

## Eating Dairy Meals in Unsupervised Restaurants

Rabbi Dr. Barry Leff

August 12, 2008

12 Av 5768

**Question:** Is it permissible to eat hot dairy meals in restaurants lacking rabbinic supervision? A very high percentage of observant Conservative Jews, many Conservative rabbis among them, eat hot dairy meals in unsupervised restaurants. Are they violating *halakhah*?"

**Response:** Eating hot dairy meals in unsupervised restaurants is a practice that would be very difficult, if not impossible, to justify within a traditional understanding of the laws of *kashrut*. For example, a cheese pizza will typically be cooked in the same oven, and the same time, as other pizzas that contain *treif* ingredients. There are two principles that relate to cooking permitted foods and non-permitted foods in the same oven that are relevant:

-- ריח (smell or aroma) is the principle that the aroma of a non-permitted food can render permitted foods not kosher. The commentators argue about whether smell has substance or not, and we could reasonably rely on the opinion of the Rambam that smell is not significant.<sup>1</sup>

-- זיעה (steam) is the principle that steam that rises from liquid non-kosher foods cooked in an oven can rise and render forbidden other foods in the same oven. The vast majority of contemporary *poskim* go with the opinion expressed in the Shulhan Arukh that steam IS significant, and can render food items unkosher.<sup>2</sup> According to this majority view, a cheese pizza cooked in the same oven as a non-kosher meat pizza would not be kosher. There are occasional minority opinions, such as one in Mishkanot Yakov that says steam is NOT significant,<sup>3</sup> but we have to acknowledge that this would be following a very minority, non-mainstream opinion.

Furthermore, cooking a cheese pizza in a pan that had been used to cook a *treif* pizza is forbidden by the traditional sources.<sup>4</sup> There is a principle that says we assume that the pots and pans of a non-Jew have NOT been used the same day (are not בן יומו), and therefore any taste they would transfer is טעם לפגם, a disgusting taste, and they would not render the food forbidden.<sup>5</sup> However, as a practical matter, we know that this is not the case today, so it would not be reasonable to rely on this leniency.

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<sup>1</sup> Maimonides, Mishneh Torah, Hilchot Ma'achlot Asurot 15:33

<sup>2</sup> Shulhan Arukh Yoreh Deah 92:8

<sup>3</sup> Mishkanot Yakov YD 34

<sup>4</sup> Shulhan Arukh Yoreh Deah 122:2

<sup>5</sup> SA YD 122:6

This question of whether it is permitted to eat dairy meals in restaurants that are not under rabbinic supervision was first addressed by Dr. Max Arzt in 1940,<sup>6</sup> who ruled that it is permissible to eat broiled fish and cooked vegetables in non-kosher restaurants. In 1940 the Committee on Jewish Law and Standards (CJLS) ruled that no general permission could be given to follow the Arzt *teshuvah*; it was decided that the *teshuvah* could only be followed *in case of emergency*.<sup>7</sup> The matter was reconsidered in 1952; the report of the CJLS from 1952 states: "...the committee went on record with the opinion that broiled fish dinners in non-Jewish eating places (providing, of course, that the fish meets the requirements of fins and scales), shall not be construed as a violation of the dietary laws."<sup>8</sup> The report goes on to state that "a complete responsum is now being drawn up on the subject and will be presented to the next convention."

That complete responsum apparently was never completed. In 1967 Dr. Phillip Sigal compiled a summary of the statements and rulings in the archives and minutes of the CJLS on the topic. In his summary, Dr. Sigal showed that there was some controversy surrounding the 1952 decision of the CJLS which continued to his day. In his closing statement he said "It is the recommendation of the compiler of this summary that the whole question of *kashrut* in the American Jewish Community be studied and evaluated and a comprehensive *teshuvah* prepared for the committee's consideration."

Since that time, *minhag* has gotten ahead of *halakhah*. A survey of North American Conservative rabbis was conducted in the fall of 2003. With over 110 responses, which gives the survey a very high confidence level,<sup>9</sup> 71% of the rabbis who answered eat hot dairy meals in restaurants that do not have kosher supervision. Another 4% of the respondents follow the Arzt *teshuvah* and only eat broiled fish and steamed vegetables in non-supervised restaurants. 92% of the respondents eat hot dairy meals in restaurants that are completely vegetarian, and 90% will eat cold foods in non-supervised restaurants. Only 4% of the respondents ONLY eat in restaurants that are under supervision.

