women making legitimate halachic (legal) arguments to their own advantage. In such cases, women’s discourses are curtailed by framing it as an issue of their believability, even in a case such as this where a rabbi rules in favor of a woman.” So even as these adjudication narratives show examples of women changing a ruling, other Babylonian Talmudic legal contexts show efforts to minimize a woman’s successful argumentation in court.
the judge’s standing to decide their case, and claims the suit is baseless since the judge’s own behavior indicates they have done nothing wrong. The facts of the case involve the extension of private dwellings into public areas. Rabbinic law categorizes a set of spaces by who has access to them. Private dwellings are not presumed to be accessible to the public except by invitation. In semi-private spaces like common courtyards, only residents regularly enter, as do people who may deliver to, or visit the residents. Alleys, the name for paths onto which courtyards may open, are public ways, but not large or useful enough that all residents of a town regularly traverse them, and they contrast with public places, which all people can expect to use, and which may hold many people at once.\footnote{There are also other spaces in this scheme, like edges of public spaces, but other spaces are not pertinent to these narratives. See the work of Gil Klein for rabbinic spaces in the Roman architectural and urban contexts, such as, Gil Klein, \textit{Sages and Cities: Rabbinic Urbanism and Roman Spatial Practices}, 2015 FRANKEL INST. ANN. 36; and Gil Klein, \textit{Squaring the City: Between Roman and Rabbinic Urban Geometry}, in \textit{PHENOMENOLOGIES OF THE CITY: STUDIES IN THE HISTORY AND PHILOSOPHY OF ARCHITECTURE} 33 (Henriette Steiner & Maximilian Sternberg eds., 2015).}

In these narratives, individuals’ private property juts into a public way, preventing other people from using it fully. A contemporary analogy might be sidewalk restaurant seating.\footnote{A further example is road closures on the Sabbath in Israel and competing communities’ needs, which are analyzed by Issachar Rosen-Zvi, \textit{TAKING SPACE SERIOUSLY: LAW, SPACE AND SOCIETY IN CONTEMPORARY ISRAEL} 95 (2004).} The Talmud presumes that permission is needed from all affected parties who expect access to a common space before an individual can adopt part of that space for private use. Then again, it would be impossible to ask everyone who has claim on a public place for permission to seize part of it.

Rabbi Ami had an architectural feature\footnote{Sokoloff, \textit{supra} note 33, at 407, translates “projection from a building,” in one case, possibly, a balcony.} that protruded into an alley. A man had an architectural feature that protruded into a public thoroughfare. The people of the thoroughfare were trying to prevent him (from keeping it there). He came before Rabbi Ami. He said to him, “Go and cut [it down].” He said to him, “But behold, sir also has one!” “Mine protrudes into the alley; the alley’s people permit me. Yours protrudes into the public thoroughfare, who can give you permission?”

Rabbi Yanai had a tree that leaned into the public thoroughfare and a man had a tree that leaned into the public thoroughfare. They were preventing him (from keeping it). He came before Rabbi Yanai. He said, “Go away now but come tomorrow.” Rabbi Yanai sent (someone) to cut back his own (tree). The next day he came before him. He said to him, “Go and cut (it) back.” He said to him, “Sir also has one.” He said to him, “Go and look, if it is cut back, cut (yours too), but if not, do not cut (yours).”\footnote{BABYLONIAN TALMUD, Bava Batra 60a-b. The base text is MS Hamburg 165.}
These two stories focus on challenges that rabbis face when they are entangled in comparable cases to those that they are judging. The stories use the same words to describe the rabbi’s and petitioner’s circumstances. The rabbis do not appear to consider transferring the case to another rabbi, though perhaps there is not one close by. Rather, in the first story the rabbi claims his case is different, making a distinction between a semi-private area and a public area, where no “public” can grant permission. In the second, the rabbi delays the case until he can personally follow the judgment that he plans to render. The unnamed petitioners know the rabbi’s offense; it might have encouraged them to insist on their own claims. If a judge is not following this rule, he should not force it on them. The petitioners use the deferential “sir,” so it seems that their claims are made politely, if insistently. But the men’s arguments about double-standards do not result in a better ruling for them.

