

Jewry Instructions: When Poskim Agree on What but Not on Why

Adapted from the writings of Dayan Yitzhak Grossman

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Before sending the jury off to deliberate, the judge in *The People of the State of New York vs. Donald J. Trump* read them 46 pages of jury instructions. The following appears on page 31:

Although you must conclude unanimously that the defendant conspired to promote or prevent the election of any person to a public office by unlawful means, you need not be unanimous as to what those unlawful means were.

In determining whether the defendant conspired to promote or prevent the election of any person to a public office by unlawful means, you may consider the following: (1) violations of the Federal Election Campaign Act otherwise known as FECA; (2) the falsification of other business records; or (3) violation of tax laws.[1]

This directive has become just one controversial element in one of the most controversial trials in US history, with even legal scholars from well outside the Trump camp saying it violates the requirement of jury unanimity:

Merchan allowed the jury to find that the secondary offense was any of the three vaguely defined options. Even on the jury form, they did not have to specify which of the crimes were found. Under Merchan's instruction, the jury could have split 4-4-4 on what occurred in the case. They could have seen a conspiracy to conceal a federal election violation, falsification of business records, or taxation violations. We will never know. Worse yet, Trump will never know.

The Supreme Court has repeatedly emphasized that the requirement of unanimity in criminal convictions is sacrosanct in our system. While there was unanimity that the business records were falsified to hide or further a second crime, there was no express finding of what that crime may have been.[2]

In this article, we survey some of the halachic literature on the general question (without application to this case) of what happens when two authorities share a conclusion but disagree about the underlying reason, with each rejecting the other's. Can these views combine to form a majority, because they agree on the ultimate halacha, or not, because there is no majority agreement on the reasoning?

In *bais din* and in the halachic process generally, a simple majority generally suffices; unanimity is not required. But the sources we cite may also apply to contexts where unanimity is necessary.

Much of the discussion of this topic revolves around this passage in the Gemara:

The *Rabanan* taught in a *breisa*: If one shechted an animal and, at the start of the shechitah, spattered blood on a nearby gourd of *trumah*, Rabbi (R' Yehudah Hanasi) says: The gourd becomes susceptible to *tum'ah*. But R' Chiya says: We suspend it (i.e., its status is in doubt). R' Oshaya said about this *breisa*: Now that Rabbi said it becomes

susceptible, and R' Chiya said we suspend it, upon whom are we to rely? Come, let us rely upon the words of R' Shimon, whose ruling is consistent with that of R' Chiya. For R' Shimon used to say: It is the shechitah of an animal that causes it to become susceptible to *tum'ah*, not its blood. (R' Shimon's ruling that shechitah blood cannot generate susceptibility to *tum'ah* supports R' Chiya's ruling that the blood did not render the gourd susceptible to *tum'ah*.)

(The Gemara elucidates the *breisa*.) Rav Papa says: All (i.e., both Rebbi and R' Chiya) agree where the blood remained on the gourd from the beginning of the shechitah until the end; in such a case, no one disputes that it makes the gourd susceptible to *tum'ah*, for both Rebbi and R' Chiya hold that blood from a shechitah generates susceptibility to *tum'ah*. The case in which they argue is where the blood was wiped from the gourd between the cutting of one pipe (either the trachea or the esophagus) and the other. Rebbi holds that slaughter is classified as shechitah from the beginning of the severing process to the end. Therefore, the blood on the gourd is considered shechitah blood, and it makes the gourd susceptible. But R' Chiya holds that slaughter is classified as shechitah only at the end, when the majority of the second pipe has been severed. Therefore, this blood that was wiped from the gourd before the second pipe was severed is considered merely blood of a wound, not blood of shechitah.

And what is meant (according to Rav Papa) by R' Chiya when he says, "We suspend it," which implies that the gourd's status is in doubt? R' Chiya meant that we suspend the matter of the gourd's susceptibility until the end of the slaughtering: If the blood is still present on the gourd at the end, it makes the gourd susceptible. But if not, it does not.

And what is meant by R' Oshaya when he says, "Come, let us rely upon the words of R' Shimon"? (R' Shimon is not saying the same thing as R' Chiya!) For according to R' Shimon, shechitah blood never makes food susceptible to *tum'ah*, whereas according to R' Chiya, it generally does. The answer is that in the case where the blood was wiped away between the cutting of the first pipe and the second, they are nevertheless in agreement. This master (R' Chiya) holds that the blood does not make the gourd susceptible, and this master (R' Shimon) also holds that way, albeit for different reasons.