In addition to the fact that a substantial majority of observant Conservative Jews appear to have gone beyond the *heter* of the Arzt *teshuvah* in their practice, there are some concerns with the Arzt *teshuvah*, as pointed out in a critique by Rabbi Abraham J. Ehrlich in 1963.<sup>10</sup> Dr. Arzt based a number of the conclusions of his *teshuvah* on certain assumptions as to how food is prepared in non-kosher restaurants. Rabbi Ehrlich discussed the issue with congregants who had kosher homes, but owned non-kosher restaurants. His congregants concluded that Dr. Arzt's assumptions regarding how thoroughly grills are cleaned between cooking meat and cooking fish, etc., were overly optimistic.

Fifty years after the last ruling of the Law Committee on this issue, the question of eating non-dairy meals in non-supervised restaurants is still controversial. However,

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<sup>6</sup> Max Arzt, "Is it permissible to eat cooked vegetables and broiled fish in non-kosher restaurants," 1940.

<sup>7</sup> Report of the CJL – 1940, Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970, (volume I) p. 124.

<sup>8</sup> Report of the CJL – 1952. Ibid, p. 346.

<sup>9</sup> With 107 responses, we are 95% certain that between 63% and 79% of Conservative rabbis on the Conservative rabbis email list eat dairy meals out. There is a possibility that rabbis on the email list are not representative of ALL Conservative rabbis.

<sup>10</sup> Letter from Rabbi Abraham J. Ehrlich to Rabbi Max J. Routtenberg dated February 5<sup>th</sup>, 1963, with attachment "Is it permissible to eat cooked vegetables and broiled fish in non-kosher restaurants?"

as difficult as it is, we must address this issue if *halakhah* is to remain a vital force in guiding the behavior of Conservative Jews. Observant Conservative Jews, rabbis and lay people alike, are right to wonder why such a large discrepancy between the Conservative movement's official halakhic position and the actual practices of the observant community has not been addressed.

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

1. We could choose to revisit the Arzt teshuvah and try to determine what is permissible within a traditional understanding of the laws of kashrut, 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, revisiting the Arzt teshuvah, 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 currently following. Thus, re-stating the Arzt teshuvah, or making it more stringent, 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 and 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.<sup>11</sup> As the Talmud dictum puts it, מוטב מזידין שיהו שוגגין ואל יהו מזידין, “it is better that they should transgress unwittingly than willfully.”<sup>12</sup> 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 the community of observant Conservative Jews 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.”<sup>13</sup> It is sad but true that we cannot go by the custom of the majority of our congregants, because we truly would have nothing left.

It needs to be understood that we are talking about a particular community: the community of *observant* Conservative Jews. A substantial majority of congregants in Conservative synagogues do not keep kosher at all or otherwise observe the commandments. It is not their behavior that is being taken into account in this teshuvah.

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<sup>11</sup> Joel Roth, *Halakhic Process*, p. 221

<sup>12</sup> See BT Shabbat 148b, for example

<sup>13</sup> Roth, *op. cit.*, p. 215.

Rather, we are concerned with the behavior of the observant community—people who keep kosher and observe the Sabbath, which symbolizes a commitment to understanding one's self as commanded to obey halakhah.

Solomon Schechter presented the idea of “Catholic Israel,” his translation for כלל ישראל, as the living body which is the center of authority. Schechter said 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.”<sup>14</sup> This teshuvah follows the reinterpretation of Robert Gordis, as quoted by Dorff—that we consider “only the practices of Jews who try to observe Jewish law in making our decisions.”<sup>15</sup>

It is not only un-observant people who have taken up the custom of eating out: it is a very substantial percentage of our most committed and dedicated people, including many rabbis. The danger that accepting the leniencies in this responsa will lead people to becoming more lax in observing other *mitzvot* seems small compared with the benefit that will accrue from our committed people seeing that halakhah can adapt to the changing times and practices.

The time for wrestling with this issue is long overdue, and this responsum is offered in an attempt to reconcile practice and halakhah. We believe that a seemingly-radical change in halakhah is preferable to allowing the current dissonance between law and practice to continue indefinitely.

