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EVERYTHING IN MODERATION: MUST JUDGES ALWAYS TREAT LITIGANTS EQUALLY?

Adapted from the writings of Dayan Yitzhak Grossman

Following the presidential debate, Axios reported that prominent conservatives attacked ABC News debate moderators David Muir and Linsey Davis for fact-checking the debate in real-time, arguing that they were one-sided against former President Trump and in favor of Vice President Kamala Harris. A sampling: "The moderators might as well be on the DNC payroll. This is ridiculous. This is the worst-moderated debate in history." "These moderators are a disgraceful failure, and this is one of the most biased, unfair debates I have ever seen. Shame on you, ABC." "This is not a debate, this is a public show trial where the judge, jury, and executioner is ABC News." "ABC's moderators are a disgrace to their profession." "ABC is making a huge mistake trying to fact check this live. They're only proving how biased they are."

Prominent liberal commentators lauded ABC: "Best moderators of a debate in a long time." "I will say it: ABC moderators have exceeded expectations. They are fact checking and confronting. Shows how

abysmal CNN was."¹

While halacha does not address moderation of political debates, it does mandate the procedural impartiality of *dayanim*. This article surveys these rules, and it considers the question of whether impartiality requires absolute evenhandedness on the part of a *dayan* even when faced with disparate conduct by the litigants, or whether impartiality is satisfied by the neutral application of the same rules to both litigants, despite the fact that this will result in their disparate treatment in consequence of their disparate conduct.

The Gemara says:

The Chachamim taught in a *breisa*: The *pasuk* says, "And the two men shall stand..." It is a mitzvah for the litigants to stand. R' Yehudah said: I have heard from my teachers that if the judges want to seat both of the litigants, they may seat them. What is prohibited? That one

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¹Sara Fischer. Conservatives cry foul as ABC fact-checks debate. Axios. <https://www.axios.com/2024/09/11/conservatives-cry-foul-as-abc-fact-checks-debate>.

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PARSHAS HA'AZINU

RESISTANCE TO CHANGE

Excerpted and adapted from a *shiur*
by HaRav Nissan Kaplan

During *Aseres Yemei Teshuvah*, *Hamelech Hakadosh* replaces *HaKeil Hakadosh*. If one forgot, the Shulchan Aruch (O.C. 582:1) rules that he must repeat *Shmoneh Esrei*. The Sha'ar Hatziyun (582:4) cites R' Abaleh Posveler as saying that on the first night of Rosh Hashanah, *Shmoneh Esrei* need not be repeated—like if one forgets *Ya'aleh Veyavo* on Rosh Chodesh night—because *bais din* does not sanctify the new month at night. The Sha'ar Hatziyun disagrees, because it is a *tartei desasrei* (internal contradiction) to say the Rosh Hashanah *Shmoneh Esrei* without *Hamelech Hakadosh*.

R' Shlomo Zalman Auerbach writes (*peirush* on Machzor Hameforash, 2nd ed.) that even according to R' Abaleh, one who forgets *Ya'aleh Veyavo* in *Birkas Hamazon* on the first night must *bentch* again. He explains that R' Abaleh's reason is that the Bais Din *Shel Ma'alah* does not convene in judgment until after the month is sanctified, so reciting *Hamelech Hakadosh* at Ma'ariv is not critical. But it is still Yom Tov, and like on other days of Yom Tov, one who forgets *Ya'aleh Veyavo* must repeat *bentching*.

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Q&A from the
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Fast Food

Q May I swallow a pill on Yom Kippur?

A If taken to alleviate discomfort rather than illness (see note in Halichos Shlomo 5:8), a pill is forbidden: If it is flavored, it is considered food, so swallowing it on Yom Kippur—even whole—is prohibited *mide'Oreisa*. If it is unflavored, it is forbidden *mide'Rabanan* (Mishnah Brurah 612:16).

If pills are taken as treatment for illness, there is dispensation:

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may not be standing while the other one sits, or one speaking as much as he needs to while to the other one he says, "Keep your words short."

