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Dedicated in loving memory of
HaRav Yosef Grossman zt"l



VICE PRECEDENT: SHOULD PAST BAD VERDICTS BE OVERTURNED?

Adapted from the writings of Dayan Yitzchak Grossman

In U.S. Supreme Court Justice Samuel Alito's majority opinion in *Dobbs v. Jackson Women's Health Organization* (the Supreme Court's recent historic ruling overturning *Roe v. Wade* and *Planned Parenthood v. Casey*), he discusses when the principle of *stare decisis* ("to stand by things decided," the doctrine that says courts should adhere to precedent in making their decisions) should apply, and when it should not:

Stare decisis plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision...It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." ...It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like

manner...It "contributes to the actual and perceived integrity of the judicial process." ... And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges..."

We have long recognized, however, that *stare decisis* is "not an inexorable command." ... It has been said that it is sometimes more important that an issue "be settled than that it be settled right." ...But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages"...we place a high value on having the matter "settled right." In addition, when one

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PARSHAS CHUKAS

LOSS PREVENTION

Excerpted and adapted from a shiur by
Dayan Yosef Greenwald

Take the staff and gather together the assembly, you and Aharon your brother, and you shall speak to the rock before their eyes that it shall give its waters. You shall bring forth for them water from the rock and give drink to the assembly and their animals.

Bemidbar 20:8

Rashi cites the Gemara (Menachos 76b) that derives from here that *chasah Torah al mamonam shel Yisrael* (the Torah has mercy on Jewish property), because Hashem performed this miracle for the animals as well.

The Tashbeitz in Zohar Harakia (*shoresh 1*) suggests that this principle is the source of the Gemara's rule that one may rely on a minority opinion in cases of *hefsed merubeh* (great financial loss).

According to the Rama in *Toras Chatas*, other cases of need are also included. For example, one may be more lenient concerning certain kashrus questions on Shabbos, because that is considered a significant need.

The Bach writes that *hefsed merubeh* is a consideration in cases of *issur de'Oreisa*. This appears to contradict a statement of the Gemara (Chulin 49b; see Maharitz Chayes and R' Akiva Eiger *ibid.*). The Shach (Y.D.

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¹ *Stare decisis*. Wex. Legal Information Institute.

O&A from the
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Dry Goods

Q We swim on Friday afternoons, and we hang the wet towels and clothes on the porch railing to dry. May we bring them inside on Shabbos afternoon?

A One of the applications of the *melacha* of *melabein* (scouring) is wringing out a wet cloth (*sechitah*). To ensure that one doesn't squeeze wet cloths inadvertently, Chazal forbade handling them on Shabbos (Rama O.C. 301:46).

The Mishnah Brurah says a cloth that was wet at the onset of Shabbos (at *shkiah*) and dried
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of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend... Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

This article explores several halachic principles that demand deference, in certain contexts, to precedents of various sorts—sometimes even where a later authority believes that an earlier authority decided the question wrongly, or that the established custom is less than ideal—for a variety of reasons. Note that the rules governing the application of these principles are complex and nuanced; in this article, we shall focus primarily on the basic formulation of the principles and the rationales given for them by the *poskim*, and touch only briefly on their scope and application.

A CHACHAM THAT FORBADE

A *breisa* teaches:

If a chacham deemed an object impure, his fellow is not allowed to deem it pure; if he forbade, his fellow is not allowed to permit.²

Rishonim offer three rationales for this prohibition:

- *Shavvei chaticha de'isura* (he has rendered it a prohibited piece): A ruling issued by a chacham forbidding something creates a prohibition, and this cannot be undone by a contrary ruling.
- Due to the honor of the chacham, a subsequent chacham may not undo his ruling.
- The Torah must not appear as two Toros, with some prohibiting and some permitting.³

There are various ramifications of this divergence. An important one is whether it applies in the opposite direction: If one *posek* deems a matter permitted, may another deem it forbidden? *Rishonim* disagree about this, and the Shach notes that it would seem to follow from the first rationale that this is allowed.⁴

A COURT DOES NOT EXAMINE ANOTHER COURT

The Gemara declares that “a court does not

examine another court.”⁵ As we have previously discussed, while in context this appears as a merely *descriptive* statement, that a court does not typically review a decision of another court—and some *Acharonim* indeed suggest this interpretation—the preponderance of early halachic invocations of this principle apparently understands it as *prescriptive*, that a court *should not* review a decision of an earlier court.⁶ Various *Rishonim* assert, with or without mentioning the principle, versions of a rule that a court or halachic authority should not reconsider a civil matter already handled by a previous court,⁷ and just as with the previous principle regarding rulings on ritual matters, different rationales are offered for this one concerning civil matters:

- Litigants may not present their case to a second court out of respect for the first one.⁸
- A litigant cannot be compelled to relitigate a case that has already been litigated and decided.⁹

R' Chaim Palagi maintains that the principle that a court does not examine another court means only that a second court should give the first court the benefit of the doubt and assume, absent evidence to the contrary, that the first court decided the matter correctly. But if it reviews the first court's decision and determines that it was wrong, it may overturn the decision.¹⁰

CASTING ASPERSIONS

The Gemara indicates that the introduction of a novel stringency in the area of gittin is prohibited, because this will cast aspersions on earlier gittin.¹¹ Some authorities maintain that the realm of gittin is unlike most areas of halacha, because the aspersions will attach to any descendants born of unions that follow the issuance of gittin in which the novel stringency was not observed.¹² Many *poskim*, however, make no such distinction,¹³

5 Bava Basra 138b.

6 See this author's *Judicial Review of a Bais Din Verdict* (n. 4); *Appealing a Bais Din Decision Part I*, *The Bais HaVaad Halacha Journal*, Volume 5777 Issue XXXIV Beha'alos'cha.