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) Should we apply the principles of אין גוזרין גזרה על הצבור - אלא אם כן רוב צבור יכולין לעמוד בה,<sup>16</sup> we do not make a decree on the public unless the majority of the public can abide by it, and מנהג מבטל הלכה, custom can nullify law, to this situation?
- 3) As a practical matter, how can an observant person meet the standards of kashrut suggested in this responsum when eating in unsupervised restaurants?

## 1. Forbidden Substances

Activities that are prohibited in Jewish practice can be found to be forbidden דאורייתא, biblically, or דרבנן, rabbinically. In many places the sages emphasize that rabbinic ordinances should be treated with the same level of seriousness as biblical ordinances. In principle, the only significant difference between things that are prohibited דאורייתא and things that are prohibited דרבנן is in the ease with which later rabbis can modify the prohibition.

In the Conservative movement we remain very cautious about making rulings that remove what we understand as biblical prohibitions. We take a somewhat more aggressive posture regarding rabbinic prohibitions, especially “fences” that were put in

<sup>14</sup> Elliot Dorff, *Conservative Judaism: Our Ancestors to Our Descendants*, p. 24.

<sup>15</sup> *Ibid.*, p. 25.

<sup>16</sup> See, for example, BT Bava Kamma 89b

place to avoid a biblical violation, as we generally assert that it is important for rabbinic decrees and enactments to be appropriate to the time and place we live in. For instance, most Conservative rabbis would not agree with the traditional “fence” prohibition against someone who is not seriously ill consuming medicine on the Sabbath for fear that it will lead a person to grinding his own medicine, an activity that is forbidden.<sup>17</sup> Refusing to remove such fences, in fact, leads the Orthodox to some seemingly illogical conclusions: there are Orthodox authorities who would say it is forbidden for someone with a headache to take a prescription strength medication because it is “medicine” but it is OK for that same person to take an aspirin. This is because aspirin is consumed by healthy people as a preventive for heart attacks, which removes it from the category of “medicine.”<sup>18</sup> Most Conservative authorities would probably prefer to see the prohibition against people who are only mildly ill taking medicine as irrelevant today, since very few people grind their own medicines. Therefore, this prohibition would seem to have outlived its usefulness, and can be withdrawn.<sup>19</sup> This liberal approach toward fences that are no longer relevant is not a novelty of the Conservative movement: Rabbi Moses Isserles said much the same thing in an opinion he brought in a commentary overturning a ban on clapping and dancing on Shabbat.<sup>20</sup>

The first question we will address, then, is to differentiate between foods that are forbidden Biblically, foods that are forbidden rabbinically, and rabbinic fences.

This teshuvah only concerns itself with the laws relating to forbidden substances. The laws of mixing meat and dairy are more stringent than the laws regarding forbidden substances. However, as explained in tractate Chullin, the laws regarding separation of meat and dairy are only applicable if the meat is kosher. They do not apply to mixtures of non-kosher meat and dairy. There is a lengthy debate, but the conclusion is דכ"ע אין איסור על איסור<sup>21</sup> “a prohibition does not fall on a prohibition” – the prohibition of תערובת does not take effect on top of the prohibition against forbidden substances.

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. The basic discussion of the matter in the Talmud is found in the Bavli Chullin 97b-99a. The *stam gemara* in Chullin says לחומרא גמרינן; דמדאורייתא - ברובא בטיל - in the debate about whether the quantity of forbidden food that renders a mixture impermissible is 1:60 or 1:100, it is a debate about a rabbinic stringency – what the Torah forbids is eating a mixture the majority of which is a forbidden food.<sup>22</sup> Elsewhere (in Avodah Zara) the Gemara says והלכתא: אידי ואידי בשיתין, וכן כל איסורין שבתורה “the law is: in this case or in that case, 1/60<sup>th</sup>”, and this is the rule for all things that are forbidden by the Torah.”<sup>23</sup>

The argument in the Chullin centers around whether or not, rabbinically, what is forbidden is a taste of something forbidden, טעם כעיקר (the taste is the essence), or whether ביטול בששים (nullification in 60 times the volume) applies even if a forbidden taste remains. According to Rashi, nullification in 60 is the overriding factor: נותן טעם קים לן דאסור בקדשים כעיקר ממשו של איסור ולהא מילתא קתני זהו למעוטי שאר קדשים אבל חולין שפיר גמרינן

<sup>17</sup> Shulhan Arukh, OH 328:1

<sup>18</sup> Yosef Adler, Shmirat Shabbat Kehilchata 34:3

<sup>19</sup> Joel Roth, Conservative Judaism Spring 1982, “Melakha u’Shevut,” p. 28.

