

Chapter Seven

The Role of Lawyers in Roman and Rabbinic Courts

I ask you, judges—just because *he* is eloquent, must *I* be convicted?¹

“Your lips have spoken lies” (Isaiah 59:3): this refers to lawyers.²

The search for truth, a quest that permeates so much of our lives and study, becomes especially pointed in the court of law where a person’s life or liberty can depend on a subtle matter of factual or textual interpretation.³ In parallel with philosophical debates concerning the existence of truth and how best to find it, legal systems encode fundamental assumptions about truth and interpretation within rules governing evidence and court procedure. Since the Rabbis of the Talmud did not write any systematic philosophical essays, this chapter will analyze Talmudic court procedures in the hopes of uncovering some of the epistemological assumptions of the rabbis. By doing so, we will be able to put the rabbis in conversation with their Roman and Christian contemporaries and find in rabbinic thought a complex and subtle approach to issues of truth and legal interpretation.⁴

Ancient epistemology offers two basic views about truth: Plato taught that there exists one unchanging objective truth, and the sophists who view reality as being relative, dependent on

¹ Lucius Annaeus Seneca, *Declamations*, trans. M. Winterbottom (Cambridge: Harvard University Press, 1974), *Controversiae* 7.4.6, p. 95.

² B. Shabbat 139a.

³ See Robert Cover, "Violence and the Word," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow, et al. (Ann Arbor: The University of Michigan Press, 1995), 223.

⁴ On the role of interpretation in law, see James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, WI: University of Wisconsin, 1985); and Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University, 1989).

context, and in constant flux.⁵ These two epistemologies, in turn, dictate two radically different modes of reasoning: the sophists engage in rhetorical argumentation with the assumption that the most convincing case will establish the best interpretation within a particular interpretive community. Plato and his foundationalist followers, on the other hand, eschew rhetoric in favor of logical proofs that will reveal the absolute and immutable truth.

These two strategies parallel two systems of court procedure: adversarial and inquisitorial. In the adversarial model, the model dominant in England and the United States, it is the responsibility of the parties and their lawyers to collect the evidence, cross-examine witnesses and present legal arguments. The judge acts as an umpire while the jury members passively listen to the adversarial advocates each present its side and then deliberate amongst themselves which they find more convincing. The adversarial system can also involve bench trials in which the judges take the fact-finding role of the jury but the trial remains a contest between two active parties.

In the inquisitorial system, on the other hand, it is the duty of the judge to collect the evidence, interrogate the witnesses, and work through legal arguments themselves while the advocates, if there are any, occupy a minor role.⁶ In practice, working legal systems are never

⁵ See Susan Handelman, *The Slayers of Moses: The Emergence of Rabbinic Interpretation in Modern Literary Theory* (Albany: SUNY, 1982), 3-25; Bruce McComiskey, "Neo-Sophistic Rhetorical Theory: Sophistic Precedents for Contemporary Epistemic Rhetoric," *Rhetorical Society Quarterly* 24, no. 3/4 (1994), 16-24 and his book *ibid.*, *Gorgias and the New Sophistic Rhetoric* (Southern Illinois University Press, 2002); and Scott Consigny, "Nietzsche's Reading of the Sophists," *Rhetoric Review* 13, no. 1 (1994), 5-26. Predictably, not everyone agrees with this reading of the sophists; see *ibid.*, "Edward Schippa's Reading of the Sophists," *Rhetoric Review* 14, no. 2 (1996), 253-269.

⁶ For descriptions of each system, see Peter van Koppen and Steven Penrod, "Adversarial or Inquisitorial: Comparing Systems," in *Adversarial Versus Inquisitorial Justice*, ed. Peter van Koppen and Steven Penrod (New York: Plenum Publishers, 2003), 1-19, as well as other essays in that book; Michael Louis Corrado, "The Future of Adversarial Systems: An Introduction to the Papers from the First Conference," *North Carolina Journal of International Law and Commercial Regulation* 35 (2010), 285-96, as well as other articles in that volume; James Diehm, "The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitorial Countries," *Journal of Transnational Law and Policy* 11, no. 1 (2001), 1-15; and Patrick Robardet, "Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry?," *Dalhousie Law Journal* 12, no. 3 (1989-1990), 111-114.

purely adversarial or inquisitorial but rather combine elements.⁷ These do, however, serve as useful typological models and, generally, legal systems can be safely categorized as predominantly one or the other.

The benefits and deficiencies of each system can, perhaps, be most easily illustrated by reviewing the trials of Job and of Susanna. The shortcomings of the adversarial system become apparent in the heavenly Adversary's successful suit against a blameless Job. In fact, it is precisely Job's righteousness that Satan attacks as superficial: "Lay Your hand upon all that he has and he will surely blaspheme You." Job, Satan charges, is loyal to God only because God showers him with prosperity. Even after Job passes his first trial and God complains to Satan, "you have incited Me against him to destroy him for no good reason," Satan manages to convince God to punish Job further. An innocent Job is made to suffer not because of his guilt, but because of the persuasive power of a strong prosecutor arguing before a seemingly weak and fickle Judge. In the next forty chapters, Job has to represent himself. In the adversarial system, uneven representation is a common occurrence and leads to unfair results. Passive judges and juries are likely to follow the most persuasive orator, which is not the same as the best evidence.⁸

The book of Susanna exemplifies the problems of the inquisitorial system. Two elders accuse the innocent Susanna of committing adultery and testify against her. The assembled court

⁷ See Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), 3-6; Joseph Grano, "The Adversarial-Accusatorial Label: A Constraint on the Search for Truth," *Harvard Journal of Law and Public Policy* 20 (1996-1997), 513-18; Felicity Nagorcka et al., "Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice," *Melbourne University Law Review* 29 (2005), 448-77; and William Pizzi, "Sentencing in the US: An Inquisitorial Soul in an Adversarial Body?," in *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*, ed. John Jackson, et al. (Oxford: Hart Publishing, 2008), 65-79, and other essays in that volume.

