

Streaming Services on Shabbat and Yom Tov: A Concurring Opinion with a Note on Dukhening

Rabbi David J Fine

Living through the Covid-19 crisis has accelerated the engagement between tradition and technology as synagogue communities across the globe quickly learned how to utilize their websites and use Zoom and other such internet platforms to bring their members together virtually. Some of us have been guided by Rabbi Avram Reisner's responsum that requires a physical minyan in one location for others to connect to.¹ Others have argued for a *hora'at sha'ah*, an emergency ruling, allowing us to constitute a minyan virtually in such circumstances where forming a physical minyan was not possible.² I believe we would all agree that in normal circumstances we would not wish to constitute a minyan virtually, following the guidelines of Rabbi Reisner's responsum. What has changed, even once the Covid-19 crisis ends, is that the world is now used to accessing community through virtual platforms. We are now in a position, nineteen years later, of fulfilling the reality on a broad scale that Rabbi Reisner and the CJLS more-or-less imagined. We are indebted to Rabbi Joshua Heller for applying the questions of virtual platforms to Shabbat and Yom Tov.³ Nineteen years ago the question was whether one could say Kaddish through the computer. Now, the question is whether we can use the computer to help make Shabbat.

Rabbi Heller argues that it is permissible to access worship services over the internet on Shabbat and Yom Tov. The primary obstacle is the use of the computer or other device on Shabbat or Yom Tov, an action that Rabbi Daniel Nevins argued was generally impermissible in a paper approved by the CJLS eight years ago.⁴ Rabbi Heller's responsum should serve to greatly influence and support Conservative rabbis and congregations seeking to bring Shabbat and Yom Tov services to people who are not in synagogue because it finds a way to do so without opposing the strictures of Rabbi Nevins's approach to electronic devices on Shabbat. Through technological expertise, Rabbi Heller has forged an halakhic path (redundant as that is) towards broad consensus. Even beyond the Covid-19 crisis, this is the right thing to do. We have more tools at our disposal now than ever before to reach our members who cannot come to synagogue, and perhaps more importantly, to extend our Torah to the growing number of Jews who are not going to walk through the doors of our congregations on their own. For these reasons I felt privileged to vote for Rabbi Heller's responsum.

However, it was precisely the wisdom of Rabbi Heller's approach in accepting Rabbi Nevins' view concerning the use of electronic devices on Shabbat that caused me some hesitation. The responsum

¹ Avram Israel Reisner, "Wired to the Kadosh Barukh Hu: Minyan Via Internet" CJLS OH 55:15.2001.

<http://www.rabbinicalassembly.org/sites/default/files/2020-04/Reisner%20-%20Internet.pdf>

² Elliot Dorff and Pamela Barmash, "CJLS Guidance for Remote Minyanim in a time of COVID-19" March 17, 2020, which is a "letter of the chair" and "not an official position of the CJLS."

<https://www.rabbinicalassembly.org/story/cjls-guidance-remote-minyanim-time-covid-19> accessed May 18, 2020.

I personally wrote an unpublished responsum, "Emergency Ruling in Regard to Livestreaming Services," dated March 14, 2020.

³ Joshua Heller, "Streaming Services on Shabbat and Yom Tov" CJLS OH 340:3.2020a.

<http://www.rabbinicalassembly.org/sites/default/files/2020-05/Streaming%20on%20Shabbat%20and%20Yom%20Tov%20Heller.pdf>

⁴ Daniel S. Nevins, "The Use of Electrical and Electronic Devices on Shabbat" CJLS OH 305:18.2012a.

<http://www.rabbinicalassembly.org/sites/default/files/2020-05/ElectricSabbathSpring2012.pdf>