<sup>20</sup> Shulhan Arukh, OH 339:3, see the Rema there.

<sup>21</sup> Bavli, Chullin 113b

<sup>22</sup> Bavli, Chullin 98b

<sup>23</sup> Bavli, Avodah Zarah 69a

מיניה למאה וששים דהא קים לן מאחרי רבים להטות דבטלי ברובא וילפינן מהכא להחמיר דלא ליבטיל אלא  
 “a forbidden taste is ... במאה ... לר' יוחנן במסכת ע"ז (דף סז) כל שטעמו ולא ממשו אין לוקין עליו.  
 what is forbidden with *kodashim* (sacrifices) where it is the essence of the prohibition; it  
 is taught to exclude other *kodashim*, but with *chullin* (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. Yochanan in tractate  
 Avodah Zarah, anything that has taste but not essence, we do not flog a person for it. In  
 other words, טעם כעיקר only applies to *kodashim*, for *chullin* we go by nullification in  
 volume (even if a forbidden taste remains).<sup>24</sup>

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  
 “Rashi explains that this is to exclude other *kodashim*, but with *chullin* 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, 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  
 “A prohibited substance mixed with a permitted substance  
 of a diverse kind, such as dairy mixed up with meat, they give it to a Gentile to taste, and  
 if he says it has no taste of dairy, 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.”<sup>25</sup>

Most later authorities assume טעם כעיקר forbids food at least rabbinically, if not  
 biblically,<sup>26</sup> in mixtures of unlike substances, which is the relevant case in eating dairy  
 meals in unsupervised restaurants. The proof brought is that the real test is having a  
 Gentile cook taste the food; we only rely on nullification of 1/60 in a situation where we  
 do not have a Gentile cook handy to taste the food for us.

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 the forbidden  
 substance is less than 1/60 (1/100 according to some opinions in Chullin, although 1/60 is  
 accepted for all forbidden substances in Avodah Zarah<sup>27</sup>) the food is permitted both  
 biblically and rabbinically.

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), נתן טעם לפגם (gives a disgusting taste), בני (vessels belonging to a gentile are assumed not to have 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. The complex rules are certainly not needed to prevent

<sup>24</sup> Bavli, Chullin 98b, Rashi DH *l'tam k'ikar*

<sup>25</sup> Shulhan Arukh YD 98:1

<sup>26</sup> See for example Shach to Shulhan Arukh YD 98:1 (note 4)

<sup>27</sup> Bavli Avodah Zarah 69b

what all would agree is a biblical violation, which only requires avoiding a mixture the majority of which is a forbidden substance. The complex of rules regarding kashrut was put in place to prevent people from violating the rabbinic stringency of treating טעם כעיקר as applicable to ordinary foods.

*To summarize, if a food contains less than 1/60 of a forbidden substance, 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. אין גוזרין גזרה על הצבור - אלא אם כן רוב צבור יכולין לעמוד (We do not impose a fence on the public unless the majority are able to abide by it)**

The traditional structure of kashrut includes many fences which 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 הונא: לא אסרה תורה אלא קדירה "R. Hiyya, the son of R. Huna said: The Torah only forbade a utensil which had been used [by a Gentile] the same day since the effect is not to worsen the flavour."<sup>28</sup> 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 don't 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.<sup>29</sup>

In the 1500 years that have transpired since the end of the rabbinic 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 are 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 might not be relevant today. Intuitively understanding this may be what has led many observant Jews to overlook the traditional fences in their eating out habits.