⁸ See further problems with the adversarial system discussed by Kent Roach, "Wrongful Convictions: Adversarial and Inquisitorial Themes," *North Carolina Journal of International Law and Commercial Regulation* 35 (2010), 387-446; Theodore Kubicek, *Adversarial Justice: America's Court System on Trial* (New York: Algora Publishing, 2006); Amalia Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial," *Cornell Law Review* 90 (2005), 1181-275; and Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World," *William and Mary Law Review* 38, no. 1 (1996), 5-44.

trust the testimony of the “distinguished” elders and condemn the woman to death. At the last moment, Daniel speaks out in defense of Susanna. He cross-examines the witnesses, exposes their lie, and reverses the penalty. It takes a good defense lawyer to reveal the truth and achieve justice. The assembled court in this case was not corrupt but simply easily swayed and quick to judge. In the inquisitorial system generally, judges simply do not have the same motivation or time as a hired advocate to think of all possible legal arguments, find the best evidence, or counter opposing arguments and evidence.⁹

The debate over these two systems dates back to the tensions between the Sophists and the philosophers. The legal system in 5th century BCE Athens was an adversarial system “taken to the extremes.”¹⁰ The role of judge and jury were combined in the *dikastai* who were ordinary citizens selected by lot and were responsible for determining both factual as well as legal questions. The number of *dikastai* judging a case was typically 500 (as in the trial of Socrates) but could reach several thousand in some cases.¹¹ These judges watched passively as the two sides presented their cases, as if they were at a sporting event or at the theater.¹² There was no place for the judges to examine witnesses or ask questions of the litigants; nor was there even any officially allotted time for them to deliberate.¹³ Athenians, with their populist mentality, expected citizens to be able to represent themselves in court and looked down upon those incapable of doing so. In practice, however, litigants would usually hire speech-writers (*logographoi*) to compose an oration which the litigant would memorize and perform for the court. In other cases,

⁹ See Gerald Walpin, “America’s Adversarial and Jury Systems: More Likely to Do Justice,” *Harvard Journal of Law and Public Policy* 26 (2003) 175-86.

¹⁰ S. C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon Press, 1993), 68 and see also pp. 126-27, 145 and 160-63.

¹¹ *Ibid.*, 83; and Douglas MacDowell, *The Law in Classical Athens* (Ithaca: Cornell University Press, 1978), 35-36. Homicide cases would be judged by the Areopagos consisting of one hundred to two hundred judges, or by the fifty-one members of the ephetai; see *ibid.*, 116-17.

¹² Adi Parush, “The Courtroom as Theater and the Theater as Courtroom in Ancient Athens,” *Israel Law Review* 35 (2001), 118-37.

¹³ Todd, *The Shape of Athenian Law*, 132.

a *synegoros* was allowed to join the litigant in court and assist him. *Synegoroi*, however, were not permitted to be paid but rather needed to claim to be a friend or relative of the litigant.¹⁴

Thus, vicarious advocacy for hire and friendly support in court more than made up for the absence of professional lawyers.¹⁵ In the Athenian court system, Sophists and their art thrived.

Plato, on the other hand, criticizes Sophists generally and their function as court advocates in particular. In the *Laws*, he envisions a utopian city called Magnesia where the court system is inquisitorial¹⁶ and where lawyers are to receive the death penalty. In the voice of the Athenian stranger, Plato writes:

None would deny that justice between men is a fair thing, and that it has civilized all human affairs. And if justice be fair, how can we deny that pleading (*συνδικεῖν*) is also a fair thing? But these fair things are in disrepute owing to a kind of foul art, which, cloaking itself under a fair name, claims, first, that there exists a device for dealing with lawsuits, and further, that it is the one which is able, by pleading and helping another to plead, to win the victory, whether the pleas concerned be just or unjust; and it also asserts that both this art itself and the arguments which proceed from it are a gift offered to any man who gives money in exchange. This art—whether it be really an art or merely an artless trick got by habit and practice—must never, if possible, arise in our State....If anyone be held to be trying to reverse the force of just pleas in the minds of the judges, or to be multiplying suits unduly or aiding others to do so, whoso wishes shall indict him for perverse procedure or aiding in perverse procedure, and he shall be tried before the court of select judges; and if he be convicted, the court shall determine whether he seems to be acting from avarice or from ambition; and if from the latter, the court shall determine for how long a period such an one shall be precluded from bringing action against anyone, or aiding anyone to do so; while if avarice be his motive, if he be an alien he shall be sent out of the country and forbidden to return on pain of death, but if he be a citizen he shall be put to death because of his unscrupulous devotion to the pursuit of gain. And anyone who has twice been pronounced guilty of committing such an act from ambition shall be put to death.¹⁷

Plato states that legal advocates seem like they practice a noble art but actually are responsible for corrupting justice. The “foul art” he refers to is rhetoric.¹⁸ Plato’s attack on rhetoric runs

¹⁴ See Demosthenes 46.26.

¹⁵ Jonathan Powell and Jeremy Paterson, *Cicero the Advocate*, vol. Oxford (Oxford University Press, 2004), 10-12; Lene Rubinstein, *Litigation and Co-operation: Supporting Speakers in the Courts of Classical Athens* (Stuttgart: Franza Steiner Verlag Stuttgart, 2000); J. A. Crook, *Legal Advocacy in the Roman World* (Ithaca: Cornell University Press, 1995), 30-37; Todd, *The Shape of Athenian Law*, 94-96.

¹⁶ *Laws* 766d, 855d-856a, and see further at Trevor Saunders, "Plato's Later Political Thought," in *The Cambridge Companion to Plato*, ed. R. Kraut (Cambridge: Cambridge University Press, 1992), 336.

¹⁷ *Laws* 937e-938c. Translation from *Plato: Laws*, trans. R. G. Bury (Cambridge: Harvard University Press, 1926). See discussion at Glenn Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws* (Princeton: Princeton University Press, 1960), 280-83; and Trevor Saunders, *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology* (Oxford: Clarendon Press, 1991), 332-33.