7 Shu"t HaRosh *klal* 56 *siman* 8 and *klal* 85 *siman* 5-6 (cited in *Bais Yosef* C.M. *siman* 12; *Darchoi Moshe* *ibid.* *siman* 25 and *Sma siman* 19 s.k. 2); *Chazei Hatenufah siman* 40 (cited in *Bais Yosef* *ibid.* and *Sma* *ibid.*); *Shu"t HaRan siman* 75 s.v. *Yoshvei al midin*.

8 *Bais Yosef* *ibid.* *siman* 22 (cited in *Sma* *ibid.* s.k. 9, and cf. *Shach* *ibid.* s.k. 9 and *Tumim* s.k. 5); *Bach* *ibid.*

9 See *Choshen Ha'eifod* beginning of *siman* 42 p. 47b.

10 Shu"t *Smicha Lechaim* E.H. *siman* 9 p. 56b.

11 *Gittin* Sb. Cf. *Sefer Hatrumah hilchos gittin siman* 114, codified in *Shulchan Aruch* E.H. 125:7, and see *Pis'chei Teshuvah* *ibid.* os 12; *Trumas Hadeshen cheilek* 1 *siman* 232; *Knesses Hagedolah* E.H. *siman* 142 *hagahas* Tur os 52; *Sdei Chemed* Vol. 3 *ma'areches halamed* beginning of *klal* 71 p. 285.

12 Shu"t Ra'anach *cheilek* 2 (Mayim Amukim) *siman* 11 s.v. *Nish'alti al ketzas mekomos*. Cf. Shu"t Chikrei Leiv O.C. (cheilek 2) *siman* 95 s.v. *Vera'isi lehaRa'anach*; *Pis'chei Teshuvah* Y.D. *siman* 214 os 4.

13 See *Sdei Chemed* *ibid.* *klal* 73.

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during Shabbos is still forbidden to move. He applies the principle of “*migu de'iskatza'i levein hashmashos, iskatza'i lechulei yoma.*” This rule dictates that an item that was *muktzeh* at the start of Shabbos remains *muktzeh* all Shabbos, even though the reason it was *muktzeh* no longer applies.



RAV ARYEH FINKEL

R' Moshe Feinstein rules (*Igros Moshe* O.C. 5:22), however, that if it is certain that the clothes will become dry on Shabbos, *migu de'iskatza'i* does not apply. Since it is known as Shabbos starts that the *muktzeh* cause will evaporate during Shabbos, the item is not characterized by its current condition. This is possible, for example, in the summer in Eretz Yisrael—during which it never rains—or anywhere the weather forecast shows no chance of rain.

But this halacha does not apply to towels. Chazal only forbade handling the sort of wet cloth that one is inclined to squeeze in order to reduce its wetness, like clothing. A towel is made to get wet; because people don't mind when it gets wet, they aren't prone to squeezing it, so wet towels aren't *muktzeh* (*Mishnah Brurah* 301:I72).

Only significant moisture makes a garment *muktzeh*. The standard is *tofeiach al menas lehatfiach*—wet enough that something it touches can go on and wet something else (*Mishnah Brurah* 308:63).

and various authorities have brought up the concern for the casting of aspersions as an argument against the imposition of stricter halachic standards than were followed by earlier generations in a variety of contexts, including those of *eruvim*¹⁴ and the checking of produce for insect infestation.¹⁵

14 *Trumas Hadeshen* *ibid.* *siman* 74.

15 Shu"t *Igros Moshe* Y.D. *cheilek* 4 *siman* 2. Cf. Shu"t *Bais Dino* Shel Shlomo Y.D. *siman* 19 s.v. *Su chazina lei lemar*, cited in *Sdei Chemed* *ibid.* end of *klal* 25 s.v. *Shuv hisagiti sefer hayakar* *Bais Dino* Shel Shlomo and vol. 4 *ma'areches hamem* *klal* 37 s.v. *Urmeiin klalin* and Shu"t *Minchas Shlomo tinyana* *siman* 63 s.v. *Vegam efshar*.

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242) adduces proof against the Bach from the case of *ir hanidachas*, in which a majority of the Sanhedrin can rule to condemn the

city to destruction: This is certainly a *hefsek merubeh*, so according to the Bach, why wouldn't we rely on the minority and spare the city?

To answer the Shach, perhaps

one could say that a verdict of the Sanhedrin is treated as a ruling of the entire body, so the minority's view cannot be taken into account.

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