

Eating Dairy Meals in Non-Kosher Restaurants
Rabbi Dr. Barry Leff
May 21, 2020
27 Iyar 5780

Question: Is it permissible to eat hot dairy meals in non-kosher restaurants?

Response: In our communities it is very common for people who keep kosher and who have kosher homes to eat vegetarian or fish meals in non-kosher restaurants. Not just lay people, but many rabbis also follow this custom, especially if they live in or travel to an area where there are few or no kosher restaurants. In “The Observant Life,” R. Paul Drazen observed, “...one of the hallmarks of Conservative Jewish practice has been the basic understanding that it is possible to eat in unsupervised restaurants responsibly.”¹ This responsum provides a halakhic rationale for what has already become accepted practice in many communities.

There is a fairly clear line delineating kosher food from food that is not kosher. Many of the rules we have regarding *kashrut* are *gezerot*, fences, that are intended to prevent a Jew from accidentally eating something that is not kosher. In this paper we will show that it is in principle possible to eat hot dairy meals in non-kosher restaurants without eating anything that is not kosher, although there are risks associated with that practice. In addition, this responsum will provide guidelines on how to minimize the risk of eating something that is not kosher when eating in restaurants that are not under rabbinic supervision.

There are many different approaches to *kashrut*. For some people, it is not enough that meat is kosher; they insist on *glatt* kosher. Some only eat dairy that is *chalav Yisrael*, and others accept dairy products including cheese that does not have a *hecksher*. Some insist on only drinking wine that is certified as kosher; others will drink all wines, and others only require supervision of wine that comes from Israel. Some people are much more stringent than others regarding which supervision they accept – there are many people in Israel, for example, for whom rabbanut certification is insufficient, they insist on Badatz certification. Similarly, there are many different levels of strictness in the religiously observant community when it comes to eating in restaurants. In this responsum we will show there is a hierarchy of strictness when it comes to eating in restaurants, and there are risks associated with eating in non-supervised restaurants that can be mitigated, for example, by preferring restaurants that are vegan or vegetarian.

Historical Background

Rabbi Paul Plotkin’s 2012 teshuvah, “[Pizza from a Non-Kosher Establishment](#),”² includes a discussion of the history of this issue with the CJLS, going back to a paper written by Dr. Max Arzt in 1940 that specifically addressed broiled fish and steamed vegetables. In summary, the issue of eating hot dairy out has been periodically addressed, although to date there has been no comprehensive teshuvah on the subject. Rabbi Plotkin’s paper specifically addresses pizza. His paper provides a very detailed guide to the many issues that arise in trying to find a way to permit eating pizza from a non-kosher

¹ Paul Drazen, *The Observant Life*, p. 335.

² Paul Plotkin, YD 108:1.2012a

establishment within traditional rules of kashrut. It also proves the contention of this teshuvah that it would be very difficult, if not impossible, to justify such behavior while adhering to the traditional *gezerot*. As Rabbi David Booth points out in his [dissent](#)³ from Rabbi Plotkin's teshuvah, the teshuvah relies on halakhic leniencies that we know are not factually correct, such as the assumption that סתם כלים אינן בני יומן, the assumption that unless we specifically know otherwise, vessels are assumed not to have been used in the last 24 hours. Additionally, the requirements in the teshuvah – finding a restaurant that only makes pizzas on screens, assumes a vented oven, requires one to ask that a particular knife be cleaned and allowed to cool before being used, etc., are sufficiently burdensome that is unlikely many people will follow them in practice. Furthermore, the teshuvah does not address the many other foods people commonly eat out, including pasta, soups, veggie burgers, etc.

In 1968 the CJLS responded to a question from the National Women's League regarding dairy or fish meals in non-kosher restaurants with the following statement:

Mindful of the importance of regional conferences and national conventions in the advancement of Judaism, whenever any hardships are encountered we deem dairy and fish meals permissible in non-kosher restaurants or hotels in connection with these events. All precautions should be taken that no non-kosher ingredients are included in the meals and that the utensils are cleansed and scoured before the preparation of the meal.

Nearly eighty years after the CJLS first considered this issue, eating dairy meals in non-kosher restaurants remains a practice that is very common in the religiously observant community, yet there is no approved halakhic rationale for this manner of observance. This paper provides that rationale, and also provides practical guidance for the many people in our community who do follow the practice of eating hot dairy in non-kosher restaurants.

Possible Responses

In considering this issue, there are three possible responses we could take as a community.