However, despite the fact that both judges eventually rule against the petitioners, the two cases also differ in the respective reactions of the judges. For a judge to distinguish his own circumstances from those of the petitioner, claiming that the law does not apply to him as it does to the other person, is a very different reaction to the judge who delays the case by a day in order to remedy his own situation. In the second case, the petitioner won his point, the judge sees the similarity of their circumstances and forces himself to comply with the ruling he will issue. This is a win, of sorts for the petitioner, though not the outcome he sought. Both narratives are occasions for the Talmud’s narrators to depict judges’ triumphs. The petitioner’s criticism also warns future judges hearing this tale, that their authority is harmed when their conduct is questionable.

CONCLUSION

The success of petitioners making arguments before rabbinic judges

115. The printed editions Venice, Pisaro and Vilna add the word “also,” i.e. “A man also had,” which emphasizes the parallel. The manuscripts (Hamburg 165, Munich 95, Paris 1337, Escorial, Vatican 115-b) do not have it.

116. Rabbi Yanai lived in third century Palestine, and Rabbi Ami (Imi) was active there in the third to fourth centuries, but these cases of protrusions are not recorded before either of these sages in the Palestinian Talmud, nor do adjudication narratives involving rabbis’ own conduct appear in the PALESTINIAN TALMUD, Bava Batra 3:8, discussion of the same Mishnah.

117. The early text variants are consistent about “sir” in both narratives. If Talmudic narratives added this title, it is part of their portrayal of how Jews might behave in court, rather than historically factual accounts of how Jews communicated to rabbis. See SOKOLOFF, supra note 33, at 707-08.

118. My thanks to Jennie Rosenfeld for this observation.

119. Catherine Heszer points out, regarding Palestinian Jewish life in late antiquity, that rabbis had ordinary professions, so they came in contact with non-rabbis in their daily conduct and their halakhic and moral views would be known. “Whatever they did could be observed and imitated by their contemporaries and remembered and used as a precedent by their own students and scholars of later generations.” Catherine Heszer, Between Rabbis, supra note 9, at 10. In the set of stories that I cite here, it seems clear that rabbis’ conduct could also be known and used against them by local people who they end up judging as well.
depends not only the plausibility or relevance of their arguments, or on the ways that their actions change the facts of the case, but also on the deference that their arguments and actions show to the authority of the rabbi as judge. A key factor in whether these tactics are successful is whether the interventions will ultimately bolster or undermine the authority of the rabbinical judges. Granted, the Talmudic editors were not creating a manual of lay people’s argumentation; each story has its own legal context and focus. Yet it is clear that in the Talmud, people who are neither rabbis nor legally trained, can make arguments to change judge’s rulings. Sometimes the arguments are formulated like the arguments that rabbis make. Other times they seem closer to the petitioner’s own concerns or experiences, such as “this will happen to me,” or “no one does the job like that.” Again, it is important to recall that the narratives themselves are heavily edited and the voices of Talmudic editors and composers are heard in all the voices of court dialogues. Yet the narrators of these stories portray lay people authoring convincing arguments that have an effect on rulings, as well as on judges’ conduct.

Some stories nudge judges to consider what factors, besides the applicable law, may be appropriate for deciding a case. Others suggest a judge listen for clues to investigate the pertinent facts of the case, particularly because the petitioner may not know how to frame their case in the most advantageous way. By its choice and presentation of adjudication narratives, the Talmud creates the expectation that changing a decision does not undermine a court’s authority. The people’s reactions to rulings, even those that are oppositional, enhance impression of rabbinic norms being accepted among non-rabbis. Someone bothering to argue and negotiate reflects submission to the authority of the judge.

Lay people’s arguments, interruptions, or other actions can work in concert with a judge’s authority if he is willing to cooperate. Painful consequences of the court’s preference for a legal value over the welfare of an individual can even be reversed if the judge collaborates with lay people, because their arguments and actions, even and perhaps particularly those outside of the rabbinic norms, may be deemed relevant post facto and even probative. These women and men are not only subject to the law and sources of relevant information. They are themselves sources of relevant arguments, can change the direction of a case through action, and can resist, even swaying the court to their point of view, if they avoid insulting or undermining the judge.

This article examined the portrayal of lay people’s advocacy and resistance within the rhetoric and reasoning of the Babylonian Talmud. Stories illustrating forum shopping, actions that change the facts of the case, interruption and finally, argumentation, each offer an opportunity to assess when and why tactics are effective for the petitioner. They also instruct
future judges who might encounter similar situations. Most important, perhaps, is that their presence as case stories incorporates lay people’s concerns, and in some cases, their “backlash,” into Jewish legal reasoning, training, and tradition.