¹⁸ *Gorgias* 462b-466a.

throughout his dialogues but is a central theme in the *Phaedrus* and *Gorgias*. He equates rhetoric with demagoguery, using verbal tricks to convince the masses of what is beneficial to the speaker without any concern for justice or truth.¹⁹ Only philosophy can rightly be called an art because the philosopher understands the truth about the subject he analyzes in all its particulars and definitions and is also able to discern the nature of the soul of his audience and how to best form a speech that will lead the soul to attain the truth.²⁰ Rhetoric is not an art but only a knack for producing pleasure, for imitating the persuasive effects of philosophy but without any substance.²¹

Plato believes that there exists one objective and unchanging truth, as did Parmenides before him. Only through philosophy can we rise above the world of illusions and bodies in order that our souls may understand the ideal forms, the realm of unchanging truth.²² Rhetoric, on the other hand, assumes the worldview of Protagoras that “man is the measure of all things” and of Heraclitus that “Everything changes and nothing remains still.” Because objective truth does not exist, or at least is inaccessible, truth must be defined subjectively as the common consent reached after both sides have been heard and weighed.

We can now appreciate why Plato wants to rid his city of lawyers. These advocates will argue any case, whether just or not, for pay and obscure the judicial system and the search for truth. The adversarial system is anathema to Plato. He prefers an inquisitorial system where impartial judges will examine the evidence and arrive at the one objective truth in each case. The two systems of court procedure thus relate directly to the two epistemological worldviews discussed. The adversarial system fits hand-in-glove with the epistemology of the Sophists;

¹⁹ *Phaedrus* 260 and 272d-e.

²⁰ *Phaedrus* 270b-272b, 277b-c. *Phaedo* 61a.

²¹ *Gorgias* 462c-466b. See Jeremy Bell, “‘Empeiria kai Tribe’: Plato on the ‘Art’ of Flattery in Rhetoric and Sophistry,” *Epoche: A Journal for the History of Philosophy* 15, no. 2 (2011), 379-94.

²² *Republic* 409d-513e, *Phaedo* 66d.

rhetorical debate by partial advocates before a passive jury and judge is, according to them, the best and only path towards arriving at the most probable and just verdict. In the inquisitorial system, on the other hand, the judge sits like a philosopher, perceiving evidence objectively, without the hinderance of rhetorical tricks and illusions, and is thus best able to arrive at Justice.²³

The preceding introduction will serve as a theoretical model by which to evaluate the legal procedure of the rabbis. First, however, we need to recall the historical background of legal procedure in Roman courts so that the contrast in the rabbinic system will be evident. The Roman system in large part continued the adversarial Greek system except that it gradually introduced professional lawyers directly and not only through logographers or *synagoroi*.²⁴

Roman civil procedure went through three overlapping phases: the *legis actio* procedure during most of the Republic, the formulary system from second century BCE until the third century CE, and the *cognitio extraordinaria* during the post-classical period of the Empire.²⁵ The

²³ See Thomas Weingend, "Should We Search for the Truth, and Who Should Do it?," *North Carolina Journal of International Law and Commercial Regulation* 36 (2011), 389-415, who associates the inquisitorial system with the correspondence theory of truth, which accords with the Platonic view that something is true if it corresponds with objective reality. The accusatorial system, in turn, is generally associated with consensus theory, which is similar to the rhetorical tradition that defines truth as the communal consensus resulting from a procedure evaluating both sides. This is not to say that every participant in an inquisitorial system believes in correspondence theory or vice versa; in real life, judicial systems are complex hybrids that do not consistently follow any epistemological model. However, in the abstract ideal world, such as the utopian world of Plato, the inquisitorial model will tend to attract adherents of correspondence theory and vice versa. See also Joseph Fernandez, "An Exploration of the Meaning of Truth in Philosophy and Law," *University of Notre Dame Australia Law Review* 11 (2009), 53-83; and Matthew King, "Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems," *International Legal Perspectives* 12 (2002), 185-236. USE THIS REF LATER IN CONNECTION WITH EXCLUSION OF EVIDENCE IN HALBERSTAM.

²⁴ Advocacy evolved from the patron-client system in the archaic period where the *patronus* would speak on behalf of his client of lower status in court. By the late republic, *patroni* would make his services available to anyone who asked, although in 204BCE, the *lex Cincia* prohibited advocates from taking fees for their services. This law, however, was later relaxed and advocacy took on a more professional character. See Crook, *Legal Advocacy*, 37-46 Powell and Paterson, *Cicero the Advocate*, 12-18; and Catherine Steel, *Roman Oratory* (Cambridge: Cambridge University Press, 2006), 29-30, 55-56.

²⁵ George Mousourakis, *A Legal History of Rome* (London: Routledge, 2007), 32. The formulary system was officially abolished in 342CE but had effectively already become obsolete beforehand. See Andrew Borkowski and Paul du Plessis, *Textbook on Roman Law* (Oxford: Oxford University Press, 2005), 79.

formulary system, which was in effect during the Tannaitic and early Amoraic periods, was highly adversarial.²⁶ George Mousourakis describes it as follows:

During the trial, the accuser and the defendant dominated the scene, with their advocates and witnesses engaged in cross-examinations that were often rancorous. The jurors listened in silence, while the presiding magistrate was mainly responsible for the orderly progress of the proceedings. Both oral and documentary evidence was admissible. Witnesses testified under oath and were examined by their own side and cross-examined by the other. After all the evidence was presented and the closing speeches delivered, the magistrate convened the jury and placed the question of the defendant's guilt or innocence to the vote.²⁷

Of course, court procedure varied greatly depending on the place, time, court, and type of case. Under the *cognitio extraordinaria*, for example, court procedure became more inquisitorial with the judge interrogating the witnesses.²⁸ However, even in this period, legal advocacy remained an important part of court procedure.²⁹ Lawyers play a prominent role in court procedure not only in the west of the Empire, where evidence abounds, but even in the east. Dozens of papyri from Egypt preserve court documents that feature advocates showing that their presence was “ubiquitous,” even if not universal.³⁰

Many sources indicate that the rabbis were familiar with Roman law. In some cases, there are clear parallels or borrowing between the systems. As an example from court procedure, in both Roman and Talmudic law, the two parties to a case would choose the judge by taking turns rejecting names from a list of men qualified to serve as judges.³¹ This being the case, it is appropriate to compare the adversarial system of Roman law and the role of advocates in that

²⁶ See Andrew Riggsby, *Roman Law and the Legal World of the Romans* (Cambridge: Cambridge University Press, 2010), 115. See Kathryn Tempest, *Cicero: Politics and Persuasion in Ancient Rome* (New York: Continuum, 2011), 61, for examples of Cicero cross-examining witnesses.