The Chachamim taught in a *breis*: The *pasuk* says, "With righteousness shall you judge your fellow." This teaches that one may not be sitting while the other one stands, or one speaking as much as he needs to while to the other one he says, "Keep your words short."²

From where is it derived that if two come for judgment, one dressed in rags and one wearing an exquisite garment worth one hundred *maneh*, that we tell the well-dressed one, "Either dress like him or dress him like you"? The Torah says, "Distance yourself from falsehood."

When litigants would come before Rava bar Rav Huna for judgment, he would say to them: "Remove your fine footwear, and then go down to judgment."³

Elsewhere, the Gemara cites a dispute about the *pasuk* "lo seileich rachil be'amecha,"⁴ with one interpretation being that it is a warning to *bais din* that it should not be soft to (*rach la*) this litigant and harsh to that one, but it must treat both sides as equals.⁵

Rashi explains that the problem with invidious treatment of one litigant is that it will hamper his ability to express his claims properly: "His words will be stopped up (*yistatmu dvarav*)."⁶

The Or Hachaim (R' Chaim ibn Atar) suggests that a judge must maintain impartiality even in his nonverbal behavior: "A *dayan* should not brighten his face and raise his eyes to one of the litigants and lower his eyes from one of them." He goes so far as to suggest that perhaps a *dayan* should not even raise his eyes to the litigants at all, lest one of them mistakenly construe the expression as favoring his opponent and then lose the confidence to argue his case.⁷

The Rambam rules:

It is a positive mitzvah for a judge to adjudicate righteously, as it says, "With righteousness shall you judge your fellow."

What is righteous judgment? This is equating the two litigants in all matters. One should not be allowed to speak as much as he needs while he tells the other one, "Keep your words short." He may not show a cheerful face to one and speak to him softly while showing a bad face to the other and speaking to him harshly. When there are two litigants, and one is wearing expensive clothes and the other is wearing degraded clothes, we tell the honored one, "Either dress him like yourself before you litigate with him, or dress like him, until you're equal, and then you both may stand and be judged." One may not sit while the other stands; rather, both shall stand. If the *bais din* wishes to seat

both of them, they may seat them. And one may not sit above and the other below, but side by side...⁸

The language of the Shulchan Aruch closely follows the Rambam's.⁹The *Acharonim* explain that a *dayan* may instruct both litigants to curtail their statements¹⁰ or to lengthen them;¹¹ it is only disparate treatment that is forbidden. R' Zvi Hirsch Kalischer qualifies, however, that even instructing both to abridge their statements is only permissible in the form of an instruction issued jointly to both litigants; a *dayan* may not tell this to just one—even if he plans to soon tell his opponent the same thing—because the initial directive to the first litigant might cost him his confidence.¹² Similarly, it seems clear from the language of the Gemara and the Rambam that a *dayan* may treat the litigants harshly and speak to them sternly, as long as he is evenhanded about it. (According to Rav Kalischer, he presumably may not be harsh with one first, even if he intends to later treat the other identically.)¹³

The Taz (R' Dovid Segal) rules that if a litigant is prolix in his arguments, he may be instructed: "Do not be lengthy; speak briefly," even if the other litigant, who argued first, was not so instructed, because he was concise. "And this is the custom every day."¹⁴ The Taz apparently does not consider this to constitute disparate treatment, because the second litigant was exhorted to be brief in reaction to his failure to do so, a failure not exhibited by the first litigant.

