

# **How would Judges Compose Judicial Panels? Theory and Evidence from the Supreme Court of Israel**

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## **Abstract**

*How would judges compose judicial panels, if they could? We focus on a procedure in the Supreme Court of Israel, which allows each Justice to compose three-Justice panels, collecting an original database of decisions in this procedure. The data reveal strong bias in Justices' panel composition. A Gini Coefficient measuring the extent of inequality in each Justice's panel composition, which runs between zero (total equality) and one (total inequality), is 0.82 on average, which contradicts the random composition theory. The high variance in the choice of panel members contradicts the professional composition theory. The data support the idea that Justices compose panels strategically, and accordingly the data uncover Justices' revealed preference for panel members. We use the data to depict the relationships within the Supreme Court of Israel, and identify three groups of Justices. Lastly, we show that Justices who were selected by the current Chief Justice under the above procedure, before she became Chief Justice, are more likely to sit on panel with her in ordinary hearings, after she became Chief Justice. Since the Chief Justice has the legal authority to compose ordinary panels, this is also consistent with strategic panel composition.*

## **I. INTRODUCTION**

Research has shown that judicial panel composition matters. For example, the presence of a single female judge on a three-judge panel affects the outcome in sex discrimination and sexual harassment cases (Perisie 2005; Farhang and Wawro 2004; Boyd, Epstein and Martin 2010). The presence of one Democrat or one Republican on a three-judge panel affects the outcome in politically salient cases (Revesz 1997, Cross and Tiller 1998, Sunstein et al. 2006). And the presence of a single black judge on a three-judge panel affects the outcome in cases involving the voting right act and affirmative action programs (Cox and Miles 2008, Kastellec 2013).

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Given the effect of panel composition on case outcomes, the manner in which judicial panels are composed is important. In the U.S., federal courts of appeals typically hear cases in three-judge panels, which are randomly configured (Abramowicz and Stearns 2005, p. 1009; Epstein, Landes and Posner 2011, p. 110; Sunstein and Miles 2009, p. 2197). Some have called for reforming the current system, arguing that the assignment of judges to panels should not be random (for example, Hasday 2000, Meador 1983, Tiller and Cross 1999). Recently, the strict randomness of panel composition has been questioned, though no improper motives have been suggested (Chilton and Levy 2015, Levy 2017).

To evaluate the desirability of random composition of judicial panels one has to consider alternative systems of panel composition. One such alternative system is allowing judges to compose panels themselves. What if each judge could choose who will be the two judges that will join him or her to decide a case? How would judges compose panels, if they could?

To investigate this question we focus on the Supreme Court of Israel. One type of cases the Supreme Court of Israel hears are High Court of Justice cases. These are cases filed against the government, where the Supreme Court of Israel serves as a court of first instance. Hundreds of these cases are filed every year, and the way they are handled is crucial for the purpose of this research.

Every week a different Justice is assigned as the Justice on Duty, and he or she receives every High Court of Justice case that is filed that week. If, after reading the petition, and sometimes the government's response, the Justice on Duty decides to reject the case, he or she writes an opinion rejecting the case, and chooses two other Justices to which the opinion is sent. These two Justices, together with the Justice on Duty, constitute the official panel for the case. The Justice on Duty is free to choose any Justices he or she wants to make the panel of three Justices, and therefore has the power to compose the judicial panel for the case.

How does the Justice on Duty choose which two Justices to send the case to? We develop three theories. According to the random selection theory, the Justice on Duty chooses two Justices randomly, so that from the petitioners perspective there will be similar probabilities of different panel compositions. According to the professional selection theory, the Justice on Duty chooses two Justices who are known as experts in High Court of Justice cases, to make sure his or her decision to reject the case is reviewed by experts. According to the strategic selection theory, the Justice on Duty selects as panel members Justices who are very likely to agree with his or her decision to reject the case. These selected Justice may be more likely to agree because of ideological or personal reasons.

To test these theories we collect an original database of all the Supreme Court of Israel decisions in High Court of Justice cases, in which the Justice on Duty decided to reject the case, and was therefore the one composing the panel. The time period we focus on is January 21st 2015 until April 5th 2017, since it is the longest recent period during which no retirements from, or appointments to the court took place. This is important because we want to make sure that during the period of study each Justice had the same set of Justices to choose from. We end up with 794 decisions. For each decision we identify the Justice on Duty and the two Justices that were selected as panel members.

To test the random selection theory we measure the level of inequality in the panel composition of each Justice on Duty by calculating a Gini Coefficient for each Justice, which goes from zero (total equality) to one (total inequality). This measure reveals very high levels of inequality in the selection of panel members. The Gini Coefficient is 0.82 on

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average, and for the majority of the Justices it is above 0.9. This seems to contradict the random selection theory of panel composition.

To test the professional selection theory we measure the variance in the Justices that are being selected as panel members by different Justices. Focusing on the two preferred panel members for each Justice reveals that 12 out of 13 Justices that could realistically be selected are the most preferred panel members by some Justice. This reflects a reality where each Justice on Duty has different preferred panel members, a situation that seems inconsistent with the idea of Justices being chosen as panel members because of their well established expertise. We also code Justices' expertise and the subject matter of cases, showing that there is no correlation between Justices' expertise the cases they are selected for as panel members.

The findings are consistent with the strategic selection theory. Accordingly, we can use the data on the choice of panel members by each Justice to uncover each Justice's revealed preferences for panel members, and thus the relationships within the Supreme Court of Israel.

We use multidimensional scaling to graphically represent the relationships within the Supreme Court of Israel in two-dimensions. Doing so reveals three groups of Justices on the Supreme Court of Israel. These groups can reflect either ideological or social closeness.

So far we have focused on a specific procedure which allows Justices on Duty dealing with High Court of Justice cases to select panel members when deciding to reject a case without a hearing. But how are panels compose for cases that are granted a three-Justice court hearing? Under the law, the Chief Justice can compose judicial panels in such cases. Accordingly, we investigate whether the Chief Justice uses this power to compose panels strategically in cases that are granted a court hearing.

We find a strong correlation between the choice of panel members the current Chief Justice made before becoming a chief Justice, when she could choose panel members only in the abovementioned specific procedure, and the choice of panel members she makes after becoming Chief Justice, when she has the legal authority to compose panels generally. We also find a strong correlation between the distance from the Chief Justice in the multidimensional scaling analysis and the choice of panel members she makes after becoming Chief Justice. These findings are consistent with the strategic theory of panel composition.

The idea that judges may compose judicial panels strategically is illustrated by Barrow and Walker (1988), who show that Elbert Tuttle, the Fifth Circuit's chief judge from 1960 to 1967, manipulated the assignment of appeals court judges to three-judge district court panels, and three-judge appellate court panels, to guarantee that the panels had at least two liberal judges who would enforce the Supreme Court's desegregation rulings. Judge Tuttle's strategic choice of panel members in civil-rights cases is also noted by Atkins and Zavoina (1974). Hausegger and Haynie (2003) find that the chief justices of the Supreme Court of Canada and the Appellate Division of the Supreme Court of South Africa strategically composed panels with justices who are ideologically close to them to hear politically salient cases.

The strategic composition of panels by judges is also highlighted by Peppers, Vigilante, and Zorn (2012), who examine the selection of district court judges by chief appellate judges to sit by designation as visiting judges on courts of appeals. This choice is interesting, as chief judges have complete discretion to designate any active district court judge in any manner they see fit. They find evidence that in choosing visiting judges, chief

judges tend to choose individuals with ideologies similar to theirs. Budziak (2015), along similar lines, finds that when selecting visiting judges, chief judges are motivated primarily by policy goals, as district court judges who share the ideological preferences of the chief judge are more likely to visit the court of appeals.