1. We could choose to continue the approach taken by Rabbis Arzt and Plotkin and try to determine what is permissible within a traditional understanding of the laws of kashrut including the various *gezerot*, and encourage people to follow it;
2. We could choose to say nothing, because to issue a teshuvah stricter than what people are willing to follow would reduce the relevancy of halakhah in the eyes of many; or,
3. We can take the changing custom and practice of the observant community into account in writing a responsum that acknowledges current practice.

The first option, continuing the approach in the Plotkin and Arzt teshuvot, is problematical. Most people are unlikely to change their practice simply because a *teshuvah* comes out that reiterates or is even more stringent than a *teshuvah* they are not

³ David Booth, YD 108:1.2012c

currently following. This approach is likely to make only more glaring the divide between official halakhah and actual practice.

Relative to the second option, to say nothing, there are those who would say that it is acceptable that the legal position is stricter than actual practice—it gives people a goal to strive for. Furthermore, as Rabbi Joel Roth describes, it is better to keep silent than to try to enforce a change in custom that people will ignore: it undermines the authority of the system. It is better that the sages give silent sanction, because the result of persistent attempts to abrogate the custom would be the willful violation by the people of a clear rabbinic statement outlawing the custom.⁴ As the Talmud dictum puts it, מוטב שייהו שוגגין ואל יהו מזידין, “it is better that they should transgress unwittingly than willfully.”⁵ To that position we respond that this is too important a part of people’s daily lives to ignore. This is not a fine point of law—it is something that Jews encounter on a daily basis.

This teshuvah takes the third approach, to acknowledge current practice of our community as the basis for the response. There are those who would say this is a dangerous path we are on, citing Rashbash: “for if we would abrogate a prohibition because of a custom, all prohibitions would be abrogated one by one, and the Torah would become null and void, God forbid.”⁶ That is a reason one must be cautious in adapting halakhah based on a change in practice.

Solomon Schechter presented the idea of “Catholic Israel,” his translation for כלל ישראל, as the living body that is the center of authority. Schechter said (quoted by Dorff) that “This living body, however, is not represented by any section of the nation, or any corporate priesthood, or Rabbihood, but by the collective conscience of Catholic Israel as embodied in the Universal Synagogue.”⁷ This teshuvah follows the reinterpretation of Robert Gordis, as summarized by Dorff—that we consider “only the practices of *Jews who try to observe Jewish law* in making our decisions.”⁸

The behavior of the community has long been a basis for halakhah. There are many places in the Talmud where the halakhah is either not clear or is in dispute, such as in Bavli Brachot where there is a debate over which is the correct blessing to say when drinking water to quench one’s thirst: the debate is settled with the instruction פוק קוֹזי מֵאֵי פִּיךָ, go out and see what the people are doing.⁹ When a question arose regarding a situation where Passover fell on Shabbat and someone forgot to bring the knife before Shabbat, Hillel forgot what the halakhah was – but he was confident people would intuit the right answer: שמעתי ושכחתי אלא הנח להן לישראל אם אין נביאים הן בני נביאים הן “I heard [the

⁴ Joel Roth, *Halakhic Process*, p. 221

⁵ See BT Shabbat 148b, for example

⁶ Roth, *op. cit.*, p. 215.

⁷ Solomon Schechter, “Historical Judaism,” in his *Studies in Judaism*, First Series (Philadelphia: Jewish Publication Society, 1896), Introduction; reprinted in Elliot N. Dorff, *The Unfolding Tradition* (New York: Rabbinical Assembly, 2005; revised edition, 2011), pp. 62-67, with the quoted passage on p. 65 (pp. 58-63 in the 2011 edition, with the quoted passage on p. 61).

⁸ Robert Gordis, “Authority in Jewish Law,” *Proceedings of the Rabbinical Assembly 41-44* (1944), pp. 64-93; reprinted in Dorff, *The Unfolding Tradition*, *ibid.*, pp. 97-121, esp. pp. 108-110 (in the second, 2011 edition, pp. 93-117, esp. pp. 104-106).

⁹ BT Berakhot 45a

halakhah] and I forgot it, but rely on Israel (the people) if they are not prophets, they are the children of prophets.¹⁰

Yad Eliyahu (Rabbi Eliyahu Yitzhak Hazan, 20th c., Hong Kong, Shanghai, and Jerusalem) said:

הרי מבואר לנו שמה שהמנהג מוסכם אצל כלל ישראל, הוא על פי רוח הקודש, שהשם יתברך הופיע ביניהם, וממש כעל פי נביא הנהיגו, כי על ידי הרצון והמעשה לשם שמים, מאיר השם יתברך בכלל כנסת ישראל רוח הקודש איך לנהוג. ויש ראיה לזה מפסחים (דף סו ע"א): אם אינם נביאים - בני נביאים הם.