However, in some of the Egyptian papyri, it is the magistrate who questions the witnesses. See Crook, *Legal Advocacy*, 66.

²⁷ Mousourakis, *A Legal History*, 80-81. Juries in Roman law were smaller than those in Athens and were sometimes dispensed with altogether. See *ibid.*, 130.

²⁸ *Ibid.*, 174..

²⁹ Olga Tellegen-Couperus, “Roman Law and Rhetoric,” *Revue Belge De Philologie Et D'histoire* 84, no. 1 (2006), 63, citing E. P. Parks, *The Roman Rhetorical Schools as a Preparation for the Courts under the Early Empire* (Baltimore: Johns Hopkins University, 1945), ch. 2.

³⁰ Crook, *Legal Advocacy*, 123.

³¹ Riggsby, *Roman Law*, 114, and M. Sanh 3:1; see Tzvi Novick, “The Borer Court: New Interpretations of MSan 3,” *Zutot* 5, no. 1 (2008), 1-8.

system with the court system envisioned in rabbinic sources. Was the rabbinic legal system adversarial or inquisitorial and what was the place of lawyers within rabbinic courts?

Furthermore, what can Talmudic sources reveal about the epistemological viewpoints of the rabbis? In our study of rabbinic sources, we work under the assumption that the texts describing the procedure are not necessarily describing a functioning court system but are more likely a theoretical construct.³² However, the extent to which the sources are theoretical makes them all the more significant for discovering the underlying philosophical assumptions of their authors in their description of their own utopian system.

One Tannaitic prohibition relating to advocates appears in Mekhilta d'Rabbi Yishmael, Masechta d'Kaspa, Mishpatim, 20:

“Keep far from a false matter” (Exod 23:7)... This is a warning to the judge... that he should not place advocates (סניגורין) beside him, for the verse states, “the claims of both parties shall come unto God” (Exod 22:8).

This Midrash forbids a judge to appoint defense advocates because this would cause a bias in his judgment.³³ He must be impartial and hear both sides; God in Exod 22:8 represents the judge and the claims are to reach him directly and not through partial intermediaries. This source does not explicitly prohibit the litigants from benefiting from the services of advocates but only that the judge should not use one.

A parallel midrash in Mekhilta d'R. Shimon bar Yohai, Mishpatim, 23:1 makes a broader prohibition:

“Do not carry false rumors” (Exod 23:1): [This teaches] that advocates (סניגורין) should not speak before them [the judges].

³² Beth Berkowitz, *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures* (New York: Oxford University Press, 2006), ??.

³³ I disagree here with the commentary called Zet Ra`anan cited approvingly by Yuval Sinai, *The Judge and the Judicial Process in Jewish Law* (Jerusalem: Hebrew University, 2010) (Hebrew), 475, who says that the object of this statement is the litigant. The context makes clear that the warning is to the judge. The parallel at bShevu 30b also addresses the judge explicitly. In this sense, this midrash is similar to mAvot 1:8 discussed below.

This midrash seems to ban advocates from the courtroom altogether. It is too terse, however, to make a definite conclusion without further evidence.³⁴ Happily, support for both of the prohibitions in these midrashim is found in the Mishnah.

The first five chapters of Mishnah Sanhedrin discuss the various aspects of rabbinic court procedure from the number of judges required for various types of cases to the procedure for tallying the final vote. The first thing we notice is the absence of any mention of advocates, even where we might expect them most. mSanh 3:6 describes the procedure for examining witnesses:³⁵

How do they [the judges] examine the witnesses? They bring them³⁶ in and intimidate them and remove them³⁷ outside [the courtroom] and leave the older of them [the witnesses]. They say to him, “Tell, how do you know that this one is liable to that one?”... Then they bring in the second [witness] and they examine him. If their words are found to line up, they [the judges] deliberate on the matter.

Examining the witnesses is probably the most central aspect of the rabbinic trial and the place where a good lawyer would have the most effect. (Remember how Daniel reversed the verdict in Suzanna’s trial.) Yet, this Mishnah explicitly assigns the role of examining the witnesses to the judges. So far, these Tannaitic sources seem to describe an inquisitorial system.

The only mention of advocates in the entire Mishnah is in mAvot 1:8 and is a negative one:³⁸

³⁴ This is true especially because, as Sinai, *ibid.*, notes this midrash derives from Midrash ha’Gadol and not from the Cairo Geniza and so its status as an authentic Tannaitic tradition is questionable.

³⁵ Translation follows ms. Kaufman. Translations of rabbinic texts are my own. Major variants are noted below.

³⁶ Ms. Kaufman reads אִתּוֹ “him” here, which I have emended to אִתָּן based on all other textual witnesses. From the context as well, it is evident that all witnesses would need to enter the courtroom to hear the intimidation since all witnesses but one are later removed.

³⁷ Printed editions of the Mishnah and ed. Venice of the Bavli read אֶת כָּל הָאָדָם—everyone” אֶת כָּל הָאָדָם. However, ed. Soncino of the Bavli and all manuscripts of the Mishnah, Yerushalmi, and Bavli as well as tSan 6:3 read “אִתָּן—them.” The former is a corruption based on mSan 7:5. See Tosafot Yom Tov and Dikduke Soferim.

³⁸ Translation follows ms. Kaufman. Major variants are noted below; for a full list of variants see Shimon Sharvit, *Masechet Avot le-doroteha: mahadura mada’it, mevo’ot ve-nispahim* (Jerusalem: Mosad Bialik, 2004), 70-2.

יהודה בן טבאי אומר אל תעש עצמך כעורכי דינים
 וכשיתקו בעלי הדין עומדין לפניך יהיו בעיניך כרשעים
 וכשנפטרים מלפניך יהוא בעיניך כצדיקים שקיבלו עליהן את הדין
 שמעון בן שטח אומר הווי מרבה להקור את העדים
 והווי זהיר בדבריה שמה מתוכן ילמדו לשקר:

Yehudah ben Tabai says, “Do not make yourself as advocates (כעורכי דינים),³⁹ and when the litigants stand before you they should be guilty in your eyes and when they leave from before you they should be innocent⁴⁰ in your eyes for they have accepted⁴¹ upon themselves the judgment.”