The paper proceeds as follows. Section 2 provides institutional background on High Court of Justice cases in the Supreme Court of Israel, develops three theories of how Justices compose panels, and explains how the data was collected. Section 3 presents the evidence, which are consistent with the strategic theory of panel composition. Section 4 uses the data to depict the relationships within the Supreme Court of Israel, and highlights how these relationships may explain how the Chief Justice composes panels in ordinary cases. Section 5 discusses an alternative explanation to our findings, and illustrates the type of cases that have been decided using the procedure we focus on. Section 6 concludes.

## **II. INSTITUTIONAL BACKGROUND, THEORY, AND DATA**

### *A. High Court of Justice Cases*

The Supreme Court of Israel includes 15 Justices. The Justices are appointed by a committee which includes sitting Justices, politicians, and members of the bar. A super majority is required for appointments, which means that sitting Justices, who always vote together, hold a veto power on new appointments to the court.

Dotan (1999a, p. 322-323; 1999b, p. 1061-1062) explains the different types of cases that the Supreme Court of Israel deals with. One type of cases the Supreme Court of Israel deals with is appeals. In Israel cases that involve serious criminal offenses, or civil disputes in which the value of the claim is particularly high, are filed in the district court. Litigants in these cases have a right to appeal a decision in the Supreme Court of Israel.

A second types of cases the Supreme Court of Israel deals with are petitions for permission to file a second appeal. Most civil or criminal cases in Israel are filed in a magistrate court. Litigants in such cases have a right to appeal a decision in the district court. Only a handful of such cases reach the Supreme Court of Israel, as a third instance, if the court grants permission for second appeal.

Lastly, a third type of cases the Supreme Court of Israel deals with are High Court of Justice cases. These are disputes that concerns a public agency exercising its legal powers. They are brought directly before the Supreme Court of Israel as a court of first (and last) instance.<sup>1</sup> Since the standing and justiciability doctrines were generally eliminated by the Supreme Court of Israel, all matters in society can be brought for immediate consideration by the Supreme Court of Israel by filing a High Court of Justice case. Accordingly, hundreds of High Court of Justice Cases are filed every year in the Supreme Court of Israel.

The way the High Court of Justice cases are handled is crucial for the purposes of this research. Every week a different Justice is assigned as the Justice on Duty. This Justice receives every High Court of Justice case that is filed that week. After reading the petition, the Justice on Duty decides whether to ask the government to respond to the petition. After the government's response is received, the Justice on Duty decides whether to reject the case, or move it to a court hearing. The Justice on Duty can also decide to reject the case

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<sup>1</sup> Since 2000 some administrative cases have been delegated, by law, from the Israeli Supreme Court to district courts.

without asking the government to respond to the petition. If the Justice on Duty moves the case to a court hearing then the three-Justice panel that will hear the case is composed by the court secretary.

If the Justice on Duty decides to reject the case, he or she writes an opinion rejecting the case. However, a single Justice cannot issue a court decision in High Court of Justice cases. Only panels of three Justices can issue court opinions in these cases. The decision to reject the case must therefore be joined by two other Justices. Thus, after writing the opinion rejecting the case, the Justice on Duty chooses two other Justices to which the opinion is sent. These two Justices, along with the Justice on Duty, constitute the official panel for the case.

The Justice on Duty is free to choose any Justice he or she wants to make the panel of three Justices. The Justice on Duty therefore has the power to compose the judicial panel for the case. Interestingly, the Justice on Duty can compose the panel after having read the case briefs, and having decided that the case has to be rejected. After choosing which two Justices to send the case to, the Justice on Duty's informs his or her clerks, who then take the case briefs and pass them on, along with the draft of the decision, to the chosen Justices. Those Justices then choose whether to sign on to the decision rejecting the case, or write a separate opinion.

### *B. Theory*

As noted, if the Justice on Duty decides to reject the case, he or she writes an opinion rejecting the case, and sends the case to two other Justices, who thus become part of a three-Justice judicial panel. How does the Justice on Duty choose which two Justices to send the case to? In other words, how does the Justice on Duty compose the three-Justice panel that decides the case? We develop three theories.

#### **Random Selection**

One possibility is that the Justice on Duty selects two Justices randomly. The advantage of such a selection method is that it results in an ex ante equal probability of different panel compositions, conditional on the Justice on Duty being one of the three panel members. This seems equitable from the perspective of the petitioner. The Justice on Duty could make this random selection after writing the decision rejecting the case, or select a random order of Justices he or she intends to use before starting his or her week of duty.

If Justices on Duty select two panel members randomly, that is if they compose panels randomly, we would predict that, for any given Justice on Duty, there would be similar probabilities for Justices to be selected as panel members.

#### **Professional Selection**

Certain Supreme Court of Israel Justices are known as experts in some legal areas, while others are known as experts in other legal areas. The Justice on Duty may therefore select two Justices as panel members based on their field of expertise. Specifically, since a majority of High Court of Justice cases involve matters of administrative or constitutional law, the Justice on Duty will select as panel members Justices who are known as experts in those areas. The idea is that the Justice on Duty would like to have his or her decision to reject the case reviewed by experts in the relevant area.

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If Justices on Duty select two panel members professionally, which means that they compose panels by taking into account the expertise of the panel members, we would predict that different Justices on Duty would select the same set of expert Justices as panel members.

### **Strategic Selection**

Lastly, the Justice on Duty may select panel members strategically. That is, the Justice on Duty may select as panel members Justices who are very likely to agree with his or her decision to reject the case. These Justices may be more likely to agree because of ideological reasons, or for personal reasons, namely their personal friendship with the Justice on Duty.

If Justices on Duty select two panel members strategically, which means that they compose panels by taking into account their prediction of how panel members will decide the case, we would predict that different Justices on Duty would select different Justices as panel members, because ideological similarities and friendships vary across Justices.

### *C. Data*

We collect data on all the Supreme Court of Israel decisions in High Court of Justice case in which the Justice on Duty decided to reject the case, and was therefore the one composing the panel. For each Justice on Duty we calculate the likelihood of each Justice being chosen as a panel member.

The time period we focus on is January 21st 2015 until April 5th 2017. We focus on this period because it is the longest recent period during which no retirements from, or appointments to the court took place. Before this period and immediately following it there were several Justices who retired and new ones who took their place. Choosing a long period with no changes to the composition of the court is important because we want to make sure that during the period of study each Justice had the same set of Justices to choose from as panel members.

During this period the Chief Justice was Justice Naor, and the Deputy Chief Justice was Justice Rubinstein. Both of them did not serve as Justices on Duty, because of their position. The other Justices on the court during that period were Justices Amit, Barak-Erez, Baron, Danziger, Hayut, Hendel, Joubran, Mazuz, Melcer, Shoham, Solberg, Vogelmann, and Zilbertal.

We started with all High Court of Justice decisions that were issued in the abovementioned time period, taken from the website of the Supreme Court of Israel. There were 3,191 such decisions. If a court hearing in the case was held, the decision notes explicitly the date of the hearing. If indeed such a date was noted we removed the decision from our database, since it means that the panel in that decision was not composed by the Justice on Duty, but rather by the court secretary. If the decision does not note a date of a court hearing we confirmed on the Supreme Court of Israel website that indeed no hearing was held. We were left with 794 decisions, all signed by three Justices.

The challenge now was to identify which of the three Justices was the Justice on Duty in each case, namely the Justice who selected the two other panel members. After speaking to several Supreme Court clerks we learned that in the overwhelming majority of cases, the Justice on duty is the one who wrote the decision. We confirmed this by taking a sample of 40 cases and comparing it to the following two precise identification methods that will be

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detailed below. We had a 100% match, which means that the Justice writing the decision is indeed the Justice on Duty.