One of the fundamental reasons *chazal* 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:

<sup>28</sup> Bavli Avodah Zarah 76a

<sup>29</sup> Beit Yosef YD 93 *k'tav baal Haitur*

מה ראו חכמים לאוסרה; מה ראו חכמים? משום חתנות  
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!”<sup>30</sup>

Conservative Judaism has rejected this approach to avoiding the problem of  
intermarriage. These days, as Rabbi Dorff points out, few of those who intermarry keep  
kosher at all.<sup>31</sup> 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  
modernity, we in the Conservative movement would undoubtedly hold that, short of  
mixed marriage, Jews *should* have social and business contact with non-Jews.”<sup>32</sup>

There are other principles, like *harif* (sharp tastes transmit flavors more  
effectively) that are still relevant as fences. Some principles, like whether dishwashers  
really nullify any absorption might be considered arguable. At least when it comes to  
eating out, however, a majority of the observant Conservative Jewish population is no  
longer willing to follow those fences, regardless of whether or not they might still be  
applicable 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.

There are two halakhic principles which 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 (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  
which 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 מבטל הלכה because it is not attempting to permit  
anything which 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 גזירה על הצבור אלא כרוב צבור יכולין לעמוד דאמר רב אדא בר אהבה, מאי קרא במארה

<sup>30</sup> BT Avodah Zarah 35b

<sup>31</sup> Dorff, “The Use of All Wines,” Proceedings CJLS 1986-90, p. 217.

<sup>32</sup> Ibid., p. 217.



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 nation<sup>33</sup>” — 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 only apply in the situation where the sages are imposing a NEW prohibition, and the sages who try 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 fence 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."<sup>34</sup>

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.<sup>35</sup>

However, it is quite clear that one of the major factors differentiating the Conservative approach to halakhah from the Orthodox approach has been our willingness to not only uproot fences when they have fallen into disuse, but to even overturn or set aside *mitzvot* that are clearly לאוריינת. Examples of teshuvot that set aside biblical laws include ones rendering *mamzerut* inoperative<sup>36</sup> and that permit Kohanim to marry divorcees.<sup>37</sup> We have many examples of teshuvot that overturn long standing rabbinic laws, such as permitting Kohanim to marry converts,<sup>38</sup> counting women in a minyan,<sup>39</sup> and allowing women to serve as witnesses.<sup>40</sup>

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<sup>33</sup> Malachi 3:9

<sup>34</sup> Mishneh Torah Hilkhoh Mamrim 2:7

<sup>35</sup> Ibid, 2:3

<sup>36</sup> Elie Spitz, "Mamzerut" EH 4.2000a

<sup>37</sup> Arnold M. Goodman, "Solemnizing the Marriage Between a Kohen and a Divorcee" EH 6:1.1996

<sup>38</sup> Arnold M. Goodman, "Solemnizing the Marriage Between a Kohen and a Convert" EH 6:8.1996

<sup>39</sup> David J. Fine, "Women and the Minyan" OH 55:1.2002

<sup>40</sup> Myron S. Geller, "Woman is Eligible to Testify" HM 35:14.2001a and Susan Grossman, "Edut Nashim k'Edut Anashim: The Testimony of Women is as the Testimony of Men" HM 35:14.2001b

We have teshuvot where the authors made great efforts to avoid overturning a biblical law while overturning many rabbinic ordinances, such as the driving teshuvah<sup>41</sup> and the Dorff – Nevins – Reisner paper on homosexuality.<sup>42</sup>

And we have several teshuvot that do the same exact thing this teshuvah does – acknowledge that practice of our observant laity (and many clergy) has changed, and thereby bring law into line with practice. Examples include teshuvot doing away with the ban on drinking יינם סתם,<sup>43</sup> and doing away with the requirement to wait 7 clean days after the end of the menstrual period before going to the mikveh.<sup>44</sup> 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.<sup>45</sup>

The situation described in the Grossman teshuvah that allows women to go the mikveh immediately after the completion of the biblical seven days is very similar to the situation described in this teshuvah: there are some basic biblical laws, which over the years the rabbis added to substantially. In our generation, many of our most observant and dedicated lay people – people who are concerned with following the laws of the Sabbath, the dietary laws, and the laws of family purity – have decided on their own not to follow the rabbinic stringencies and fences that accumulated over the years. Rabbi Grossman found “My own random sampling of colleagues and observant Conservative women has shown that the majority of observant Conservative women who take seriously the sense of being obligated to Torah and mitzvot, observe mikveh today without the seven extra white days and would object to having to keep an additional seven white days.”<sup>46</sup> Her teshuvah brings law into line with practice.