It is explained to us that a custom agreed to by *klal Yisrael* is according to prophecy, that God appears among them, and they behave just as by the mouth of a prophet, for their will and deeds are for the sake of heaven, Holy God has enlightened the community of Israel with prophecy on how to behave. And there's proof from this in Pesachim, "if they are not prophets, they are the children of prophets."¹¹

We see this also in practical halakhic rulings. As cited in "Reciting Maariv Early on Erev Shabbat," Terumat Hadeshen (R. Yisrael Isserlin, 15th c. Austria) says many rabbis followed the custom of the people in reciting Maariv earlier than the theoretical earliest time according to accepted halakhah during the long days of the summer.¹²

Questions to be Addressed

Thus, this responsum will in the main address three questions:

- 1) What is forbidden regarding eating forbidden substances דאורייתא (on a Torahitic level)? On a rabbinic level?
- 2) What is the status of fences that have fallen into neglect?
- 3) As a practical matter, how can an observant person meet the standards of kashrut suggested in this responsum when eating in non-kosher restaurants?

In many ways, the last item, guidance on how to eat only kosher food when eating in non-kosher restaurants, is the most important part of this teshuvah. People are already eating out; guidance on how to do that while observing kashrut would be very helpful. It is also worth noting that there are more vegetarian restaurants than ever before, and there is greater "vegetarian consciousness" even in restaurants that are not 100% vegetarian, which makes it easier than ever to find ways to eat out that minimize the danger of eating something non-kosher. In Israel you can also find restaurants that advertise themselves as כשר בלי תעודה, "kosher without a certificate," restaurants that follow the laws of kashrut but for financial or political reasons do not seek a certificate from the rabbanut.

1. Forbidden Substances

This section will explore the difference between kosher and non-kosher food.

¹⁰ BT Pesachim 66a

¹¹ Yad Eliyahu, Psakim, siman 25

¹² Barry Leff, OH 267:2.267.2012b

Odd as it may sound, the only thing CLEARLY forbidden דאורייתא, by all authorities without argument, is a mixture that contains a majority of the forbidden substance. There is a lengthy argument in the Talmud, Bavli *Hullin* 97b-99a, on what quantity of a forbidden food would render the mixture impermissible, and whether the main criterion to meet is taste or nullification in volume. There is a debate about whether nullification should be 1:60 or 1:100; that argument is settled, and has been established as halakhah, by a passage in Avodah Zarah that clearly states: והלכתא: אידי ואידי בשיתין, וכן כל "the law is: in this case or in that case, 1/60th, and this is the rule for all things that are forbidden by the Torah."¹³

Any forbidden substances (or forbidden combinations, such as kosher meat and kosher dairy) are only considered nullified בדיעבד (after the fact). The Shulhan Arukh forbids ביטול בששים לכתחילה (nullification in 1/60 up front, ahead of time).¹⁴ Traditionally, it is only permitted to rely on ביטול בששים in the case of an "accidental" mixing. It would be forbidden to intentionally put even a very small amount of a forbidden substance into a much larger volume of permitted substance, relying on ביטול בששים. We do have to rely on the integrity of the restaurant where we are eating – and there are risks in doing so. But as long as the consumer takes care to inquire about the ingredients in the food and the preparation of the food with reasonable diligence, any forbidden substance in the food is both undesired and unintended, and therefore is present in a בדיעבד (after the fact) status—i.e., it is accidental—which all authorities agree renders the forbidden substance nullified, and the food permitted.

Rashi says that taste is forbidden for *kodashim* (sacrifices), but for *hullin* (ordinary food) we go by nullification in volume, even if a taste remains:

נותן טעם קים לן דאסור בקדשים כעיקר ממשו של איסור ולהא מילתא קתני זהו למעוטי שאר קדשים אבל חולין שפיר גמרינן מיניה למאה וששים דהא קים לן מאחרי רבים להטות דבטלי ברובא וילפינן מהכא להחמיר דלא ליבטיל אלא במאה ... לר' יוחנן במסכת ע"ז (דף סז) כל שטעמו ולא ממשו אין לוקין עליו.