Shimon ben Shataḥ says, “Examine the witnesses greatly and be careful with your words lest [the witnesses] learn to lie from them.”

Yehudah ben Tabai advises judges on how to deal with litigants while Shimon ben Shataḥ instructs them on how to examine witnesses. The latter statement backs up mSan 3:6 in assuming that the judges have the role of interrogating the witnesses. Yehudah ben Tabai’s statement, however, is more ambiguous. While the modern Hebrew word for lawyers is עורכי דין “arrangers of law,” the Mishnah’s עורכי דינים “arrangers of judges” is difficult to explain.⁴² For this reason, Yechezkel Kutscher argues that the original reading follows those manuscripts that read ארכי ארכי to mean: do not act as a chief justice.⁴³ Yuval Sinai, however, counters that ארכי is more

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³⁹ Lit. arrangers of the judges; see discussion below. Mss. London, Rome, and ten extant Geniza fragments read כערכי or כעורכי with and *ayin*. Ms. Parma and four Geniza fragments read ארכי or כארכי with an *alef*. Ms. Kaufman originally read ארכי but was then changed to כערכי.

⁴⁰ Mss. Kaufman, Parma, London and most Geniza fragments read כצדיקים. Ms. Rome, some Geniza fragments and printed editions read כזכאין.

⁴¹ Some mss. and the printed ed. read כשקבלו “when they accept.”

⁴² Maimonides, in his Mishnah commentary, explains as follows: “These are the people who learn how to plea so that they can advocate for people in their litigations. They propose questions: if the judge will say this, the response is this and if the litigant should claim this then the response will be this, as if they arrange the judges and the litigants before them. For that reason they are called ‘arrangers of judges,’ as if they arranged the judges before them.” See Yosef Kafih, *Mishnah with the Commentary of Rabbenu Moses ben Maimon* (Jerusalem: Mossad Harav Kook, 1963-7) (Hebrew), *Nezikin*, 270; and Hanoch Albeck, *Six Orders of Mishnah*, 6 vols. (Jerusalem: Mossad Bialik, 1959) (Hebrew), *Nezikin*, 494.

⁴³ Yechezkel Kutscher, *Milim ve-toldotehen* (Jerusalem: Kiryat Sefer, 1965), 89-91. Kutscher explains that ארכי is a transliteration of the Greek prefix ἀρχι-. In fact, Kutscher traces the same shift from Greek to Hebrew in the manuscript tradition of Genesis Rab. 50. Ms. London includes the original Greek word ἀρχικριטים, which is changed in ms. Vatican to ארכי דינים, and then appears in Midrash Sekhel Tob as ערכי הדינים. Similarly, ארכי (archiudex) in ms. London is changed to עורכי דין in Ms. Oxford 2335. See all mss. variants at Hanoch Albeck and Judah Theodor, *Midrash Bereshit Rabbah: Critical Edition with Notes and Commentary* (Jerusalem: Shalem Books, 1996), 519, and cf. p. 625.

likely to be a misspelling of the original עורכי and that the term in all manuscripts should be understood to refer to someone who provides legal advice to the litigant. Nevertheless, even if Kutscher is correct, the change to עורכי דיינים happened very early on in the Mishnah's transmission so that even the early Amoraim understood it to refer to advocates. This meaning has the advantage that both parts of Yehudah ben Tabai's statement work together since both address the manner in which the judge should treat the litigants.⁴⁴ Furthermore, it is reminiscent of the Mekhilta d'R. Yishmael cited above and so we should not be surprised to find the same idea in another Tannaitic source.

To be sure, the Mishnah does not ban advocates altogether but only prohibits the judge from acting as an advocate by providing legal advice to one party.⁴⁵ However, the Talmuds greatly expand the application of this Mishnah to prohibit not only active judges from acting like advocates, as the context of the statement suggests, but to forbid anyone from being a lawyer. yBB 9,4 (17a) states:⁴⁶

It was taught: Rabbi Shimon ben Gamaliel says, "Any ailment that has a fixed cost is healed [using the funds of] her *ketubah*. If it does not have a fixed cost, it is healed from the property [of the husband's estate].

As the case of a relative of Rabbi Shimon bar Va who suffered pain in her eye. She came to R. Yoḥanan. He told her, "Does your physician charge a fixed fee? If he does charge a fixed fee then [it will be deducted] from your *ketuba*. If he does not charge a fixed fee then your husband will give it to you.

Avot d'Rabbi Natan A, 10, assumes this reading in its gloss: "How so? This teaches that if you came to the House of Study and heard a matter or a halakha, do not hurry in your mind to respond. Rather sit and ask what is the reason they said this, what is the context of this law or halakha that they asked me about." See also Albeck, *Mishnah*, *ibid.*; and Zvi Aryeh Steinfeld, "'Asinu `asmenu ke-orche ha-dayanin," *Te`udah* 7 (1991): 112 n. 5.

⁴⁴ Regarding the difficulty of parsing the phrase עורכי הדינים, Sinai cites scholars who claim that the term refers to the magistrates of the court who would prepare the case, gather the evidence, assess that there is a legitimate plea, and reveal to the plaintiff what punishment he should sue for. Need to check this. It is not clear what aspect of the magistrate's activities might be done by the judge and what would be wrong with such activity.

⁴⁵ The mention of advocates here also suggests that the rabbis were familiar with role advocates played in Roman courts. See Yuval Sinai, "Do Not Make Yourself as Advocates': On the Place of a Rule in Court Procedure," *Iyunim be-Mishpat `Ivri u-Behalacha: Dayyan ve-Diyun* (2007) (Hebrew), 99-100.

⁴⁶ Translation is based on ms. Leiden. For textual issues see Steinfeld, "'Asinu," 117-19. This sugya has a partial parallel at yKet 4, 11 (29a).