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.”<sup>47</sup>

To accept the concept that we cannot remove a precedent that earlier generations put in place would put us in an untenable position regarding the evolution of *halakhah*. We would be left with a system that could only become more conservative and strict over time, never more lenient. If *halakhah* is to be a living system that allows us to adapt living a committed Jewish life to living in the modern world, we need be willing to overturn accepted precedents when there is a strong case to do so. As Rabbi Joel Roth puts it, “The authority of the codes reflects more than anything else their acceptance as the repositories of the recorded and reasoned weight of precedent. As such, and

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<sup>41</sup>Morris Adler, Jacob Argus and Theodore Friedman, "Responsum on the Sabbath"

<sup>42</sup> Elliot Dorff, Daniel Nevins and Avram Reisner, "Homosexuality, Human Dignity and Halakhah" EH 24.2006b

<sup>43</sup> Elliot Dorff, "On the Use of All Wines" YD 123:1.1985

<sup>44</sup> Susan Grossman, "Mikveh and the Sanctity of Being Created Human" YD 183.2006b

<sup>45</sup> Mayer Rabinowitz and Avram Reisner, "Tevilat Kelim" YD 120:1.2007

<sup>46</sup> Ibid, p. 12.

<sup>47</sup> Dorff, op. cit., p. 217.

consonant with the doctrine of precedent, they ‘will probably be followed by the courts.’ But circumstances and considerations that are sufficient to warrant overturning an accepted precedent can warrant overturning a decision recorded in the *Shulhan Arukh* too. In the final analysis, only the systemic principle *Ein lo la-dayyan ella mah she-einav ro’ot* (the judge should rely on what his eyes see) stands as the ultimate judicial guide.”<sup>48</sup>

The judge needs to go after what his eyes see. The question is not whether we have the ability to overturn precedent, but whether we SHOULD engage in such a wide-ranging overturning of well established precedent and custom. Indeed, such a change should only be made cautiously—which is perhaps one reason why despite widespread changes in the eating habits of our community, the issue has not been addressed in a formal way since 1952. It is not lightly that we conclude that behavior that goes against the long accepted norms of *kashrut* is acceptable. However, the longer we go without addressing the question of people eating out, the more damage we do to the place of *halakhah* as a living system in the minds of observant Conservative Jews.

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. Prior to going to rabbinical school, the author was an active, committed Conservative Jew, who served on the board of a synagogue and was chairman of its ritual committee, yet he was not aware that it was in theory not permitted to eat dairy meals in non-supervised restaurants. 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.<sup>49</sup>

We are facing a situation that is described in Emet Ve-Emunah, the Statement of Principles of Conservative Judaism: “Occasionally the integrity of the law must be maintained by adjusting it to conform to contemporary practice among observant Jews. Every legal system from time to time must adjust what is on the books to be in line with actual practice if the law is to be taken seriously as a guide to conduct.”<sup>50</sup> Making those adjustments is something that is a traditional practice. Rabbi Theodore Friedman wrote “While traditional halakhists are prone to discountenance *minhag*, no historical view of the halakhah can gainsay the fact that in many areas the halakhah was simply the acceptance and validation of the *minhag*.”<sup>51</sup>

Zacharias Frankel, the man who more than any other was the founder of the Conservative Movement said “When the people allows certain practices to fall into disuse, then the practices cease to exist. There is in such cases no danger for faith.”<sup>52</sup>

As Neil Gilman describes the power of the community in formulating the law, “It is the community that decides for itself what will be considered *mitzvah* and it does so on its own authority. The assumption, of course, is that this process is taken seriously, not casually. It is clearly not taken this way by the entire community; substantial numbers of Jews have no interest in any of it. But many Jews do. In the final analysis, all we can do

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<sup>48</sup> Roth, p. 113

<sup>49</sup> Roth, p. 218.

<sup>50</sup> Emet Ve-Emunah: Statement of Principles of Conservative Judaism, p. 23.

<sup>51</sup> Theodore Friedman, “The Problem of Halakhah Today.” In *Be’er Tuvia: From the Writings of Rabbi Theodore Friedman*, p. 81.

<sup>52</sup> Zacharias Frankel, “On Changes in Judaism.” In *The Jew in the Modern World*, ed. Paul Mendes Flohr and Jehuda Reinharz, p. 196.

is speak to and for them.”<sup>53</sup> A substantial portion of that community—the community that takes *mitzvah* seriously—has clearly spoken regarding their attitudes toward eating out and the related *gezeirot*.