a transferred (forbidden) taste is what is forbidden with *kodashim* (sacrifices) where it is the essence of the prohibition; it is taught to exclude other *kodashim*, but with *hullin* (normal, unconsecrated food) it is preferable to learn from 100 and 60 (1/100 or 1/60) for it is taught to go after the majority, that to nullify in a majority (on a biblical level), and we learn from here a stringency that it is not nullified except in 100...according to R. Yohanan in tractate Avodah Zarah, anything that has taste but not essence, we do not flog a person for it.¹⁵

Tosafot is not content with this and responds (despite Rashi's rather clear message!):

פירש בקונטרס דזהו למעוטי שאר קדשים אבל חולין שפיר ילפינן מיניה למאה וששים דמדאורייתא בטלי ברוב וילפינן מהכא להחמיר דלא ליבטיל אלא במאה וששים משמע דר"ל דטעם כעיקר דקאמר לאו לטעם גמור הוא דהא בטיל במאה וששים אלא טעם כל דהו

¹³ Bavli, Avodah Zarah 68b/69a

¹⁴ Shulhan Arukh YD 99:5.

¹⁵ Bavli, *Hullin* 98b, Rashi DH *l'tam k'ikar*

Rashi explains that this is to exclude other *kodashim*, but with *hullin* it is preferable to learn from 100 and 60, since biblically [forbidden substances] are nullified in a majority, and we learn here 100 and 60 as a stringency; that is, what he wanted to say is “*ta’am k’ikar*,” the taste is the essence [does not apply] he is not talking about a complete taste that is nullified in 100 or 60, but rather a ‘shadow of a taste’ (or a least little taste).

The Shulhan Arukh states:

איסור שנתערב בהיתר מין בשאינו מינו, כגון חלב שנתערב בבשר יטעמנו נכרי, אם אומר שאין בו טעם חלב או שאומר שיש בו טעם אלא שהוא פגום, מותר... ואם אין שם עובד כוכבים לטועמו, משערינן בס'

A prohibited substance mixed with a permitted substance of a diverse kind, such as forbidden fat mixed up with meat, they give it to a Gentile to taste, and if he says it has no taste of forbidden fat, or if he says that it damaged the taste, the mixture is permitted... and if there are no Gentiles available to taste it, we go by nullification in 60.”¹⁶

Most later authorities assume טעם כעיקר forbids food at least rabbinically, if not biblically,¹⁷ in mixtures of unlike substances, which is the relevant case in eating dairy meals in non-kosher restaurants.

Nowadays, there is another problem in relying on *ta’am k’ikar*. While most people who are familiar with the taste of bacon might not be fooled by the taste of “Bac-Os,” bacon-flavored bits with an OU hecksher, some vegetarian meat substitutes such as the Impossible Burger could fool a casual taster. It may be that we have no choice but to rely on *bitul b’shishim* in our times.

All of the authorities in the Gemara, as well as later authorities, would agree that if the substance you are eating has no forbidden taste AND the volume of any accidentally introduced forbidden substance is less than 1/60, the food is permitted both biblically and rabbinically.

As a practical matter, we can rely on *bitul b’shishim* alone, and not have to worry about asking a Gentile cook to taste our food: the Rama on the above cited reference in the Shulhan Arukh says:

ואין נוהגים עכשיו לסמוך אעובד כוכבים ומשערינן הכל בס'

It is not now our custom to rely on a non-Jew and we measure everything to 60.

This may help explain why eating out in non-kosher restaurants has become so common in the observant community. Most people who keep kosher are familiar with the concept of *bitul b’shishim*, and those who eat out in non-kosher restaurants very likely assume that anything forbidden that was unintentionally in their food would be nullified. There is some halakhic justification for this approach.

¹⁶ Shulhan Arukh YD 98:1

¹⁷ See for example Shakh to Shulhan Arukh YD 98:1 (note 4)

It follows, therefore, that the whole complex structure of *kashrut* as we know it, with principles like זיעה (steam), חריף (spicy flavors transmit flavors more effectively than non-spicy flavors), נותן טעם לפגם (gives a disgusting taste), סתם כלים של עובדי כוכבים אינן בני יומן (vessels belonging to a gentile are assumed not to have been used within 24 hours), etc., exists as גזרות (fences) to prevent us from violating טעם כעיקר, which, if we follow Rashi, is in itself a rabbinic stringency.

Even though we follow the Rama and rely on *bitul b'shishim*, we clearly do not want our eggs to taste like bacon, so in addition to asking questions about the ingredients in food to make sure there was nothing non-kosher intentionally added to the food – which would be forbidden since we cannot rely on *bitul b'shishim l'khatilah* – we have to ask about or specify about food preparation so we still avoid violating *tam k'ikar*.