When the name of the Justice writing the decision does not appear, we checked who was the Justice who issued prior decisions in the case, using the Supreme Court of Israel website. That Justice is the Justice on Duty, who handled the case from the moment it was filed. When there were no prior decisions in the case, which happened in 30 cases, we simply dropped the cases from the analysis. Still, even in the latter group we can see who was the Justice on Duty by seeing which Justice issued other decisions the same week the case was filed (recall that the Justice on Duty receives all the cases that are filed the week he or she are on duty).

Using our data, we can list the number of High Court of Justice cases, which were rejected without a hearing, by Justice on Duty. In all these cases the Justice on Duty selected the two panel members and composed the three-Justice panel. This list is presented in the table in Table 1.

Table 1: Number of High Court of Justice cases in which each Justice could compose the panel

| Justice    | Cases |
|------------|-------|
| Amit       | 58    |
| Barak-Erez | 42    |
| Baron      | 42    |
| Danziger   | 52    |
| Hayut      | 67    |
| Hendel     | 70    |
| Joubran    | 39    |
| Mazuz      | 73    |
| Melcer     | 22    |
| Shoham     | 26    |
| Solberg    | 67    |
| Vogelman   | 137   |
| Zilbertal  | 64    |

On average, the number of cases in which each Justice could choose panel members is 59, but there is large variation across Justices. This variation could be the result of the fact that Justices vary in the number of times they served as Justices on Duty during our research period, which affects the number of cases they each handled. Moreover, some Justices could be more likely to reject cases, while others may be more likely to move cases to court hearings.<sup>2</sup> Our analysis focuses on how Justices on Duty composes panel, conditional on the Justice on Duty deciding to reject the case.

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<sup>2</sup> Justice Vogelmann, in particular, seems to have many more cases than the rest of the Justices. The reason for this seems to be that, in addition to handling the cases he received as a Justice on Duty, Vogelmann handled cases in which the government's response was requested, but this response was delayed for a long time, with the petitioners consent. It seems that, at some point, such cases are moved to be handled by Justice Vogelmann.

### **III. EVIDENCE**

#### *A. Panel Composition by Justices*

Recall that, if the Justice on Duty decides to reject the case, the law requires that the decision will be issued by a three-Justice panel. The Justice on Duty chooses two other Justices as panel members to constitute a three-Justice panel together with him or her. The Justice on Duty can select any Justice that he or she wants from all the Justices of the Supreme Court of Israel.

Recall that we have identified who the Justice on Duty was for all the decisions in our database. We can now present the data on how panels are composed by each Justice on Duty, that is which Justices were chosen as panel members by each Justice on Duty. These data are presented in Table 2.

Each row in Table 2 represents the panels composed by the Justice at the beginning of the row. The columns in the table represent the selected Justices. Recall that Chief Justice (Naor), and the Deputy Chief Justice (Rubinstein), do not serve as Justices on Duty, and therefore they are not included in the list of selecting Justices. Still, they can be selected to be panel members by other Justices on Duty, and therefore they do appear in the list of selected Justices. Since there are three Justices on a panel, the Justice on Duty and two other Justices, the sum of each row is 300%. The Justice on Duty is always part of the panel, and accordingly the diagonal in the table has cells with the value 100%. We use heat-map style shading, where cells with high values are shaded, to highlight choices that are very likely to occur.

Let us illustrate the results from the table in Table 2 by focusing on several Justices. We begin with the Justices Vogelman, Barak-Erez and Mazuz. As a Justice on Duty, Justice Vogelman issued 137 decisions rejecting cases without a hearing. This means that 137 times Justice Vogelman could compose the judicial panel. Justice Vogelman selected Justice Barak-Erez to be a panel member in 88% of those cases, and selected Justice Mazuz to be a panel member in 85% of those cases.

Justice Barak-Erez issued 42 decisions as a Justice on Duty in which she rejected the case without a hearing. This means that 42 times Justice Barak-Erez could compose the judicial panel. Justice Barak-Erez selected Justice Vogelman to be a panel member in 90% of those cases, and selected Justice Mazuz to be a panel member in 86% of those cases.

Justice Mazuz issued 73 decisions as a Justice on Duty in which he rejected the case without a hearing. This means that 73 times Justice Mazuz could compose the judicial panel. Justice Mazuz selected Justice Vogelman to be a panel member in 81% of the cases, and selected Justice Barak-Erez to be a panel member in 73% of the cases.

As one can see, the data reveal a close relationship among the Justices Vogelman, Barak-Erez and Mazuz. Each one of those Justices almost always selects the other two as panel members.

Another case of reciprocal relationship seems to exist between Justices Hendel and Solberg, though not as strong as among the former three Justices. Justice Hendel selects Justice Solberg to be a panel member in 84% of the cases, and Justice Solberg selects Justice Hendel to be a panel member in 61% of the cases.



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Table 2: Choice of panel members by Justices on Duty

| Selecting Justices | Selected Justices |            |       |          |       |        |         |       |        |        |         |          |           |       |             |
|--------------------|-------------------|------------|-------|----------|-------|--------|---------|-------|--------|--------|---------|----------|-----------|-------|-------------|
|                    | Amit              | Barak-Erez | Baron | Danziger | Hayut | Hendel | Joubran | Mazuz | Melcer | Shoham | Solberg | Vogelman | Zilbertal | Naor* | Rubinstein* |
| Amit               | 100%              | 5%         | 0%    | 0%       | 0%    | 0%     | 0%      | 21%   | 2%     | 59%    | 36%     | 16%      | 57%       | 0%    | 5%          |
| Barak-Erez         | 2%                | 100%       | 2%    | 2%       | 2%    | 0%     | 2%      | 86%   | 0%     | 0%     | 0%      | 90%      | 2%        | 2%    | 7%          |
| Baron              | 7%                | 29%        | 100%  | 14%      | 33%   | 7%     | 19%     | 12%   | 2%     | 29%    | 2%      | 33%      | 5%        | 5%    | 2%          |
| Danziger           | 23%               | 8%         | 13%   | 100%     | 0%    | 8%     | 38%     | 13%   | 0%     | 46%    | 13%     | 6%       | 31%       | 0%    | 0%          |
| Hayut              | 10%               | 46%        | 33%   | 3%       | 100%  | 1%     | 0%      | 0%    | 0%     | 0%     | 0%      | 91%      | 15%       | 0%    | 0%          |
| Hendel             | 0%                | 1%         | 21%   | 1%       | 0%    | 100%   | 0%      | 3%    | 0%     | 86%    | 84%     | 0%       | 3%        | 0%    | 0%          |
| Joubran            | 0%                | 0%         | 44%   | 67%      | 0%    | 0%     | 100%    | 3%    | 0%     | 82%    | 0%      | 3%       | 0%        | 0%    | 3%          |
| Mazuz              | 4%                | 73%        | 0%    | 22%      | 0%    | 0%     | 0%      | 100%  | 1%     | 0%     | 0%      | 81%      | 19%       | 0%    | 0%          |
| Melcer             | 0%                | 0%         | 5%    | 0%       | 0%    | 95%    | 0%      | 0%    | 100%   | 9%     | 91%     | 0%       | 0%        | 0%    | 0%          |
| Shoham             | 46%               | 0%         | 0%    | 23%      | 0%    | 4%     | 42%     | 0%    | 8%     | 100%   | 4%      | 0%       | 54%       | 0%    | 19%         |
| Solberg            | 0%                | 0%         | 0%    | 33%      | 0%    | 61%    | 12%     | 1%    | 16%    | 54%    | 100%    | 1%       | 12%       | 7%    | 1%          |
| Vogelman           | 4%                | 88%        | 1%    | 1%       | 0%    | 0%     | 0%      | 85%   | 0%     | 0%     | 3%      | 100%     | 17%       | 0%    | 1%          |
| Zilbertal          | 39%               | 3%         | 3%    | 27%      | 0%    | 0%     | 3%      | 30%   | 3%     | 30%    | 19%     | 39%      | 100%      | 3%    | 2%          |
| Average            | 11%               | 21%        | 10%   | 16%      | 3%    | 15%    | 10%     | 21%   | 3%     | 33%    | 21%     | 30%      | 18%       | 1%    | 3%          |
| Std. Deviation     | 16%               | 31%        | 15%   | 20%      | 10%   | 31%    | 16%     | 32%   | 5%     | 32%    | 33%     | 37%      | 20%       | 2%    | 5%          |

\* Naor was Chief Justice, and Rubenstein was her deputy. They did not serve as Justices on Duty, but could still be selected as panel members.