We acknowledge that the Conservative approach to halakhah may often find itself in a difficult position relative to how we handle rabbinic fences. If we are willing to remove some fences because they are no longer relevant, how do we decide which fences to remove and which fences to keep? For example, the prohibition on eating chicken and milk together is also a rabbinic ordinance.<sup>54</sup> Why not change that one too, while we are at it? Our response is that in balancing tradition and change, our default position is to stay with tradition unless there is a sufficiently strong reason to change. Notwithstanding those who crave Chicken Parmigiana, the case for changing the rabbinic prohibition on fowl and dairy together is NOT as compelling as the case for eating out. Also, relative to the logic followed in this teshuvah, the majority of observant Conservative Jews have NOT abandoned or rejected the *gezeira* of treating chicken as *fleishig*, therefore the same logic does not follow. How aggressive to be with removing or altering fences is clearly a matter of judgment and people of integrity may differ on where to “draw the line.”

The truth is, the halakhic system is more dynamic and flexible than many contemporary *poskim* would admit. Mordecai Waxman describes three main schools of thought in the Conservative movement, which he describes as Right, Center, and Left. Regarding the relationship of the Center group to halakhah, he writes “Traditional Jewish law, however, is regarded by the Center group as itself sufficiently flexible and latitudinarian to permit, within its own frame, whatever indispensable changes the needs of the times call for. The fact that so far little has been achieved by the process of interpretation is charged up to the inertia of those who should have performed the task of interpretations rather than to any obstacle inherent in the tradition itself. Life, however, cannot wait.”<sup>55</sup> Life cannot wait—it is incumbent upon us to use the tools at our disposal to adapt halakhah to the “indispensable changes the needs of the times call for.” In fact, on the same page, Waxman cites as an example that while “most have two sets of dishes, few do not. No one has any scruples about eating fish and milk foods in hotels and restaurants.”<sup>56</sup> Waxman made this statement in 1958; forty-nine years later, this teshuvah is simply acknowledging as normative behavior that which has been accepted by observant Conservative Jews for a long time.

The tension between those who say we can adapt halakhah to changing circumstances, and those who would insist on not deviating from law codes like the Shulhan Arukh is not new. In the 17<sup>th</sup> century, the Penei Yehoshua, Rabbi Joshua Hoeschel ben Joseph of Cracow, wrote that to abdicate one’s rights to make decisions contrary to the Shulhan Arukh “negates the systemic principles that empower the sages of every generation to render authentic and authoritative decisions as they deem appropriate and necessary and any sage audacious enough to exercise his traditional rights may be assured that his efforts, even if absolutely defensible, will be vilified and rejected.”<sup>57</sup>

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<sup>53</sup> Neil Gilman, *Sacred Fragments*, p. 57.

<sup>54</sup> Shulhan Arukh YD 87:3

<sup>55</sup> Mordecai Waxman, *Tradition and Change*, p.222.

<sup>56</sup> *Ibid.*

<sup>57</sup> Penei Yehoshua, summarized by Roth, p. 110.

In a more contemporary vein, Rabbi Mayer Rabinowitz has argued that when we *posken halakhah* taking into account changed social conditions we are acting within traditional boundaries. In an article relating to the ordination of women (certainly a significant break with rabbinic precedent), R. Rabinowitz wrote “Anyone having even a minimum knowledge of the legal code of any known society knows that legal definitions and applications are influenced by time and place, no matter what transcendent authority may be involved. The *Halakhah* was no exception to this universal experience of mankind. When the Rabbis defined a term or structured an institution, they did so both as interpreters of a historic tradition and as contemporary leaders mindful of the social realities of their own time. Hence, in some cases long-established halakhic procedures were dramatically changed because of significant changes in social conditions.”

One can debate whether codifying the lifting of fences in any particular case is a good idea or not. However, it is well accepted in the Conservative Movement that we will consider *halakhah* in light of contemporary circumstances and not only remove fences but overturn centuries, if not millennia, of rabbinic precedent and ordinances when circumstances dictate taking such action.