To summarize, if a food contains less than 1/60 of a forbidden substance that may unintentionally be present, and it does not have a taste of a forbidden substance, it is kosher on both the biblical and rabbinic levels.

However, what are we to do with the גזרות intended to help us comply with the above prohibitions?

2. The status of neglected fences

The traditional structure of *kashrut* includes many fences that are in place to prevent the possibility of tasting a forbidden substance. The most widely known is the requirement to use separate dishes for meat and dairy. It is thus an assumption of the system of *kashrut* that pots, dishes, and utensils absorb food and tastes and exude them back out, possibly resulting in tasting a forbidden combination.

We can see the rabbis' concern with pots absorbing forbidden tastes from the discussion at the end of Avodah Zarah about how a Gentile's pots are forbidden from use because of the flavors they might have absorbed. The Gemara says אמר רב חייא בריה דרב "R. Hiyya, the son of R. Huna said: The Torah only forbade a utensil that had been used [by a Gentile] the same day, since the effect is not to worsen the flavor."¹⁸ It is, therefore, permitted to use a Gentile's pot if it had not been used within 24 hours, even without washing. There is an implication that if the pot is washed you don't have to wait 24 hours—it says that the rabbis decreed the pot has to be washed whether or not 24 hours have passed because of people who do not wait 24 hours.

At one time, not everyone was so stringent about the treatment of meat and dairy dishes; in Beit Yosef, Joseph Karo expresses surprise that Baal Haitur allowed cooking dairy in a pot that had been used to cook meat, even the same day.¹⁹ But Karo himself was much more lenient than many of today's Ashkenazi authorities: he ruled that you may wash meat plates in a dairy pot as long as the water is hot because it's "*nat bar nat*," a second degree transfer.²⁰ Not only that, he ruled that if you put ashes in the water – and certainly soap would be stronger than ashes – it is permissible to wash meat and dairy

¹⁸ Bavli Avodah Zarah 76a

¹⁹ Beit Yosef YD 93 *k'tav baal haitur*

²⁰ Shulhan Arukh YD 95:3

dishes together even if there is still grease on the dishes.²¹ More recently, R. Ovadiah Yosef ruled you may wash meat and dairy dishes together in the same dishwasher at the same time.²² On the other hand, a teshuvah approved by the CJLS from R. Loel Weiss is more stringent, holding that the same dishwasher should only be used for both meat and dairy if there is a 24-hour waiting period in between using the dishwasher for meat and using it for dairy.²³

In the 1500 years that have transpired since the end of the talmudic period, methods of food preparation have changed dramatically. In developed countries with stringent health regulations and industrial strength dishwashers, we can be reasonably confident that pots, pans, and dishes (unlike grills) will not impart forbidden tastes. Modern cookware and plates, with the exception of cast-iron cookware, is generally non-porous, and going through an industrial dishwasher would certainly remove tastes as effectively as kashering in boiling water. Any small particles that survived a trip through a dishwasher would certainly meet most people's definition of a טעם לפגם, a disgusting taste, which cannot render something unkosher. Thus, many of the fences relating to dishes are not relevant today. Intuitively understanding this may be what has led many observant Jews to overlook the traditional fences in their eating out habits. The fences surrounding dishes could be dispensed with because they are no longer relevant.

There are other principles, such as *harif* (sharp tastes transmit flavors more effectively) and *ziah* (transmission of flavors through steam) that are still relevant as fences, but which our community is ignoring when they eat out.

Social / Cultural Considerations

One of the fundamental reasons *hazal* put in place many of the dietary restrictions was a conscious effort to minimize contact between Jews and non-Jews to prevent intermarriage. In the Babylonian Talmud, tractate Avodah Zarah, it says

אמר רבי: כמה נאה פת זו, מה ראו חכמים לאוסרה; מה ראו חכמים? משום חתנות!

Rabbi exclaimed: How beautiful is this loaf; why should the Sages have thought fit to prohibit it! Why should the Sages have thought fit to prohibit it? As a safeguard against intermarriages!²⁴

We reject this approach to avoiding the problem of intermarriage. These days, as Rabbi Dorff points out, few of those who intermarry keep kosher at all.²⁵ Continuing to ban food cooked by non-Jews will not make any difference whatsoever in the intermarriage rate.