Table 2 also reveals that relationships are not always reciprocal. Justice Melcer selected Justice Hendel to be a panel member in 95% of the cases. By contrast, Justice Hendel never selected Justice Melcer to be a panel member. Similarly, Justice Hayut selected Justice Vogelmann to be a panel member in 91% of the cases, but Justice Vogelmann never selected Justice Hayut to be a panel member.

## *B. Testing the Theories of Panel Composition*

### **1. Testing Random Selection**

Recall that if Justices on Duty select two panel members randomly, we would expect that, for any given Justice on Duty, there would be similar probabilities for Justices to be selected as panel members. With 14 Justices to select from, we would expect to see the value 14.3% ( $=2/14$ ), or something close to this value, in all the cells in Table 2 (other than the diagonal, which reflects the 100% probability of the Justice on Duty being a panel member when he or she is the Justice on Duty). But in fact, looking at Table 2, this does not seem to be the case. There are many cells with the value 0%, and many cells with a probability that is much higher than 14.3%.

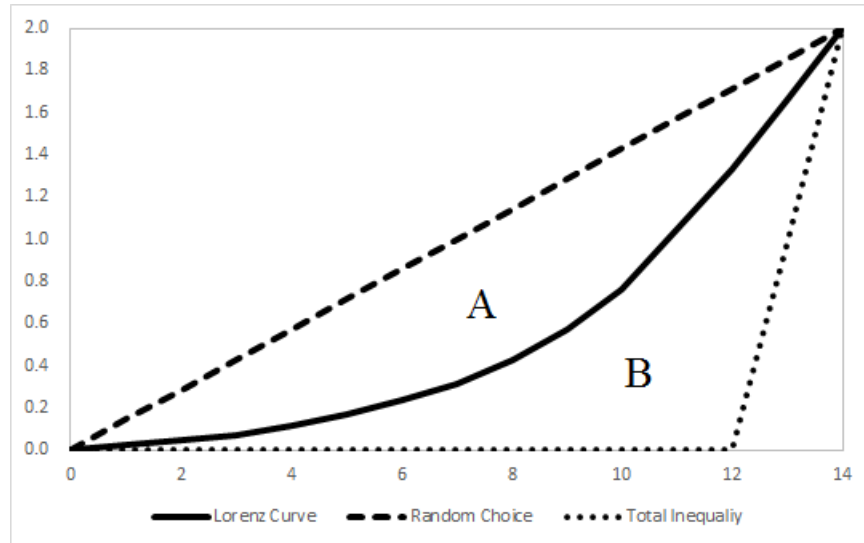
A different way to look at whether the Justices' composition of judicial panels is done randomly is by generating a Gini Coefficient for each Justice. A Gini Coefficient is a common measure of inequality of income, but it can also be applied to our other settings. For example, the Gini coefficient has been used as a measure of biodiversity (Wittebolle et al. 2009), as a measure of inequality of health related quality of life (Asada 2005), and as a measure of the inequality of academic publications across universities (Halffman and Leydesdorff 2010). To the best of our knowledge, this is the first time that the Gini Coefficient is used to measure inequality in judicial panel composition.

To develop the Gini Coefficient for each Justice, we order the choices of panel members he or she made, from the Justice that is least likely to be chosen to the one that is most likely to be chosen. We then create a Lorenz curve, which is the cumulative distribution function of each Justice's choices. We illustrate how we do that in Figure 1 for Justice Baron.<sup>3</sup>

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<sup>3</sup> Using Table 2 the choices of panel members that Justice Baron makes, from the Justice that is least likely to be chosen to the one that is most likely to be chosen, are the following: 0.02, 0.02, 0.02, 0.05, 0.05, 0.07, 0.07, 0.12, 0.14, 0.19, 0.29, 0.29, 0.33, 0.33. The sum of these values is 2. Thus, the cumulative distribution function begins with the value 0, and after gradually adding up the values listed above, in the order used above, it reaches the value 2.

Figure 1: Lorenz Curve for Justice Baron



Given each Justice's Lorenz curve, we can calculate the area between the actual Lorenz Curve and a curve that represents how the Lorenz Curve would have looked if the Justice on Duty selected panel members with equal probability (area A). We can also calculate the area between the actual Lorenz Curve and curve that represents how the Lorenz Curve would have looked if the Justice on Duty selected only two specific Justices in all cases (area B). Figure 1 illustrates these two areas for Justice Baron. The Gini Coefficient is defined as:

$$G = \frac{A}{A + B}$$

The Gini Coefficient goes from zero (total equality) to one (total inequality). This is clear from Figure 1. If the Lorenz Curve is very close to the Random Selection Curve, area A is very small, so the Gini coefficient tends to zero. By contrast, if the Lorenz Curve is very close to the Total Inequality Curve, area A is very large, while area B is very small, and the Gini coefficient tends to one.

In the case of Justice Baron area A is 6.2, and area B is 5.8, which yields a Gini Coefficient of 0.52. We can undertake a similar calculation for each and every Justice. Table 3 presents the Gini Coefficient for measuring inequality in the selection of panel members, of each Justice.

Table 3: Gini Coefficient for measuring inequality in selection of panel members

| Jutice     | Gini |
|------------|------|
| Melcer     | 0.98 |
| Vogelman   | 0.95 |
| Hendel     | 0.95 |
| Joubran    | 0.93 |
| Mazuz      | 0.92 |
| Barak-Erez | 0.92 |
| Hayut      | 0.90 |
| Amit       | 0.81 |
| Solberg    | 0.79 |
| Shoham     | 0.78 |
| Zilbertal  | 0.64 |
| Danziger   | 0.63 |
| Baron      | 0.52 |

The findings in Table 3 reveal very high level of inequality in the selection of panel members. The Gini Coefficient, which goes from zero (total equality) to one (total inequality), is 0.82 on average, and for 7 out of the 13 Justices it is 0.9 and above. This seems to contradict the random selection theory of panel composition.

## **2. Testing Professional Selection**

Recall that if Justices on Duty select two panel members professionally, which means that they compose panels by taking into account the expertise of panel members, we would expect that different Justices on duty would select the same set of expert Justices as panel members. Accordingly, in the Table 2 we would expect to see some columns with high probabilities, and low probabilities in most columns. However, looking at the Table 2 this does not seem to be the case.

Another way to test the professional selection theory is by looking at who are the two preferred panel members for each Justice on Duty. This simply means that, for each row in Table 2, we look for the two justices with the highest probability of being selected. The result of this analysis is presented in Table 4.