A similar position is apparently set forth by the Me'il Shmuel (R' Chaim Shmuel Florentin):

It appears that if a litigant speaks and goes on at length about matters that are not relevant to the litigation, such as words of enticement (*pitumei mil*), the *dayan* may tell him: "Curtail your statement, and do not trouble me with words that are mere hay and straw."...¹⁵

What scenario is Rav Florentin addressing? As we have noted above, the *Acharonim* declare that a *dayan* may always instruct both litigants to curtail their statements, apparently even if they are not going on at length about irrelevant matters. On the other hand, surely a *dayan* may not instruct only one litigant not to trouble him with words that are mere "hay and straw" if *both* litigants are doing so. It would seem that Rav Florentin is discussing a scenario where one litigant is going on at length about irrelevant matters but the other is not—either he spoke to the point, or he hasn't yet spoken—and Rav Florentin is making a point similar to that of the Taz.

I have long wondered about the following common scenario: In *bais din*, one litigant is repeatedly behaving improperly, e.g., speaking out of turn or using hostile language toward his counterpart. The *bais din* repeatedly admonishes him, but he defies

its orders. May he be addressed harshly, or would this be considered disparate treatment? It may be argued that just as the Taz and Me'il Shmuel permit the *bais din* to direct one litigant to be brief because he is rambling and his opponent is not, so too may the *bais din* speak harshly to the offender. But I have not found an explicit source for this.

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If the condition is life threatening, any medication may be taken, because *pikuach nefesh* overrides even an *issur de'Oreisa*. If necessary, one may even down it with water (Igros Moshe O.C. 3:91). Some *poskim* require tainting the water (see below) to make it unpleasant (Chut Shani p. 165). Others allow plain water, but no more than needed for swallowing (Igros Moshe *ibid*; Teshuvos Vehanhagos 5:189).



RAV ARYEH FINKEL

Medication may even be taken prophylactically to prevent dangerous illness in a healthy person (Igros Moshe *ibid*).

An infectious disease is deemed life threatening by halacha if it can occasionally have fatal consequences if left untreated; consult a physician to determine whether this applies. If medical advice is unavailable, take the treatment, because even *safeik pikuach nefesh* overrides a *de'Oreisa*.

When treating a non-life-threatening illness, only Rabbinic prohibitions are overridden, so only unflavored pills may be swallowed, and without water (Igros Moshe *ibid*). If swallowing is difficult, tainted water may be used (Halichos Shlomo *ibid*). It suffices to add an off-taste (e.g., some soap) to the water (*ibid*).

A flavored pill may be wrapped in thin paper and swallowed; eating this way is forbidden only *mideRabanan* (Mishnah Brurah *ibid*), and the Chachamim permitted it for a *choleh* (Halichos Shlomo *ibid*).

²Shvuos 30a.

³*Ibid.* 31a.

⁴Vayikra 19:16.

⁵Koubos 16b.

⁶Rashi Shvuos 30a s.v. Shelo yehei and 31a s.v. Levosh Kemoso, and Dvarim 16:19.

⁷Or Hachaim Dvarim 1:6. Cf. Nachalas Binyamin mitzvah 80.

⁸Halichos Sanhedrin 213:3.

⁹Shulchan Aruch C.M. 17:1.

¹⁰Bach *ibid*; Shach *ibid.* s.k. 1; Knesses Hagedolah *ibid.* Hagahos Tur os 1; Urim Vetumim, Urim os 1; Nesivos Hamishpat, *Chidushim* os 1.

¹¹Aruch Hashulchan *ibid.* se'f 1.

¹²Mozonayim Lemishpat *ibid.* os 2. Cf. Halacha Psukah *ibid.* p. 215 n. 6.

¹³See Halacha Psukah *ibid.* p. 216 n. 10.

¹⁴Taz *ibid*.

¹⁵Me'il Shmuel to Rambam *ibid.* remez 1.

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If someone is unsure whether he said *Hamelech Hakadosh* on Rosh Hashanah, the Mishnah Brurah (582:4) says that if he knows that

he properly recited the passages that precede it (*Uvechein tein pachdecha*, etc.), perhaps he doesn't need to repeat *Shmoneh Esrei*, because we can assume he did not follow these with the words

of the regular *Shmoneh Esrei*. The Chayei Adam says this definitively. Rav Elyashiv rules that someone who davened from a *machzor* can assume he said it correctly.

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