Furthermore, we are active and engaged in the secular communities around us. Many of us live in places with no kosher restaurants. If we are to have normal relations with our neighbors, we need to be able to break bread with them in places other than our own homes. As Rabbi Dorff wrote, "In keeping with our acceptance of the conditions of

²¹ Ibid., 95:4

²² Yabea Omer (vol. 10, 4)

²³ Loel Weiss, YD 95:2015

²⁴ BT Avodah Zarah 35b

²⁵ Dorff, "The Use of All Wines," Proceedings CJLS 1986-90, p. 217.

modernity, we in the Conservative movement would undoubtedly hold that, short of mixed marriage, Jews *should* have social and business contact with non-Jews.”²⁶

It has become normative, not only among Conservative Jews but also among many Modern Orthodox Jews to eat hot dairy in non-kosher restaurants, regardless of the existence of rabbinic fences, including ones that may still be relevant today. *Therefore, rather than attempt to justify a change in each individual “fence” that has been traditionally enacted, this teshuvah relies on the change in practice as justifying a change in halakhah.* This teshuvah will NOT address each individual fence and argue it is irrelevant. It does not matter whether the fence still is potentially relevant when the public does not accept it.

אין גוזרין גזרה על הצבור - אלא אם כן רוב צבור יכולין לעמוד בה (We do not impose a fence on the public unless the majority are able to abide by it)

There are two halakhic principles that could in theory be used to justify a new ruling with respect to kashrut: *אין גוזרין גזרה על הצבור - אלא אם כן רוב צבור יכולין לעמוד בה* (We do not impose a fence on the public unless the majority are able to abide by it) or *מנהג מבטל הלכה* (custom nullifies law).

- *אין גוזרין* is applied in situations where a rabbinic “fence” has been mandated that the public is not following.
- *מנהג מבטל הלכה* is a principle that can be applied when the custom of the people overrules a biblically mandated action.

This teshuvah is NOT going to apply *מנהג מבטל הלכה* because it is not attempting to permit anything that is forbidden *דאורייתא*. Rather, what this teshuvah is addressing is the series of fences that the sages have put around the dietary laws to distance us from the possibility of eating something forbidden. Therefore, *אין גוזרין* is the relevant principle for our discussion.

The fundamental principle of *אין גוזרין* is found in the Bavli, Avodah Zarah 36a/b, regarding a case where the sages had made an attempt to forbid the use of heathen oil, yet the people refused to abide by it: *דאמר רבי שמואל בר אבא אמר רבי יוחנן: ישבו רבותינו ובדקו על שמן שלא פשט איסורו ברוב ישראל, וסמכו רבותינו על דברי רשב"ג ועל דברי רבי אלעזר בר צדוק, שהיו אומרים: אין גוזרין גזרה על הצבור אלא כרוב צבור יכולין לעמוד דאמר רב אדא בר אהבה, מאי קרא במארה .. אתם נארים ואותי אתם קובעים הגוי כולו, אי איכא גוי כולו - אין, אי לא - לא* “for R. Samuel b. Abba said in the name of R. Johanan: Our masters sat and made investigation concerning [the use of heathens’] oil [and found] that its prohibition had not spread among the large majority of Israelites; they accordingly relied upon the dictum of Rabban Shimon b. Gamliel and R. Eliezer b. Zadok who declared: “We make no decree upon the community unless the majority are able to abide by it.” R. Adda b. Ahaba said: “What Scriptural verse supports this rule? ‘You are cursed with the curse; for you rob Me, even this whole nation²⁷’ — i.e., when the whole nation has accepted an ordinance, then the curse which is the penalty of its infraction does apply; otherwise it does not.

The current situation is different. One could argue that *אין גוזרין* would apply only in the situation where the sages are imposing a NEW prohibition, and the sages who try

²⁶ Ibid., p. 217.

²⁷ Malachi 3:9

to promulgate a new prohibition would retract it if people refuse to accept it, more or less giving the people the ability to ratify new fences. In our current situation it would appear that the community accepted the fences generations ago, so some would argue that authorities today do not have the power to uproot it, because they are not the ones who put it in place.