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Table 4: The two preferred panel members for each Justice on Duty

| Jutices    | 1st Choice | 2nd Choice |
|------------|------------|------------|
| Amit       | Shoham     | Zilbertal  |
| Barak-Erez | Vogelman   | Mazuz      |
| Baron      | Hayut      | Vogelman   |
| Danziger   | Shoham     | Joubran    |
| Hayut      | Vogelman   | Barak-Erez |
| Hendel     | Shoham     | Solberg    |
| Joubran    | Shoham     | Danziger   |
| Mazuz      | Vogelman   | Barak-Erez |
| Melcer     | Hendel     | Solberg    |
| Shoham     | Zilbertal  | Amit       |
| Solberg    | Hendel     | Shoham     |
| Vogelman   | Barak-Erez | Mazuz      |
| Zilbertal  | Vogelman   | Amit       |

Recall that there were 15 Justices on the court during our research period. Two of these Justices were the Chief Justice (Naor) and the Deputy Chief Justice (Rubinstein), who have other responsibilities, and are therefore not likely to be chosen as panel members by Justices on Duty. This leaves us with 13 Justices who could realistically be chosen. Looking at the Table 4, one can see that 12 out of those 13 Justices are included. That is, 12 out of 13 Justices are the most preferred panel members by at least one Justice. This reflects a reality where each Justice on Duty has different preferred panel members, a situation that seems inconsistent with the idea of professional choice, namely with the idea that Justices on Duty compose panels by taking into account the well established expertise of panel members.

A third way to test the professional selection theory is by looking at the two last rows in Table 2. The second to last row calculates the average probability of each Justice being selected, that is the average value of the cells in each column, excluding the cell representing each Justice's self selection. One can see that the Justice that was most likely to be selected as a panel member was Justice Shoham. This seems particularly inconsistent with the professional theory of panel selection, since Justice Shoham is an expert in criminal law, and not in public law. The last row calculates the standard deviation for these cells. As one can see, the standard deviation is quite high, and for almost all Justices is greater than the average. This reflects high variance in the choices of panel composition by each Justice on Duty.

Lastly, we attempt to test the professional selection theory more directly by investigating whether Justices' expertise correlates with the subject matter of the cases they are chosen for as panel members. To identify each Justice's expertise we utilize another procedure on the Supreme Court of Israel. Unlike High Court of Justice cases, where the Supreme Court of Israel serves as a court of first instance, most cases in Israel are filed in the magistrate court, and may be appealed in the district court. After an appeal in the district court, litigants may request permission for a second appeal from the Supreme Court of Israel. The way these requests are handled by the Supreme Court of Israel allows us to identify Justices' expertise.

## *How would Judges Compose Judicial Panels?*

When a litigant files a request for a second appeal with the Supreme Court of Israel this request is handled by a single Justice. Different Justices are assigned by the Chief Justices to deal with different types of such requests. During our research period all requests having to do with decisions on administrative law cases were handled by Justices Vogelman and Barak-Erez. All requests having to do with criminal law cases were handled by Justices Shoham, Joubran and Melcer. All requests having to do with family law cases were handled by Justices Rubinstein, Mazuz, and Hendel. Lastly, the remaining Justices handled requests having to do with civil cases. As noted, this assignment of Justices to request types is made by the Chief Justice, and is commonly understood to reflect Justices' expertise. We therefore use this classification of Justices to identify them as experts in administrative law, criminal law, family law and civil law.

We then review the 794 cases in our sample, and manually classify them into the same four areas of law. Since the defendant in High Court of Justice cases is always a state body, one would assume that all our cases are related to administrative law matters. This, however, is not the case. Since the court's general policy is to allow any matter to be brought before it, many of the cases fit into other categories.

We classify cases as administrative law cases when the defendant was an administrative body (or a quasi-administrative body), or if the cases are constitutional cases. These are classic High Court of Justice cases, and they are indeed the majority of the cases. We classify cases as being on civil law matters when they involve decisions of lower courts in civil law cases, including arbitration cases, class action cases, or decisions of labor courts. We classify cases as being on family law matters if they have to do with decisions made by family courts or religious courts, which deal in Israel with family law matters. Lastly, we classify cases as being on criminal law matters if they have to do with decisions of lower courts in criminal cases, prosecutorial conduct in criminal cases, or decisions by military courts.<sup>4</sup>

With the Justices classified as experts in four areas of law (administrative law, civil law, criminal law and family law), and our cases classified into these same areas of law, we can investigate whether Justices' who are experts in a specific area are selected for panels for cases in that area. In Table 5 we do so by documenting which type of Justices were selected as panel members for which types of cases. Each row in Table 5 reflects a group of Justices of a specific expertise, and the columns reflect the share of that group's cases that belong to the different areas of law.

Table 5: Justices' expertise and the types of cases they are selected for

| Justice Expertise | Case Type      |       |          |        |
|-------------------|----------------|-------|----------|--------|
|                   | Administrative | Civil | Criminal | Family |
| Administrative    | 69%            | 11%   | 9%       | 11%    |
| Civil             | 60%            | 14%   | 13%      | 12%    |
| Criminal          | 62%            | 14%   | 11%      | 12%    |
| Family            | 64%            | 13%   | 9%       | 14%    |

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<sup>4</sup> We were unable to classify 9% of the cases into one of these categories. These unclassified include cases where the petition has no legal basis whatsoever, or where we could not understand from the court decision what the case was about.

## *How would Judges Compose Judicial Panels?*

Under the professional selection theory we would expect Justices who are experts in administrative law to be selected for administrative law cases, and similarly for civil law, criminal law and family law. In other words, in Table 5 we would expect the diagonal to include very high values. But as one can see, this is not the case. In fact, the distribution of types of cases seems quite similar across the four groups of Justices. This seems inconsistent with the idea of professional choice, namely with the idea that Justices on Duty compose panels by taking into account the well established expertise of panel members.

### **3. Consistency with Strategic Selection**

Recall that if Justices on Duty select two panel members strategically, which means that they compose panels by taking into account their prediction on how panel members will decide the case, we would predict that different Justices on Duty would select different Justices as panel members, because ideological similarities and friendships vary across Justices. The data presented in the Tables 2, 4 and 5 are consistent with this theory.

It is worth recalling that under the strategic theory of panel selections, selected Justices may be more likely to agree with the Justice on Duty for personal reasons, namely their personal friendship with the Justice on Duty. Thus, this theory does not exclude the possibility of friendship affecting the choice of panel members. But friendship matters here only because it affects how likely panel members are to agree with the decision of the Justice on Duty to reject a case.

It is hard to imagine friendship affecting the choice of panel members in any other way, given our unique setting. Unlike panels in ordinary court hearings, where Justices spend time sitting together and may enjoy the company of specific Justices, in our case the Justices do not interact at all. When a Justice on Duty decides to reject a case, he or she writes a decision to that effect, and then instructs his or her clerks to take that decision, along with the parties' briefs, to the chambers of the selected panel members. With no interaction at all among the Justices, it is hard to imagine that friendship would matter in any way other than through its effect on the likelihood of panel members agreeing with the Justice on Duty's decision to reject a case.

Recall again that, as the second to last row of Table 2 indicates, the Justice that was most likely to be selected as a panel member was Justice Shoham. We noted that this finding seems particularly inconsistent with the professional theory of panel selection, since Justice Shoham is an expert in criminal law, and not in public law. This finding, however, may be explained under the strategic theory of panel selection. One thing that Justice Shoham was particularly known for is never writing minority opinions and always joining the majority opinion (Gorali 2018). This attitude makes him quite appealing as a panel member, if indeed Justices on Duty compose panels strategically.