proposes that computers (or laptops or tablets or smart phones) be set up in advance of Shabbat or Yom Tov, with advice on how to do so, avoiding the necessity of typing in website addresses or passwords. While this approach is worthy in bringing our movement into the world of digital worship, it reflects a concern that is outside the consideration of the overwhelming majority of our constituency. The Conservative movement has often been challenged with living with the tensions of a disconnect between its committed core and broader constituency in terms of the expectations of Jewish law. We should be mindful not to further increase such tensions. And furthermore, the question here is whether even the majority of the committed core of observant Conservative Jews consider electronic devices to be prohibited on Shabbat and Yom Tov. As Rabbi Elie Kaplan Spitz argued in his dissenting opinion to Rabbi Nevins's responsum in 2012, "In my own congregation, I held a public conversation on the use of electricity and electronic devices during a Shabbat morning after the CJLS vote on the Nevins teshuvah. There were over a hundred and fifty people and no bar mitzvah....Many of my congregants have strong backgrounds in Jewish and secular learning. No one supported the majority vote banning the use of electronic devices on Shabbat....These are my most Jewishly invested constituents. It made me pause and appreciate that we as a CJLS are writing our teshuvot precisely for these Jews. In addressing them, we need to take into account their current practices and their desire to live authentic Jewish lives."⁵ In the case of Rabbi Heller's responsum, I fear that the strictures on the use of devices will be ignored by the overwhelming majority of those who will utilize their devices to access our services.⁶ Some of my colleagues on the right were concerned that the decision would dilute the sanctity of Shabbat by opening up a door for the use of devices. My concern is from the opposite end of the spectrum, that a responsum that only permits streaming on Shabbat if the Jew is not actively using the device will be read (when it is properly read) as irrelevant to the practice of the majority of our committed core. This discomfort from both sides of the spectrum on the use of electricity on Shabbat is surely a sign that Rabbi Heller's responsum found a centrist position that was exactly right for the Conservative movement at this time.

The Question of Ketivah (Writing)

While we have been living with *mahloket* (disagreement) on the use of electric devices on Shabbat since 1950, a key issue in Rabbi Heller's paper, and Rabbi Nevins's in 2012, is the question of whether use of the electronic device constitutes *ketivah* (writing). Rabbi Nevins argued that writing on a device constitutes *ketivah* because of the recording of data, even if the writing is not preserved on the screen. In doing so, Rabbi Nevins found support in the opinion of Rabbis Gordon Tucker and Elliot Dorff who argued in 1989 that a video or audio recording of a Shabbat or Yom Tov service would constitute *ketivah*,

⁵ Elie Kaplan Spitz, "On the Limited Use of Electronics on Shabbat: Microwave Heating of Cooked Foods and the Reading and Conversing on Electronic Devices," p. 26. CJLS OH 305:18.2012d.

<http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/2011-2020/limited-electronics-spitz.pdf>

⁶ Indeed, the JTA article by Josefin Dolsten (May 15, 2020) covering our decision was titled, "Conservative movement allows livestreaming on Shabbat, holidays during pandemic," missing both the caveats as well as implying that this decision was limited to the pandemic, which it was not.

<https://www.timesofisrael.com/conservative-movement-allows-livestreaming-on-shabbat-holidays-during-pandemic/>

in contradistinction to the opinion of Rabbi Arnold Goodman that it would not.⁷ One could, of course, look for support to Rabbi Goodman's responsum and permit the use of the electronic device on Shabbat. But even Rabbis Dorff and Tucker seem to permit the use of electronic devices if not used for recording: "If one accepts the use of electricity on Shabbat, playing games on a computer would be permissible as long as one does not write the file to a disk. Note, however, that doing work on a computer on Shabbat would be prohibited."⁸ At issue here is the disagreement between Rabbi Goodman and Rabbis Dorff and Tucker on what a "reasonable person definition" of *ketivah* would be, with Rabbi Goodman employing a strict constructionist approach to *ketivah* (and a more liberal conclusion), and with Rabbis Dorff and Tucker employing a broad constructionist approach (and a more conservative conclusion).⁹ I agree (as does Rabbi Nevins on the practical questions of recording services on Shabbat) with the conclusion of Rabbis Dorff and Tucker. I understand their approach as defining *ketivah* as intentional rather than functional. That is, a reasonable person would consider composing an article (or a consenting opinion for the CJLS) on a laptop as *ketivah*, but would not necessarily consider selecting a movie to watch on Netflix as *ketivah* (even though Netflix remembers all of our choices).¹⁰

My hesitancy with permitting streaming of services on Shabbat is not with the use of devices but the concern that people using their devices may capture the stream in order to "save" it, which, in my opinion, would surely constitute intentional *ketivah*. When we set up the livestream off our website for my congregation in Ridgewood, New Jersey, I instructed my technology chair to insert a running footer on the stream that says "Forbidden to Record on Shabbat." That warning would hopefully dissuade individuals from recording the feed off their devices, especially as they would be unable to eliminate the footer from the hypothetical bar/bat/bnei mitzvah video recording. I would suggest that we explore such approaches, not only to limit individuals from transgressing halakhah (which is ultimately in their hands), but also to preserve the spirit of Shabbat in our congregations. We should not be at services "playing to the camera."¹¹ This leads to the question of the somewhat extra-halakhic question of *shevut* and the spirit of Shabbat.