There is a general principle that a court cannot overrule the decree of an earlier court unless it is greater in wisdom and in number. However, custom can give a later court the power to overrule the earlier court: Rambam says גזרו ודימו שפשטה בכל ישראל ועמד הדבר כן שנים רבות ולאחר זמן מרובה עמד בית דין אחר ובדק בכל ישראל וראה שאין אותה הגזרה פושטת בכל ישראל, יש לו רשות לבטל ואפילו היה פחות מבית דין הראשון בחכמה ובמנין. "If they enacted [a decree] and they thought that it had spread throughout all of Israel and the matter stood that way for many years and then, after a long time, another court checked throughout Israel and saw that this decree had not spread throughout all of Israel, it may annul [the decree], even if it was a lesser court than the first in wisdom and numbers."²⁸

In context, Rambam only intended allowing a later court deficient in wisdom and numbers to overturn a ruling that had never been accepted. He was not talking about situations where the decree had been accepted and fallen into disuse, and Rambam explicitly rejects applying this concept לסייג התורה; in such a case Rambam says even a court greater in wisdom and numbers cannot uproot the fence.²⁹

Nonetheless, we have a number of examples where change in accepted practice has led to a change in the accepted halakhah. In addition to the earlier cited example of reciting Maariv earlier than *plag haminḥah* during summer months, we have teshuvot doing away with the ban on drinking יינם סתם (the wine of Gentiles),³⁰ and doing away with the requirement to wait 7 clean days after the end of the menstrual period before going to the mikveh.³¹ The teshuvah doing away with the requirement to immerse utensils prior to use provides a halakhic basis for ignoring a practice most Conservative Jews have abandoned, without relying on that abandonment as a halakhic basis for the change in law.³²

As Rabbi Dorff wrote in his teshuvah on "The Use of All Wine," "One must also recognize that many Jews who otherwise observe the laws of kashrut drink rabbinically uncertified wine. In other words, whatever one may think of the halakhic status of the prohibition based on the sources, the fact is that for many the prohibition has fallen into disuse. In the operation of any legal system, Jewish law included, when that happens those in charge of the law must decide whether to lament and combat the widespread transgression or to accept it, recognizing that a specific law has fallen into disuse and that there is no strong reason to fight for it."³³

There does seem to be some historic precedent for having an ex-post facto explanation for a situation where the public is not following what appears to be the halakhah. The opening Mishnah of masekhet Berakhot states, מאימתי קורין את שמע בערבין, משעה שהכהנים נכנסים לאכול בתרומתן (from when do we recite the evening Shema? From the

²⁸ Mishneh Torah Hilkhhot Mamrim 2:7

²⁹ Ibid, 2:3

³⁰ Elliot Dorff, "On the Use of All Wines" YD 123:1.1985

³¹ Susan Grossman, "Mikveh and the Sanctity of Being Created Human" YD 183.2006b

³² Mayer Rabinowitz and Avram Reisner, "Tevilat Kelim" YD 120:1.2007

³³ Dorff, op. cit., p. 217.

time when the Kohanim enter to eat their *terumah*). The Tosafot on that passage says, "פי רש"י ואנן היכי קרינן מבעוד יום ואין אנו ממתניין לצאת הכוכבים כדמפרש בגמרא על כן פירש רש"י שיקריאת שמע שעל המטה עיקר והוא לאחר צאת הכוכבים. Rashi explained: And how do we recite Shema when it is still daytime and do not wait until the stars come out, as the Gemara explains (that this is the time when Kohanim begin come to eat their Terumah)? For this reason, Rashi explains that the Shema that is recited when we go to bed is the primary (fulfillment of the mitzvah of Shema), and that is recited after the stars appear.³⁴ Tosafot continue with a discussion claiming that the recital of the Shema in the synagogue is the primary fulfillment of the mitzvah, but the point is that the widespread behavior in violation of that rule is clear: people are reciting the Shema in the synagogue while it is still daylight, contrary to the clear ruling of the Gemara that the proper time for the Shema is after dark.

It very well may be that the custom of eating dairy meals out has become so widespread because a generation of Jews mistakenly thought it was permitted by the Arzt teshuvah, or they simply assumed it was permitted because everyone was doing it. As Rabbi Roth points out, quoting the Rosh, the strength of a custom is greatest when people think they are doing it in compliance with a law, even if the source of the law cannot be found.³⁵

3. Practical issues

As was stated earlier, if one can avoid eating anything that has more than 1/60 (ביטול בששים) by volume of a forbidden substance, or that has a forbidden taste, the food is kosher.

Those dining in a non-kosher restaurant need to take care to ask enough questions to satisfy themselves that they are not eating anything forbidden. This means asking about ingredients—especially inquiring after soup bases, sauce bases, flavorings, etc. Some dishes that sound vegetarian, e.g., risotto with mushrooms, might turn out to have been cooked with chicken stock. Onion soup is traditionally made with beef stock. Mexican restaurants can be particularly challenging: lard is very commonly used as an oil. Enchilada sauce is often based on chicken stock.