One anecdote may illustrate the strategic choice of panel members. On May 17, 2017 Justice Amit released four decisions rejecting High Court of Justice cases.<sup>5</sup> This means that Justice Amit had to compose four panels to do so. Justice Amit selected Justice Shoham as a second panel member for the four cases, which is a common choice, as noted above. However, as a third panel member Justice Amit selected Justice Solberg for two of the cases, and Justice Vogelmann for the remaining two. This choice to select a different third panel members for decisions that were issued on the same day seems quite interesting.

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<sup>5</sup> The cases are H CJ 3999/17, H CJ 6806/16, H CJ 4021/17, and 3979/17.

Moreover, looking at Table 2, one can see that Justice Amit selects Justice Solberg more than twice as often as Justice Vogelmann. Why then could not Justice Solberg be selected as a panel member for all the four cases, just like Justice Shoham?

When looking at the four cases that Justice Amit rejected that day, one sticks out as politically salient. The case (HCJ 4021/17) involved a petition to allow Jews to visit the Temple Mount during the upcoming Jerusalem Day. Since the case involved a religion based limitation on the freedom of movement of citizens, there was a risk that some Justices would not agree with Justice Amit's decision to reject the case without a court hearing. Most people who are familiar with the Supreme Court of Israel would quickly recognize that selecting Justice Solberg for this case would have been risky. Justice Solberg is an Orthodox Jew, and may have a stronger sympathy to the petitioners, being a more conservative voice on the court. Justice Vogelmann by contrast, who is known to be very liberal, is a much safer choice. And indeed, Justice Vogelmann was chosen as a third panel member for this politically salient case. This is consistent with the strategic theory of panel selection.

Lastly, in a recent introduction to a book in honor of Justice Danziger's retirement from the court, Justice Rubinstein reflects on their work together, noting that "in most human and legal matters our perspectives are close" (Rubinstein 2017). In the following sentence, Justice Rubinstein notes that during their years together, he frequently chose Justice Danziger as a panel member when rejecting High Court of Justice Cases. That these two sentences are adjacent is consistent with the strategic theory of panel selection.

## **IV. RELATIONSHIPS WITHIN THE SUPREME COURT OF ISRAEL**

### *A. Groups within the Supreme Court of Israel*

The findings in Section **Error! Reference source not found.** are consistent with the strategic theory of panel selection. If indeed Justices on Duty select panel members strategically, we can use the information on their selections to derive each Justice's revealed preferences for panel members. We can then use the information to learn about the different circles within the Supreme Court of Israel.

To do so we use the technic of multidimensional scaling, which allows for graphical representation of closeness in two-dimensions (see generally, Cox and Cox 2000, Borg and Groenen 2005). This technic is sometimes used on the U.S. Supreme Court, where all Justices vote in all cases (Grofman and Brazill 2002, Fischman 2015, Fischman and Jacobi 2015). The manner in which it is used here is similar to principal component analysis. As one can see in the table in Figure 2 we have 13 Justices (observations) with 15 variables (their selection of panel members). The analysis tries to distill these 15 variable into 2. The distance between two Justices reflects the euclidean distance between the choice of panel members that they made. A greater distance reflects more different choice of panel members.

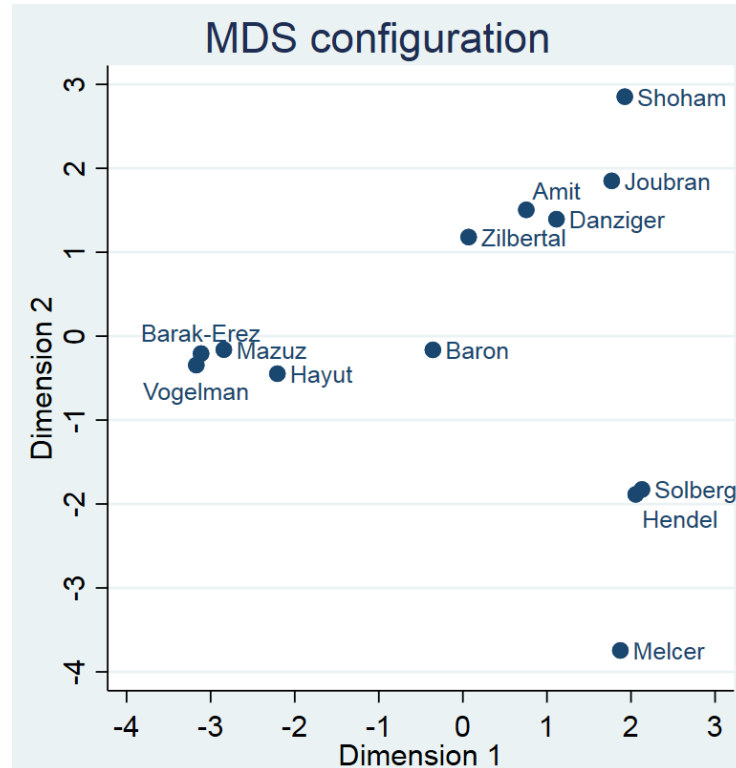
The result of the multidimensional scaling analysis, using the data from Table 2, can be seen in Figure 2.<sup>6</sup>

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<sup>6</sup> Figure 2 was obtained by running the following command in Stata on the data in Table 2: "mds amit-



Figure 2: Relationships within the Supreme Court of Israel



The two dimensional diagram in Figure 2 reveals three groups within the Supreme Court of Israel. One group consists of Justices Hayut, Barak-Erez, Mazuz and Vogelman. This group has special importance, because it includes the current Chief Justices, Justice Hayut (she was not the Chief justice during the research period). A second group includes Justices Amit, Zilbertal, Danziger and Jourbran, with Justice Shoham, being close to that group, though a bit distant. Justice Baron is somewhere between the former group and the latter group. Lastly, a third group is a group consisting of the two Justices Solberg and Hendel. Justice Melcer is distant from all the Justices, as he has a very low likelihood of being selected as a panel member, though he is the closest to Solberg and Hendel, who he often selects as panel members.

We have some other information that seems consistent with the existence of the groups identified in Figure 2. Generally, Justices have to excuse themselves from a case if they have some personal relationship with the lawyer representing one of the parties. The list of such lawyers, by the relevant Justice, has recently been made public (Neuman 2018). Naturally, Justice Hayut includes in this list her husband, who is a prominent lawyer. Interestingly however, Justices Vogelman, Barak-Erez and Baron also include Hayut's husband as a lawyer that will make them excuse themselves from a case. This indicates that these three Justices all have a close personal relationship with Hayut's husband, and naturally also with Hayut. This is consistent with a close relationship among these Justices indicated in Figure 2.

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rubinstein, id(justice\_name) std".

Moreover, some have claimed that “it is absolutely obvious that Justice Hayut shares the view that. . . the Justice system is ‘the responsible adult,’ whose role is to guarantee that the political system will not make decisions that are morally or economically wrong” (Radozkovitch 2017). Accordingly, some people may identify the group of Justices centered around Justice Hayut as a very activist group.

By contrast, the two-Justice group which consists of Justices Hendel and Solberg may represent a more conservative group. Both Justices Hendel and Solberg are the only Orthodox Jews on the Supreme Court of Israel, and the fact that they stick together may reflect shared values.

We now turn to investigating whether the relationships identified in Table 2 and Figure 2 can be used to predict other choices made by Justices.

### *B. Choice of Panel Members by the Chief Justice*

So far we have focused on one specific procedure in the Supreme Court of Israel. This procedure is unique and worth exploring, since it allows Justices to select panel member who will join them. This procedure, however, applies only when a Justice on Duty dealing with a High Court of Justice case, decides to reject the case without a hearing. But what about Supreme Court of Israel cases that are granted a three-Justice court hearing? How are panels composed for such cases?