⁷ Elliot Dorff and Gordon Tucker, "On Recording Shabbat and Yom Tov Services," CJLS OH 340:3.1989c. http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/dorfftucker_recording.pdf ; Arnold Goodman, "May a Shabbat Service Be Taped?" CJLS OH 340:3.1989b. http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/goodman_taped.pdf

⁸ Dorff and Tucker, "On Recording Shabbat and Yom Tov Services," p. 2 of the responsum. (In *Responsa 1980-1990*, p. 236.)

⁹ Liberal or conservative methodological approaches do not always translate into liberal/permissive/*meikil* and conservative/stringent/*mahmir* results. For another example, see my "Women and the Minyan" CJLS OH 55:1.2002, pp. 15-16 of the responsum (and printed in my *Passionate Centrism: One Rabbi's Judaism* [Lanham, MD: Rowman & Littlefield, 2016], p. 118.

¹⁰ For a deeper analysis of the different CJLS positions from the 1980s on electronic *ketivah* and Rabbi Nevins's approach, with an important critique, see Elie Kaplan Spitz, "On the Limited Use of Electronics on Shabbat," pp. 13-19.

¹¹ In the midst of the Covid-19 crisis, I have officiated at funerals where the few mourners who are able to gather with me at the graveside direct their words to the phone being held up with the Zoom meeting rather than to those other immediate relatives standing at the grave. These have been extraordinary circumstances. But looking towards a post-Covid-19 reality, Shabbat service participation should be rooted in the physically present congregation rather than taking on the model of members of Congress speaking from an empty chamber to the C-SPAN camera.

The Question of the Spirit of Shabbat

Our movement's *mahloket* on electricity goes back to 1950. Saying "no" is much easier than saying "yes" because every "yes" must be qualified with caveats. Beyond the definition of *ketivah* is the question of whether the use of electrical devices violate the spirit of Shabbat. Much of Rabbi Nevins's reponsum, which informs Rabbi Heller's approach, is premised on the ideal of a Shabbat unplugged, as if the absence of electronic devices establishes the authenticity of Shabbat holiness. But of course our ancient forebears neither used nor abstained from using electronic devices. Rabbi Arthur Neulander's Torah on electricity and the spirit of Shabbat, from the original 1950 deliberation of the CJLS, are just as meaningful seventy years later:

It must be clearly understood that whatever use of electric apparatus we permit on the Sabbath, we allow only on condition that use is in consonance with the spirit of the Sabbath. Thus the telephone may be used for conversation to strengthen family ties, to foster friendship and neighborliness, to convey a message of cheer to the sick or for a similar *dabar mitzvah*. But the telephone should not be used for shopping purposes, for making a business appointment, much less a business transaction. The first group is in keeping with the holiness of the Sabbath. The second group violates the *menuhah shelemah* of the Sabbath.

Similarly, in the use of radio or television common sense should dictate that only such programs may be indulged in which are not vulgar and banal and do not desecrate the sanctity of the ideal Sabbath. Only programs of high esthetic taste, of high ethical content, instructive and of social value are in keeping with our concept of a *Shabbat Kodesh* and only such programs should be listened to and seen on the Sabbath day.¹²

What we learn from Rabbi Neulander is that the observance (*shmirah*) of Shabbat is found not in the use or non-use of electric (electronic) devices, but in how they are used and not used. Rabbi Neulander's advice on the proper and improper use of a telephone on Shabbat is the same as one would give for speech in general. One may certainly engage in conversation on Shabbat, but one should not engage in a business conversation. Rabbi Neulander's advice on the proper and improper usage of a radio or television on Shabbat is the same as one would give for reading a book or magazine. One may certainly read on Shabbat, but there is reading material that is more suitable for "Shabbat reading" than others. While the halakhah strives to set us on a path towards realizing the holiness of Shabbat, what is and is not fitting on Shabbat is ultimately beyond legislative prescription. Using a device to watch a Shabbat service (and fulfill religious obligations thereby) is certainly in the spirit of Shabbat. When is electronic device usage inappropriate on Shabbat? To borrow from a United States Supreme Court decision from 1964, I know it when I see it.

A Note on Dukhening

Rabbi Heller's reponsum is not restricted to the Covid-19 crisis, but it does reflect on some special concerns that relate to virtual services during the pandemic. The CJLS continues to work on guidance in

¹² Arthur Neulander, "The Use of Electricity on the Sabbath" in Mordecai Waxman, ed., *Tradition and Change: The Development of Conservative Judaism* (New York: Rabbinical Assembly and United Synagogue, 1958), p. 407.

these areas in anticipation of the 5781 High Holydays.¹³ While these questions are both a work-in-progress and limited in applicability, I will devote a note here to the question of virtual dukhening in response to a remark on that question in Rabbi Heller's paper.