We consider the current question, whether or not to permit eating dairy meals in unsupervised restaurants, one of those situations where we must act to “adjust what is on the books to be in line with actual practice if the law is to be taken seriously as a guide to conduct.”<sup>58</sup>

### 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.

The *ביטול בששים* rule is clearly the easier of the two to meet. If one goes to a restaurant and orders a meal carefully specifying that the meal must not contain any meat substances, asking about potentially troublesome ingredients such as chicken stock in sauce bases, one can be reasonably confident that the food will not contain more than 1/60 of a forbidden substance. But will it acquire a forbidden taste?

The answer is “it depends.” Most restaurants would not grill a piece of fish directly on a grill that had just been used for meat without a thorough cleaning: it would almost certainly impart an unfavorable flavor. On the other hand, some McDonald’s restaurants serve veggie burgers, but since they are “meat flavored” anyway, they cook them on the same grill with their burgers—and bacon cheeseburgers! Logic would dictate that in such a circumstance there is a serious danger of the food absorbing a forbidden taste, and one should NOT eat such a veggie burger at McDonald’s.

*טעם כעיקר* (the taste is the essential thing) as a standard has a major problem: people’s taste buds differ. Is there a “golden standard,” a particular level of sensitivity, which should be applied? The discussion in the Bavli Chullin 97a says the standard is a gentile cook: *רבין בר רב אדא אמר: כילכית באילפס הוה, ואתו שילוח לרבי יוחנן, ואמר להו: ליטעמיה* “Rabin son of R. Ada said: It was the case of a kilkith (a forbidden fish) that was found in a pot of stew, and on enquiring of R. Johanan he ruled that a gentile cook should taste it.” The discussion in the Talmud continues and applies the same standard to

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<sup>58</sup> Emet Ve-Emunah, op. cit.

mixtures of meat and dairy.<sup>59</sup> If a gentile cook can detect the taste of the forbidden substance, it is forbidden for Jews to eat it. Since gentile cooks are not always available, the rabbis ruled that we can rely on *ביטול בששים* in those cases. Therefore, the argument about which takes priority, *ביטול בששים* or *טעם כעיקר* becomes circular—if you do not have a gentile cook around to taste it, you go back to relying on *ביטול בששים*.

This may help explain why eating out in unsupervised restaurants has become so common among the otherwise-observant. When I discussed this issue with a colleague who eats dairy meals in unsupervised restaurants, he shrugged his shoulders and said “it’s all *bitul b’shishim* anyway.” There is, in fact, some halakhic justification for this seemingly cavalier response.

Some would argue that we are relying on *ביטול בששים* לכתחילה (up front, ahead of time), which is explicitly prohibited by the Shulhan Arukh.<sup>60</sup> 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*. The response to this charge is that 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 is permissible.

Those dining in a non-supervised 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. In addition to asking about ingredients, it may mean inquiring about method of preparation; as mentioned above, a veggie burger prepared on a meat grill could possibly pick up the taste of the meat.

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.”<sup>61</sup> 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 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.<sup>62</sup> The case was settled out of court. Buyer beware!

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<sup>59</sup> The reason for a gentile cook, by the way, is not because their palates were more refined than those of Jewish cooks—it was simply if the mixture DID taste like meat, it would be forbidden for a Jew to have tasted it! The gentile cook has no such prohibition, and could in fact eat the rest of the pot even if it did have a taste that is forbidden to Jews.

<sup>60</sup> Shulhan Arukh YD 99:5.

<sup>61</sup> 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.

<sup>62</sup> Hilary MacGregor, “Faith and Food,” Los Angeles Times; Jan 25, 1998; pg. 3 California and the West section

## Conclusion / Piskei Halakhah

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

- 1) In a place like Jerusalem or Manhattan where there are many kosher eating establishments, it is strongly 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-supervised restaurants even in places like New York or Israel.
- 2) If there are no appropriate supervised restaurants available, 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 sushi, in restaurants that also serve *treif* foods, where the chance of introducing a forbidden taste is lower.
- 4) In non-supervised, non-vegetarian restaurants, the diner needs to take precautions and inquire about the ingredients and the method of preparation. One must be cautious in such circumstances: *המהמיר תבוא עליו ברכה* (the stringent bring blessing upon themselves).

This teshuvah does NOT propose applying the same principles for eating at home as for eating out. Many Conservative 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.