But did they not teach us: Do not make yourself as advocates? And R. Hagi said in the name of R. Yehoshua ben Levi: It is prohibited to reveal to an individual his judgment. Say that R. Yoḥanan knew that that woman was upright and for that reason he revealed it to her.

If her husband wants it to be a fixed amount and she does not want it to be a fixed amount, to whom do we listen, not to her husband?

R. Matnaya said, this is only said for someone whose law is not with him but for someone whose law is with him he may tell him something.

A widow is generally sustained by the estate of her husband, which is inherited by his children.

This sustenance includes not only food but also medical care. Rabban Shimon ben Gamaliel qualifies that the estate is only required to pay ongoing medical care but a one time ailment with a fixed cost must be paid by the widow herself, i.e. it is deducted from the amount owed to her in her ketubah. R. Yoḥanan once gave legal advice to a widow based on this ruling. The Talmud challenges the permissibility of doing so based on mAvot 1:8 and the comment of R. Yehoshua ben Levi, even though R. Yoḥanan here does not seem to be the judge.⁴⁷ The Talmud thus assumes a general prohibition against anyone providing legal advice that may help someone use a technicality in the law to their advantage in court. The Talmud responds that R. Yoḥanan was permitted in this case to offer advice because he knew the woman was upright and would not unjustly manipulate her plea based on his advice. In any case, adds the Talmud, the structure of doctor payments would have to be approved by the husband and is not up to her.⁴⁸ R. Matnaya's statement generalizes the caveat already proposed: one may provide legal advice to someone who is in the right and whose plea will already be successful because that advice will not change either the plea or the outcome.⁴⁹

⁴⁷ Ibid.BECAUSE ONLY SHE COMES

⁴⁸ For other interpretations of this line see *ibid.*, 119-20. I do not read this line as a new question (as does R. Eliyahu Fulda) nor as part of the response of the previous line (as does Pnei Moshe) but rather as a separate second response to the original question.

⁴⁹ For a different interpretation of R. Matnaya's statement see *ibid.*, 120-

A parallel to this sugya appears in the Bavli where the R. Yoḥanan himself challenges his own previous action:⁵⁰

A relative⁵¹ of R. Yoḥanan had a step-mother who needed medical care every day. They⁵² came before R. Yoḥanan. He told them,⁵³ go and set a price for her medical care. R. Yoḥanan said, “We have made ourselves as advocates!” What did he think at first and what did he think in the end? At first, he thought, “Do not ignore your own kin” (Isaiah 58:7). At the end he thought, it is different for an important person.

It is difficult to date when this interpretation first appears. According to the Bavli it is R.

Yoḥanan himself and in the Yerushalmi it is R. Yehosua ben Levi, at least according to the Talmud’s application of his statement. Steinfeld thinks it is later.⁵⁴

Both the Yerushalmi and the Bavli interpret mAvot to prohibit even non-judges to act as advocates. However, both Talmuds also allow for exceptions: the Yerushalmi allows one to give advice if such advice will not change the plea and the Bavli permits a layperson to help his or her relative. Other sources allow even the judges to help the plea of one side in exceptional cases. But the general principle that runs throughout these sources demands that advocates may not be active in the rabbinic court itself.

To be sure, court advocates do make some appearances in exceptional cases. For example, a trustee (אפוטרופוס—ἐπίτροπος) may act as an advocate for the estate of young orphans who cannot represent themselves. bKet 109b relates that one such trustee successfully regained

⁵⁰ bKet 52b. Translation based on Geniza fragment Cambridge T-S NS 329.237. See variants, see Abraham Liss, *The Babylonian Talmud with Variant Readings* (Jerusalem: Yad Harav Herzog, 1983) (Hebrew), Ketubot, 1.386-87. See the parallel sugya at bKet 85b.

⁵¹ All mss. read קריביה, indicating a single relative. Some mss., however, use a plural pronoun later in this sentence (untranslated here), that may indicate many relatives.

⁵² One ms. reads “he.” If only one person came before R. Yoḥanan, then he certainly was not acting as a judge. However, even according to the most manuscripts that read a plural here, it still seems that only one party of many people came to him and he was not acting as judge. First, R. Yoḥanan would not be able to give his advice if both parties were present. Second, bKet 54b uses a plural pronoun even though it is clear that R. Yoḥanan was not acting as a judge in that case. See Steinfeld, “Asinu,” 113-115; and Sinai, *Judge*, 50.

⁵³ Two mss. have a singular pronoun here.

⁵⁴ According to this timeline, the later anonymous layer which prohibits lawyers coincides with the the *cognitio extraordinaria* which similarly moved away from the adversarial method. However, based on the Mekhilta d’R. Shimon bar Yohai and M. Sanh 3:6 discussed above, it seems more likely that already the Tannaim opposed the adversarial system and its use of lawyers.

ownership of a contested field using far-fetched but legally valid pleas. Abaye, who was the judge, then commented: “Any person who appoints a trustee should appoint one like this who knows how to turn [the verdict] in favor of the orphans.” While this source shows, on the one hand, how a skilled advocate can make a big difference, it also allows for such advocacy only in exceptional cases of young orphans.

In order to explain why the rabbinic court system rejects the use of advocates, one may be tempted to turn to a line from ySan 2, 1 (19d): “Let him appoint a representative (אנטלר)⁵⁵? Think about if he was required to swear—could a representative swear!” This line entertains the possibility of having someone represent the high priest in a suit since it undignified for the high priest to be tried in person. The Yerushalmi rejects the possibility of using representation when the litigant is absent because only the litigant can swear about his own affairs. However, this cannot be the reason for the general antipathy of the Talmud towards lawyers because the problem of the lawyer not being able to swear only arises if the litigant is absent. In a general case of a lawyer who joins the litigant in the courtroom, this reason would not apply.

Rather, the Talmud seems to hold the adversarial system suspect because it does not lead to justice or promote honesty. They view the Roman court system as corrupt and capricious to the point that they can say: “Anyone who goes up to the gallows to be judged, if he has great advocates (פרקליטין) he is saved but if not he is not saved.”⁵⁶ Once the trial is put in the hands of hired lawyers, it becomes simply a debating contest and the most persuasive orator will win regardless of truth or justice. As Eliezer Segal puts it:

⁵⁵ On this word, see Saul Lieberman, *Greek in Jewish Palestine* (New York: The Jewish Theological Seminary, 1942), 12-14; and Boaz Cohen, *Jewish and Roman Law: A Comparative Study* (New York: The Jewish Theological Seminary of America, 1966), 54.