Three-Justice court hearing are held on the Supreme Court of Israel for three types of cases. First, for High Court of Justice cases, where the Justice on Duty did not think the case should be rejected. Second, for civil or criminal cases where litigants have a right to appeal a decision in the Supreme Court of Israel. Lastly, for civil, criminal or administrative cases where litigants do not have a right to appeal a decision in the Supreme Court of Israel, but following a request, a Justice granted a permission for second appeal.

Under the law, the Chief Justice has the official authority to compose judicial panels in all cases handled by the Supreme Court of Israel, including ones where a court hearing is held (Law of Courts, Section 27(a)). We therefore investigate whether the Chief Justice uses this power to compose panels strategically in cases that are granted a three-Justice court hearing.

The database we have used thus far focused on the period ending in April 2017, when Justice Naor served as Chief Justice. In November 2017, upon Naor’s retirement, Justice Hayut was elevated to become Chief Justice. We can therefore investigate whether Chief Justice Hayut, after becoming Chief Justice, and obtaining the legal authority to compose panels, does so strategically. Our general approach is to use the choices Justice Hayut made as a Justice on Duty to identify her revealed preferences for panel members, and to see whether these preferences help explain the panels she composed after becoming Chief Justice.

To measure Justice Hayut’s choice of panel members after becoming Chief Justice, we count the number of times each Justice sat on panel with Chief Justice Hayut, following her appointment as Chief Justice in November 2017. We count days of court hearings, when new cases are being assigned.<sup>7</sup> We have data for these days of court hearings from

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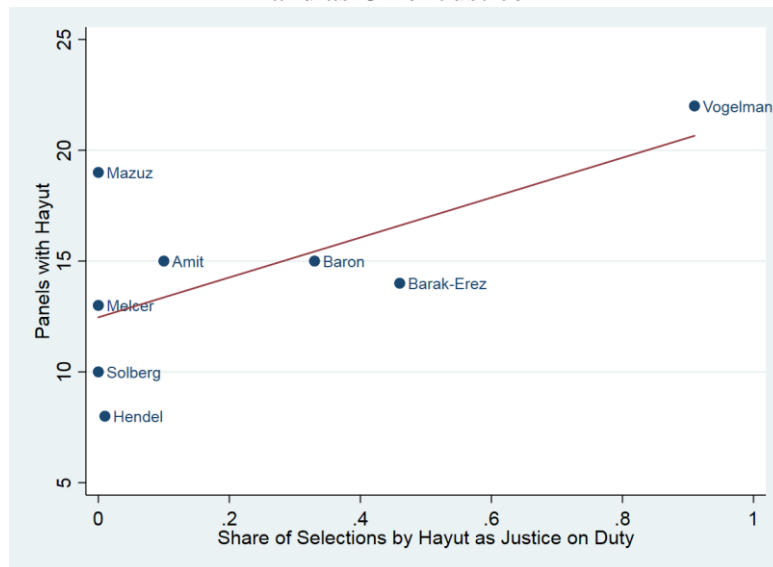
<sup>7</sup> We do not count days of court hearings in which cases, which were already heard once, are heard again by the same panel. A second hearing takes place in complicated cases, or cases where the court gave the parties an opportunity to reach an agreement. Including such days of court hearings would be double

## How would Judges Compose Judicial Panels?

November 2017 through July 2019, and also scheduled panels through December 2019. We focus only on Justices that were on the court during our original research period, and have not retired since.<sup>8</sup>

We begin by using a measure of closeness to Justice Hayut based on the selections she made as a Justice on Duty, before she became chief Justice. Accordingly, in Figure 3 the x-axis represents the choice of panel members that Hayut made when rejecting High Court of Justice cases as a Justice on Duty, before she became Chief Justice. These data are simply taken from Justice Hayut's row in Table 2. The y-axis represents the number of panels that different Justices shared with Hayut in cases where a three-Justice court hearing was held, after she became Chief Justice.

Figure 3: Choice of panel members by Hayut as a Justice on Duty and as Chief Justice



As one can see, there is a positive correlation between the choice of panel members Hayut made before becoming a chief Justice, when she could choose panel members only when she rejected High Court of Justice cases as a Justice on Duty, and the choice of panel members Hayut made after becoming a Chief Justice, when she had the legal authority to compose panels generally, and specifically choose the Justices who will sit with her in ordinary court hearings.<sup>9</sup> This finding is consistent with the strategic theory of panel composition.

Another way to measure closeness to Hayut is by using the output of the multidimensional scaling analysis. This approach utilizes the full data we have on the choice of panel members that were made by all the Justices on Duty, as opposed to only the

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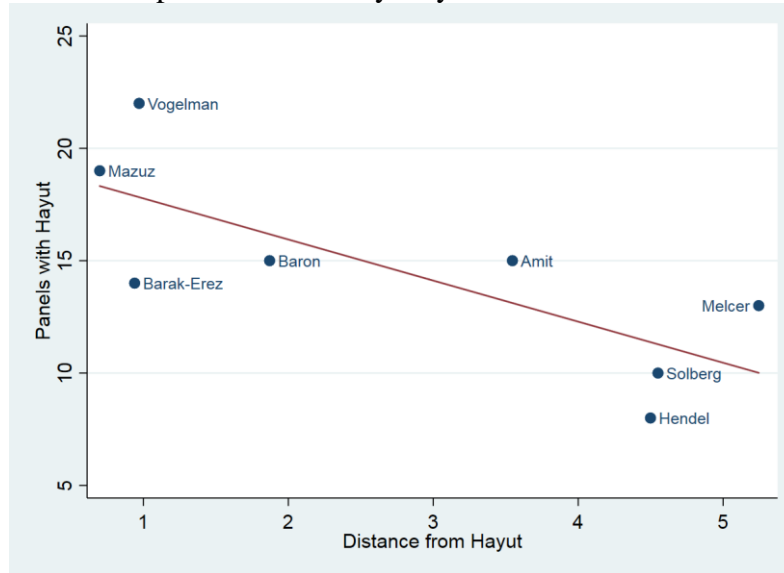
counting, since we count these cases already when they are heard by the court for the first time, and they therefore do not represent another instance of panel selection.

<sup>8</sup> This is because we are using data from our original research period (01/2015-04/2017) to identify Justice Hayut's preferences for panel members, and data from the period following November 2017 to see how these preferences help explain panel composition in cases where a court hearing was held.

<sup>9</sup> In a bivariate regression the coefficient is 9 with p-value=0.036. Though there is no principled reason to drop Justice Vogelmann from the analysis, it should be noted that if he is dropped the correlation loses its statistical significance.

choices made by Hayut. We can use that figure to measure closeness to Hayut as the euclidean distance to Hayut in Figure 2. Accordingly, in Figure 4 the x-axis represents this distance, based on the data from the period 01/2015-04/2017, before Hayut became Chief Justice. The y-axis represents the number of panels that different Justices shared with Hayut in cases where a three-Justice court hearing was held, after she became Chief Justice.

*Figure 4: Distance from Hayut in MDS figure and choice of panel members by Hayut as Chief Justice*



As one can see, there is a negative correlation between the distance from Hayut and the choice of panel members by Hayut after before becoming a chief Justice.<sup>10</sup> This finding is consistent with the strategic theory of panel composition.

## V. EXTENSIONS

### A. Proximity of Chambers

This paper shows that, as Justices on Duty, Justices choose panel members in a manner that is not random or professional, and seems to be strategic. One alternative explanation that may be raised is that, as Justices on Duty, Justices select panel members based on the proximity of those Justices' chambers to the Justice on Duty's chamber. This possibility is worth exploring because it was raised by the Supreme Court of Israel in its official response to a draft version of this paper as the reason for our findings.