Consequently, Rebbi remains an individual opposed by two, and the words of an individual do not hold where there are two that oppose him.**[3]**

Some *Rishonim* infer from here that as long as a majority of authorities agree on a particular conclusion, their disagreement about the reasoning is immaterial. R' Yitzchok ben Moshe of Vienna (the Or Zarua) writes:

It appears to me that where three sit in judgment and two find in favor of one litigant and one finds against, or two find against and one finds in favor, but the two disagree with each other, so that the proof

of Reuven is not accepted by Shimon—who says it is no proof at all—and so says Shimon to Reuven; nevertheless, because two are in agreement in favor or against, they are the majority. And I adduce a proof for this (from the above Gemara)...you learn that although they mutually disagree about the basic halacha (i.e., the underlying halachic principles), for R' Chiya holds that blood renders items susceptible to *tum'ah*, but this (i.e., the blood that splashed on the gourd during the shechitah) is not considered the blood of shechitah, because shechitah is defined only as the conclusion of the act, whereas R' Shimon holds that even the blood of shechitah does not render items susceptible to *tum'ah*. Nevertheless, because they are in agreement that the gourd is not rendered susceptible to *tum'ah*, even though they mutually disagree about their proofs, they are nevertheless considered the majority vis-à-vis Rebbi, and the halacha is in accordance with their opinion.[4]

R' Yosef Colon (the Maharik) similarly invokes this Gemara in allowing a *bracha* to be made on a set of *arba'ah minim* that includes a certain type of *hadasim* whose validity is a matter of contention. Based on this Gemara, he combines the view that accepts these *hadasim* with the view that a *bracha* may be made even if not all of the species are present.[5]

Based on the position of the Maharik, the Rama codifies a ruling quite similar to that of the Or Zarua:

Even if the majority do not agree upon a single rationale, and each one has his own rationale, because they agree on the halacha, they are called the majority, and we follow them.[6]

R' Shabsai Cohen (the Shach), however, disagrees with the Rama. He argues that the Maharik himself was uncertain of his argument and only proposed it to justify the prevailing practice. The Shach himself concludes that it is implausible, and that when dealing with a *de'Oreisa* matter, two lenient positions based upon different rationales cannot, in concert, yield a majority. But he seems to concede that this may be done in a *deRabanan* context.[7]

Elsewhere, the Shach limits his rejection to documented opinions whose authors are not present “before us,” but where the authorities are present and they agree on a ruling, they form a majority and are heeded, even if they reject each other’s reasoning.[8] (The Shach understands the Or Zarua to corroborate his own view, but the Or Zarua arguably corroborates the more expansive view of the Rama.)[9]

[1]Read the Jury Instructions from Judge Juan Merchan in the Trump Hush Money Trial. CNN Politics.

www.cnn.com/2024/05/29/politics/read-the-jury-instructions-from-judge-juan-merchan-in-the-trump-hush-money-trial/index.html

[2]Jonathan Turley, Opinion Contributor. “Bragg’s Thrill Kill in Manhattan Could Prove Short-Lived on Appeal.” The Hill.

thehill.com/opinion/judiciary/4697118-braggs-thrill-kill-in-manhattan-could-prove-short-lived-on-appeal/

[3]Chulin 36a.

[4]Or Zarua *piskei Sanhedrin os* 86.

[5]Shu"t Maharik end of *shoresh* 41.

[6]Hagahos Shulchan Aruch C.M. 25:2.

[7]Shach Y.D. end of *siman* 242 at the end of the *Pilpul Behanhagas Hora'os Be'issur Veheter*.

[8]Ibid. C.M. *siman* 25 s.k. 19 os 1.

[9]As we have seen, the Or Zarua adduces the discussion in Chulin in support of his view. While R' Oshaya was a *talmid* of R' Chiya, and perhaps even R' Yehudah Hanasi could have been present, it seems less likely that R' Shimon (bar Yochai), a *tana* who lived a generation before R' Yehudah Hanasi, would have been there.

The Shach could not see the actual text of the Or Zarua, because the work was not published until about two centuries after his passing. He saw only an abridged version of the text, cited in the Hagahos Ashri (Sanhedrin *perek* 4 *siman* 5). It includes the Or Zarua's basic position, followed by the words "and the proof is written at length." The Shach speculates that the Or Zarua's proof may have been from a certain Gemara in Sanhedrin (which is indeed discussing a case where the people were all present), but as we have argued, the Or Zarua's actual proof from Chulin may indicate that his position extends even to cases where they are absent.