Rabbi Heller writes:

The committee has not addressed the idea of the priestly blessing (dukhening) through a video link, but it would seem that congregations that normally include this practice in person may also do so remotely. The Kohanim may bless the congregation from wherever they are as long as a minyan has been constituted. The Shulhan Arukh offers a beautiful expression of this idea: "The people who are behind the Kohanim are not included in the blessing, but those before them and to the sides, even an iron curtain does not interrupt between them. And even if they are behind the Kohanim, if it is because they are forced (for instance, if they are overwhelmed with work in the fields and they cannot come) they are included in the blessing."¹⁴

The passage from the Shulhan Arukh cites the concept that even an iron curtain (*mehitzah shel barzel*) would not interfere between the kohanim and the congregation. The term *mehitzah shel barzel* is used in the Talmud in the discussion of what would situate an individual "outside" in terms of being excluded from a paschal meal. The Talmud quotes Rabbi Joshua ben Levi as saying that even a *mehitzah shel barzel* cannot separate Israel from God.¹⁵ This is from a key passage in the Talmud that was used by Rabbi Reisner and others in considering an internet minyan.¹⁶ If an iron curtain cannot separate worshippers, how can we not allow kohanim to virtually dukhen when we are able to hear them through our internet connections?

When researching this question over Hol Hamoed Pesah in 2020 amidst the Covid-19 crisis, my initial conclusion was to permit virtual dukhening. A revealing comment by the Magen Avraham on the Shulhan Arukh's statement that the kohanim should stand on the bimah in front of the ark facing the people indicates that there was a variety of practice as to where the kohanim stood:

"Toward the people." And if the ark is set up in another place the kohanim should nevertheless stand facing the shatz. And I have seen in Constantinople that the ark is established on the north side and that is where the kohanim stand. And there are also a number of places where the kohanim cluster and some stand by the southern wall and some by the northern wall. And there are some places where the ark is set up on the eastern wall but facing toward another direction and there the kohanim do not face the shatz.¹⁷

The Magen Avraham is reporting that because not all synagogues follow a standard design, the kohanim will not always be able to stand in front of the ark facing the shatz. These concerns are clarified in the Arukh Hashulhan, which cites the Magen Avraham comment:

It is known that in most congregations that the ark is on the eastern wall and the kohanim turn their faces to the west. And if the ark is on the southern or northern walls there are those who

¹³ Rabbi Heller and I are working together on the question of the location of the shaliah tzibur, baal korei and the oleh/olah to the Torah. The baal koreh may recite all the brakhos for the aliyot. One question is whether the baal korei must do so or if an oleh/olah can be separated spatially from the sefer Torah.

¹⁴ Heller, "Streaming Services," p. 10, citing Shulhan Arukh, Orah Hayim 128:24.

¹⁵ Pesahim 85b.

¹⁶ I also found the phrase cited in Wikipedia as the source of the term "iron curtain" from the Cold War.

¹⁷ Magen Avraham to Orah Hayim 128:10, note 15.

say that the kohanim should turn and face toward the shatz and not to the west (Magen Avraham note 15). And there are places where they are not careful about this (ibid.). And in truth I do not understand, for does not the Torah warn regarding the faces of the majority of the congregation? And if so, the simple matter is that in the place where the majority of the congregation is standing, that is where the kohanim should turn toward. But know that the basic rule is that the kohanim should stand by the ark and that is the place of the “dukhan” as in the Holy Temple where they would stand in a specific place on the dukhan, meaning a specified location...and therefore the kohanim are required to stand there. And if there are many kohanim then they should stand alongside the dukhan but still along the eastern wall and this is the plain custom in all countries. Therefore the kohen may not stand in his place where he regularly stands, for he must uproot himself from his place...and there are some kohanim who do not know this law, and therefore we are obligated to show them so that they will not do so [remain in their places for the dukhening and not ascend the bimah].¹⁸

Questioning why the Magen Avraham thought the kohanim should face the shatz, the Arukh Hashulhan argues that what is essential is that they face the congregation, which in most cases they do by standing in front of the ark that is on the eastern wall of the synagogue. I believe that the reason why the Magen Avraham wanted to the kohanim to face the shatz was that the shatz generally stood amidst the congregation and served as a point of reference establishing the location of the congregation. The Arukh Hashulhan then goes on to stress that the most important thing is that the kohanim not recite the dukhening from where they are, but that they “uproot” themselves and go to a different location in the synagogue (usually the bimah on the eastern wall).