This argument raises several problems. First, the distance among chambers is very short. Getting to the farthest chamber may require a 30 second walk. So it is hard to understand why such a distance would be so crucial. Furthermore, the Justice on Duty is not the one who carries the briefs to the other chambers, the clerks do it. Accordingly, one

<sup>10</sup> In a bivariate regression the coefficient is -1.83 with p-value=0.035. Though there is no principled reason to drop Justice Vogelmann from the analysis, when he is dropped the coefficient is -1.41 with p-value=0.071.

## *How would Judges Compose Judicial Panels?*

wonders if saving such a short walk to the clerks is important enough for the Justice to be an important factor in selecting panel members. Lastly, the choice of chambers' location is endogenous. Chambers are not allocated randomly, and Justices who are friends with each other often ask to sit next to each other. Thus, the closeness of chambers may be driven by the same factors that make Justices select each other as panel members.

But does physical proximity of chambers explain the choice of panels? After speaking to former Supreme Court clerks who clerked during our research period, we were able to reconstruct the map of the chambers during this period. The chambers of the Justices on the Supreme Court of Israel are organized along two parallel corridors, each housing seven chambers. Figure 5 presents these corridors, as well as the probability of being selected to be a panel member by Justice Hayut, when she was the Justice on Duty, taken from the Table 2.

*Figure 5: Map of chambers and likelihood of being selected as panel member by Justice Hayut*

|                 |                 |                         |               |                   |                  |              |                   |                 |                 |             |           |
|-----------------|-----------------|-------------------------|---------------|-------------------|------------------|--------------|-------------------|-----------------|-----------------|-------------|-----------|
|                 |                 | 33%                     | 0%            | 46%               | 91%              | X            | 0%                | 1%              |                 |             |           |
|                 |                 | <b>Baron</b>            | <b>Mazuz</b>  | <b>Barak-Erez</b> | <b>Vogelman</b>  | <b>Hayut</b> | <b>Solberg</b>    | <b>Hendel</b>   |                 |             |           |
| <b>Entrance</b> | <b>Corridor</b> | <b>Eastern Corridor</b> |               |                   |                  |              |                   |                 | <b>Corridor</b> | <b>Naor</b> | <b>0%</b> |
|                 |                 |                         |               |                   |                  |              |                   |                 |                 |             |           |
|                 |                 | <b>Western Corridor</b> |               |                   |                  |              |                   |                 |                 |             |           |
|                 |                 | <b>Joubran</b>          | <b>Melcer</b> | <b>Shoham</b>     | <b>Zilbertal</b> | <b>Amit</b>  | <b>Rubinstein</b> | <b>Danziger</b> |                 |             |           |
|                 |                 | <b>0%</b>               | <b>0%</b>     | <b>0%</b>         | <b>15%</b>       | <b>10%</b>   | <b>0%</b>         | <b>3%</b>       |                 |             |           |

Looking at Figure 5, it is hard to see how the selection of panel members by Hayut was driven by the physical proximity of chambers. The chambers of both Vogelmann and Solberg are adjacent to Hayut's, yet the former was selected to be a panel member in 91% of the cases Hayut made such a selection, while the latter was never selected. The chambers of both Barak-Erez and Justice Hendel are one chamber away from Hayut's, yet the former was selected to be a panel member in 46% of the cases Hayut made such a selection, while the latter was only selected in 1% of the cases. Mazuz is closer to the chambers of Hayut than Baron, yet he is never selected to be a panel member, while Baron, who is farther way, is selected in 33% of the cases. A similar analysis for other Justices does not seem consistent with the idea that physical proximity played a major role in the selection of panel members.

### *B. Types of Cases*

As noted, our database includes 794 decisions in which the Justice on Duty decided to reject the case without a hearing, and was able to choose two other panel members to compose

the three-Justice panel for the case. It is important to note that some of these rejections involve the writing of a full detailed decision, that can even set a precedent. Thus, this procedure is not necessarily limited to the rejection of unimportant cases. This is important because in its official response to the draft version of this paper, the Supreme Court of Israel has argued that the procedure we focus on in this paper is used exclusively for unimportant cases.

To illustrate, in High Court of Justice case *Movement for Quality of Government v. Minister of Interior*<sup>11</sup> the Justice on Duty was Justice Solberg. The petitioner in this case requested that a deputy minister be removed from office because she was a suspect in a case of bribery. Justice Solberg wrote an 11 page detailed decision, deciding that, under the specific circumstances of the case, the deputy minister does not have to be removed from office. Justice Solberg chose as panel members Justices Naor and Zilbertal, who joined his opinion.

In High Court of Justice case *Zidan v. Minister of Interior*<sup>12</sup> the question was whether a municipality employee may run for political office in the municipality, when he was unable to take leave long enough before the elections, since elections were called unexpectedly because of the passing away of a mayor. The Justice on Duty was Justice Amit, who wrote a 13 page decision, and chose as panel members Justices Barak-Erez and Mazuz, each of whom wrote a separate opinion.

Other examples can be noted, but the point here is to illustrate how potentially important decisions can be made using the procedure which allows the Justice on Duty to compose the panel deciding the case.

## **VI. CONCLUSION**

Litigants often claim that the outcome of their case depends on who will be the judges assigned to the panel. Research has also shown that panel composition matters. Still, no evidence has been presented that judges themselves think that panel composition matters. The findings in this paper are consistent with the idea that judges care about panel composition, and therefore compose panels strategically. Although our paper begins by focusing on a specific procedure on the Supreme Court of Israel, which allows Justices on Duty to compose three-Justice panels when rejecting a case, we also provide evidence that ordinary panels, which the Chief Justice has the legal authority to compose, are composed strategically. If this is indeed the case then the paper provides strong evidence in support of the random configuration of three-judge panels in the U.S. Courts of Appeals.

Furthermore, Levy (2017) notes that the non-randomness in the U.S. system occurs when there is discretion to do things like replace judges that had to recuse themselves or call in sick, or when judges decide to visit from another circuit. The findings in this paper raise a concern that this discretion will be used to calling allies. We may therefore want to reduce, to the extent possible, any discretion in the composition of panels.

Another implication of our paper is that public scrutiny of Justices' behavior matters. A draft of our paper was first circulated on Thursday, November 22<sup>nd</sup>, 2018, before a faculty workshop which was scheduled for the following week. On Sunday, November 25<sup>th</sup>, the Supreme Court of Israel issued an official response to our draft, raising the arguments which

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<sup>11</sup> HCJ 990/15, published in Nevo, March 15th, 2015.

<sup>12</sup> HCJ 3195/16, published in Nevo, April 25th, 2016.

we discuss in Section 5. Then, on Tuesday, November 27<sup>th</sup>, the Supreme Court announced that Justices on Duty will no longer be able to choose panel members as they wish (Hovel 2018). Under the new rules, when rejecting a case the Justice on Duty has to select as panel members the Justice who is on duty the week the decisions is issued, and the Justice who is scheduled to be on duty the following week. This development seems to suggest that strategic panel composition, to the extent presented in this paper, is possible only when judges believe no one is watching.

This development highlights the importance of empirical legal studies and their real world affects. Still, it is important to acknowledge their limitations as well. The Chief Justice has not given up her authority to compose ordinary panels. Furthermore, Justices often exercise absolute power in ways that, unlike panel composition, are difficult to empirically measure and scrutinize. Our findings thus may also shed light on the exercise of absolute power by Justices in such cases.

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