⁵⁶ bShab 32a. See similarly bBer 60a stating that an innocent person who cannot find an advocate is at risk of being put to death by courts.

The Traditional Jewish court does not permit the use of lawyers at all... The Talmudic sources, which were familiar with the Roman court system and its susceptibility to persuasion by mellifluous rhetoric, warned the rabbis, "Do not act like the professional pleaders." It was the judge's job to get at the truth without its being packaged by a professional.⁵⁷

Does this mean that the rabbis imagine a purely inquisitorial court along the lines of Plato? Did they reject the rhetorical tradition entrenched in Greco-Roman culture as thoroughly as did Plato? The continuation of Mishnah Sanhedrin that detail procedures for the deliberation of the judges suggests a more complex picture. mSan 4:1-3 reads:

Both monetary cases and capital cases require interrogation and investigation as it is said, "You shall have one standard" (Lev 24:22).⁵⁸

What is the difference between monetary cases and capital cases?

[1] Monetary cases require three [judges] while capital cases require twenty three.

[2] In monetary cases they begin the deliberation with [arguments] either for guilt or acquittal while in capital cases they begin with [arguments] for acquittal and they do not begin with [arguments] for guilt.

[3] In monetary cases they incline based on one [vote] whether for acquittal or for guilt while in capital cases they incline based on one [vote] for acquittal but based on two [votes] for guilt.

[4] In monetary cases, they change they overturn [the verdict] whether for acquittal or for guilt while in capital cases they overturn for acquittal and do not overturn for guilt.⁵⁹

[5] In monetary cases everyone can offer [arguments] for acquittal or for guilt while in capital cases everyone can offer [arguments] for acquittal but not everyone can offer [arguments] for guilt.⁶⁰

[6] In monetary cases, he who argues for guilt may argue for innocence and he who argues for innocence may argue for guilt while in capital cases he who argues for guilt may argue for innocence but he who argues for innocence may not change and argue for guilt.

[7] In monetary cases, they judge during the day and may finish at night while in capital cases they judge during the day and must finish during the day.

[8] In monetary cases they may finish on the same day whether for acquittal or for guilt while in capital cases they may finish on the same day for acquittal or on the next day for guilt. Therefore they do not judge on the eve of Shabbat or they eve of a holiday.

⁵⁷ Eliezer Segal, *Holidays, History, and Halakhah* (Northvale, NJ: Jason Aronson, 2001), 16. See also *ibid.*, "Jewish Perspectives on Restorative Justice," in *The Spiritual Roots of Restorative Justice*, ed. Michael Hadley (Albany: State University of New York Press, 2001), 183-84.

⁵⁸ Referring to the previous verse which mentions both monetary and capital punishments.

⁵⁹ This refers to a case when new testimony becomes available after sentencing but before the punishment is given.

⁶⁰ This refers to students, witnesses, or other spectators who want to submit an argument to the court that the court had not thought of.

[9] In monetary cases and purity and impurity cases they begin from the greatest [judge] while in capital cases they begin from the side.

[10] Everyone is fit to judge monetary cases but not everyone is fit to judge capital cases except priests, Levites, and Israelites who are marriageable to the priesthood.

The Sanhedrin was like half of a round granary so that [the judges] would be able to see each other. Two court scribes stood before them, one on the right and one on the left, who would write the words of those who convict and the words of those who acquit. R. Yehudah says, there were three [court scribes]; one writes the words of those who convict, one writes the words of those who acquit, and the third writes the words of those who convict and the words of those who acquit.

The deliberation of the judges is not simply an open discussion but rather follows a detailed protocol. The protocol in monetary cases is fairly straightforward: the chief judge opens the deliberation [9] by taking a stance either for guilt or innocence [2] and arguing his case; the rest of the judges would then argue in turn for one of the two sides but could change their stances either way during the deliberation [6]; if one of the witnesses or students has an argument to add they may do so [5] (mSan 5:4).

The protocol for capital cases, on the other hand, is much more complex and interesting. The lesser judges begin the deliberation [9] because if the chief judge opens to convict, the lesser judges will feel apprehensive about disagreeing with him. Beginning with the lesser judges encourages the most diversity of opinion.⁶¹ Furthermore, the judge who begins the deliberation must argue to acquit and he, as well as any other judge who argues for acquittal may not change their positions to argue for conviction. This ensures that there will be at least one judge, and probably many, committed to arguing solely on behalf of the defendant. The Yerushalmi comments on this Mishnah:

⁶¹ Significantly, the Roman Senate began deliberation with the most senior members and junior senators rarely got a chance to speak. See A. W. Lintott, *The Constitution of the Roman Republic* (Oxford: Oxford University Press, 1999), 77-78; and Steel, *Roman Oratory*, 12-13, 20.

Said R. Yoḥanan: One who does not know how to derive that a reptile is pure and impure in one hundred ways, may not open the deliberation in merit [of the defendant].⁶²

The judge who opens the deliberation for acquittal must be as skilled as a high paid lawyer and is forced, throughout the deliberation, to use his skill almost as if he were playing the role of the defendant's lawyer. As Saul Lieberman comments: "The judge must thus be a rhetor who can *disputare in utramque partem* and prove at one and the same time the two opposite points of view."⁶³ What emerges from this protocol is that the rabbis are not Platonists who believe there exists one truth that an objective inquisitorial judge can access. Rather, they remain within the realm of rhetoric, recognizing the power of persuasion and the near impossibility for humans to arrive at anything like objective truth. However, it is precisely for that reason that the power of rhetorical argumentation cannot be trusted in the hands of hired and biased advocates but rather must be delivered into the care of the judges.⁶⁴

For this same reason, the rabbis will not convict on the basis of a simple majority: the judgement of one deciding judge who might be swayed to acquit with a few more minutes of deliberation is too thin of a margin to take someone's life. It is too easy, even for a group of twenty-three judges to fall into group-think and not be creative enough to think of all possible lines of argumentation. The Mishnah thus allows for bystanders to chime in and offer further reasons to acquit. In all of the deliberation, the Mishnah looks to sway towards innocence because it is better to let a guilty person go free than to kill an innocent person. I do not believe that the primary purpose of this set of protocols is to ban capital punishment per se.⁶⁵ Rather,

⁶² ySan 4:1 (22a). See parallel at bSan 17a and discussion at Richard Hidary, "Classical Rhetorical Arrangement and Reasoning in the Talmud: The Case of Yerushalmi Berakhot 1:1," *AJS Review* 34, no. 1 (2010), 33-64.