The initial question of virtual dukhening was focused in my mind on whether the kohanim could dukhen if they were not on the bimah in front of the ark. After studying these comments from the Magen Avraham and the Arukh Hashulhan I at first concluded that it was permissible for the kohanim to dukhen even if not by the ark, as long as they were facing the congregation, and had moved (uprooted) themselves from where they had been for the worship service prior to that point. I reasoned that through the virtual platform they were “facing” the congregation. But they did need to relocate to a different place in their respective homes.

I shared my findings with a congregant who regularly dukhens, and while she would have complied with my decision (this was in anticipation of the seventh and eighth days of Passover during the Covid-19 crisis of 2020 when we were doing Zoom services; I was not prepared to consider the question on the first two days of Yom Tov so we did not dukhen then), she challenged me to reconsider, arguing that she certainly could not be near the ark, that staying in the same room in the same area captured by the camera would not constitute a different spot, and that even if she moved her location, her perspective of the congregation through the screen would be unchanged, as if she had not moved at all. I realized that at times we can be so anxious to reach a particular conclusion that we forge a tortuous path that can be difficult for others to follow.¹⁹

I went back to the question and in the end came to the opposite conclusion, that we should not dukhen over a virtual platform.²⁰ I wanted to get to “yes” as I have loved the dukhening service since

¹⁸ Arukh Hashulhan, Orah Hayim 128:19.

¹⁹ With gratitude to Miriam Bakal for pushing me on this point.

²⁰ With gratitude to my father Rabbi Robert Fine for talking through these ideas with me.

childhood.²¹ I have over the years argued with those who objected to dukhening because of its connection with the Temple cult. However, I did not realize until now the force of an extraordinary comment of the Rema which completely separates the mitzvah of dukhening from the Temple. In the liturgy the dukhening is highlighted by the festival Musaf Amidah celebrating the Temple, which would seem to explain why in the Diaspora we only dukhen on festivals (unlike in Israel every Shabbat, and in Jerusalem every day). But the Rema writes as follows:

The custom in our countries is not to dukhen except on festivals because only then are we focused on joy because of the Yom Tov, and the heart is set to recite the benediction. This is not the case on other days, even on the sabbaths of the year, where we are busy with thoughts about our obligations and about losing work [by observing Shabbat]. And even on Yom Tov we do not dukhen except during Musaf, since we will soon be leaving the synagogue to celebrate the joy of the Yom Tov [with a festive meal].²²

According to the Rema, the reason why we only dukhen on festivals is not because in the Diaspora we are more mournful for the fallen Temple, but simply because we are happiest on holidays, and by our custom, joy is a prerequisite to perform and experience the mitzvah of dukhening. In explaining why we do not have the same level of joy on a Shabbat, the Rema explains that while Shabbatot are a break from the work of the week, we cannot really separate our minds from our mundane concerns every six days. Only on Yom Tov can we be especially joyful. And in explaining why we only dukhen at Musaf and not Shaharit,²³ the Rema explains that even at Shaharit we are not so joyful because we have a long service in front of us. It is only at Musaf, when we can almost smell the meal waiting for us on our tables (remembering that in the past and in many cultures still, it was the midday meal, not the evening supper, that was the main meal of the day), that we are experiencing the mystical level of joy allowing for a proper dukhening.

If what the Rema says is true, then it becomes clear that we should not dukhen when circumstances {like a pandemic} prevent the kohen or kohanim from being physically present in the synagogue. The virtual platform allows us to experience Shabbat and Yom Tov together, but it cannot compare to the warmth of physical proximity and community. To not dukhen over Zoom, acknowledging the separation and loss that we experience through the pandemic, aligns with the Rema's suggestion that kohanim who are mourners should not dukhen.²⁴ Along similar lines, Rabbi David Wolpe has said that during the Covid-19 crisis as the whole world stays at home it is as if the whole world is sitting shiva.²⁵ How can we dukhen then?

²¹ For my defense of the ritual, see *Passionate Centrism*, pp. 18-22

²² Rema to Shulhan Arukh, Orah Hayim 128:44.

²³ As is the custom except for Simhat Torah where the revelry and drinking during Musaf elicits a different type of joy that is not commensurate with the solemnity of dukhening.

²⁴ Rema to Shulhan Arukh, Orah Hayim 128:43.

²⁵ David Wolpe, "The Whole World is Sitting Shiva" *The Atlantic*, May 20, 2020.

<https://www.theatlantic.com/ideas/archive/2020/05/whole-world-sitting-shiva/611872/>