In addition to asking about ingredients, it is important to inquire about method of preparation; as mentioned above, a veggie burger prepared on a meat grill could possibly pick up the taste of the meat. Eggs cooked on a grill used to cook bacon could absorb a taste of bacon.

This teshuvah only provides some general guidelines; it is impossible to legislate rules for every possible situation. As Rabbi Gerson Cohen said, "Experience of God does not mean exact legislation for every contingency."³⁶ However, by considering these issues before we eat, we create moments when we can increase our "God-consciousness" during the course of the day.

The consumer also has to know that eating out in this fashion does have some risks: for example Taco Bell bean burritos are 100% vegetarian and therefore would be kosher under this teshuvah; however, mistakes can occur, as attested to by a famous case

³⁴ Tosafot on Bavli Berakhot 2a

³⁵ Roth, p. 218.

³⁶ R. Gerson Cohen, quoted in Gordon Tucker, "Can a People of the Book also be a People of God?" Conservative Judaism, Fall/Winter 2007/2008, p. 21.

a few years ago when a Hindu sued Taco Bell for serving him a beef burrito (instead of the bean one he ordered), which necessitated his making a trip to India for ritual purification in the Ganges.³⁷ The case was settled out of court. Buyer beware!

There may be a hidden benefit in following the guidelines of this responsum. It is not a simple thing to keep kosher while eating in non-kosher restaurants. It requires substantial thought. Rabbi Harold Kushner described how when he and his wife were traveling, they were much more conscious of their commitment to kashrut when eating in a non-kosher restaurant than they were later in the trip when they could and did eat in a kosher restaurant.³⁸

Conclusion / Piskei Halakhah

It is possible to eat dairy meals in non-kosher restaurants without violating the dietary laws. There is, however, a hierarchy in preference:

- 1) In places where there are many kosher eating establishments, it is preferred to eat in places under supervision. In addition to the kashrut considerations, eating in supervised restaurants is a statement of communal solidarity. People who live in small towns should not complain about a shortage of kosher restaurants if they fail to patronize the ones that do exist. Following the principle of לא פלוג, however, we do not rule that it is forbidden to eat in non-kosher restaurants even in Israel where there are many kosher restaurants.
- 2) If there are no appropriate supervised restaurants available, or if social or other considerations are a factor, it is preferable to eat in vegetarian restaurants, where there would be no concern of a significant quantity of non-kosher ingredients being introduced into the food, and the dishes, ovens, pots and pans are never used to prepare products containing meat. In Israel, for example, there are many strictly dairy restaurants that do not have a *teudah* because they are open on Shabbat. It is not unusual to see observant people eating in such restaurants. Even outside of Israel, many vegetarian restaurants are just as strict about no meat products as are dairy restaurants under kosher supervision.
- 3) Traditionally, cold foods and vessels are not considered to transmit taste as effectively as hot foods and vessels. Therefore, the third best choice would be to eat simple cold foods, like salads, or sashimi, in restaurants that also serve *treif* foods, where the chance of introducing a forbidden taste is lower. When eating sashimi or sushi there are still precautions one must take; obviously there are many species of non-kosher fish, sushi rice is cooked (although almost certainly in a dedicated rice cooker with no added ingredients other than rice wine vinegar), and some food in sushi restaurants is cooked.
- 4) In restaurants that serve non-kosher fish or meat the diner needs to take precautions and inquire about the ingredients and the method of preparation.

³⁷ Hilary MacGregor, "Faith and Food," Los Angeles Times; Jan 25, 1998; pg. 3 California and the West section

³⁸ "Conservative Judaism in an Age of Democracy," *Conservative Judaism*, Vol. 59, no. 4 (Summer 2007), pp. 3-13; reprinted in Elliot N. Dorff, *The Unfolding Tradition: Philosophies of Jewish Law* (New York: Rabbinical Assembly, 2011), pp. 397-405; comment found on p. 402.

- 5) The same principles apply in accepting an invitation to a meal in a home that is not a kosher home. One may eat in the home of friends and family who do not keep kosher or who are not Jewish if they serve a vegetarian or fish meal and understand what that means.

This teshuvah does not apply to one's own home, synagogues, or other communal kitchens. Many Jews who eat dairy meals out continue to maintain their homes according to the traditional guidelines. This is praiseworthy, to be encouraged as part of creating a Jewish home. Furthermore, maintaining the traditional practices at home helps foster Jewish unity as more people will be comfortable eating in each other's homes.