⁶³ Saul Lieberman, *Hellenism in Jewish Palestine* (New York: The Jewish Theological Seminary, 1962), 63.

⁶⁴ Merumeh, yuval sinai

⁶⁵ See Berkowitz, *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures*, 19-20, and the history of scholarship on this at pp. 25-64. One set of sources that suggests that the rabbis were not against the death penalty is tSan 10:11, 7:2, bSan 33b and 36b, which legislate that push towards acquittal in mSan

because they recognized that human reasoning is frail and fickle, the judges must use their rhetorical abilities argue for innocence. It is best to err on the side of innocence, even to the point of disallowing potential arguments for conviction by bystanders and by judges who have already committed to acquittal.

Is the rabbinic court inquisitorial or adversarial? It is a complex combination of both. The overall structure of the court procedure, including the hearing of pleas and examining witnesses, follows the inquisitorial system. However, a substantial adversarial element is introduced during the stage of deliberation—not utilizing lawyers but the judges themselves. The judge is prohibited from acting like a lawyer during the first half of the trial: he may not suggest pleas or direct witness testimony. But during the deliberation, the courtroom is transformed into a mock adversarial trial with the judges lining up on two sides as prosecutors and defendants and with two court stenographers each dedicated to recording only the words of one side.⁶⁶ The rabbis, at heart, were sophists; but whereas the sophists translated their epistemology into a complete adversarial system, the rabbis legislated that the adversarial element must be limited and better controlled. The best way to justice is by having two opposing parties arguing for each side. But if those parties are lawyers then they will introduce deception and trickery and obfuscate the chances of finding the truth. The best chance for justice comes with adversarial rhetoric in the hands of competent and honest judges. This complex set of court procedures reveals a highly sophisticated and nuanced epistemology that harnesses but also controls the power of persuasion by synthesizing rhetoric with an honest search for justice.

4:1 does not apply to the inciter to idolatry (Deut 13:7-12). In cases when the rabbis see it fitting to use the death penalty they seem to have no qualms about doing so.

Even if one thinks that the rabbis were against the death penalty, it is still worthwhile asking why they chose this particular method to effectively ban it. See the same methodology used by Devora Steinmetz, *Punishment and Freedom: The Rabbinic Construction of Criminal Law* (Philadelphia: University of Pennsylvania, 2008), 16.

⁶⁶ These scribes are also mentioned at Lev. Rabbah 30:11.

This study is significant in its own right but also as a window into rabbinic epistemology, a subject that the Talmud rarely discusses explicitly. A few parade sources indicate that the rabbis did not believe in one truth. In fact, Handelman says they are anti-Plato. What she misses, however, is that they were part of the general Greco-Roman culture. She is correct, however, in that the rabbis are skeptical of rhetoric. That is, more skeptical than the typical sophist, though there were critics of sophism among the Romans as well. They managed to create a unique hybrid system that reveals a complex epistemological stance.

Add points about toanin layoresh, and also we help the agunah at end of yevamot.

Copy cohen and fish from other article

Other attempts have been made to combine the two systems. See. A successful combination of the strengths of each system is the holy grail of the vast literature and real life attempts.

see article by Jonah ostrow.

Toen – careful treading in rambam based on b and y, advocacy article.

I'd like to claim that the rabbis on the one hand rejected the adversarial system common to their surrounding Roman context. However, they also did not buy into the philosophical underpinning of the inquisitorial system. They recognized the frailty of human reasoning and bias and subjectivity built into it. They therefore introduce an adversarial element into the deliberation of the judges.

Author of Acts also shows a distrust and antipathy towards lawyers but at the same time the New Testament uses many rhetorical devices. Complex relationship.

PJ4801 K8 1965 kutcher gottesman

[The origins of adversary criminal trial / John H. Langbein.](#)

Pollack kd8220 136 2003 on reserve – In England they kept the adversarial approach even though it hid the truth because the truth led to too many deaths. Use this as a comparison to the adversarial heavenly court.

Rabbis also wanted to limit death so they manipulated the system to block out the truth. But their move is away from the unpredictability of rhetoric and rhetorical method towards a modified inquisitorial system.

The evidence of the Talmudic tradition with regard to the existence of "courts in Syria" (,lp'1:lt nll:'?) and "two people who had a trial in Antioch"⁴⁰ reinforces the contention that the Jewish community was organizationally distinct from the polis and had autonomous status. The existence of a Jewish court is also attested to by Johanes Chrysostomus who bitterly complains that many Christians preferred to submit their cases to the Jewish court in Antioch because of its impartiality, and because the Jewish oath seemed to them stricter and more committing. – Kasher “The Rights of the Jews of Antioch”

Marrou p. 256, Syria 23, 178-79. – trial in Antioch cross witness in Greek
The Roman Near East. Fergus Milner – yu ebook

Scholars have noted the absence of lawyers in Talmudic court procedure. “In Talmudic times, a legal representative empowered to plead in behalf of another was unknown except in the case where the High priest was a defendant, when it was assumed that the אנטלר might appear in his behalf; hence the science of rhetoric typical of the Greeks, with its emphasis upon devices and stratagems to help the client win his case, was not developed by the rabbis.”⁶⁷

Cohen already picks up on the close connection between lawyers and the rhetorical tradition. I agree that there are no lawyers and that the rabbis did not develop style of judicial rhetoric. However, they the power of arguing both sides was important to them. Cohen underestimates the influence of rhetoric upon the rabbis.

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⁶⁷ Boaz Cohen I, 54.

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