OH 55:14.2021b

A Minyan Is Constituted in Person

Rabbi David J Fine

This paper was approved by the CJLS on July 23, 2021, by a vote of twelve in favor, six opposed, and one abstention (12-6-1). Voting in favor: Rabbis Pamela Barmash, Nate Crane, Elliot Dorff, David J. Fine, Jan Caryl Kaufman, Barry Leff, Amy Levin, Daniel Nevins, Avram Reisner, Tracee Rosen, Robert Scheinberg, and Ariel Stfenmacher. Voting against: Rabbis Jaymee Alpert, Susan Grossman, Judith Hauptman, Micah Peltz, Deborah Silver, and Ellen S. Wolintz-Fields. Abstaining: Rabbi Suzanne Brody.

שאלה

May a minyan be constituted when more than ten adult Jews can see each other over videoconference, but are not physically located in the same place?

תשובה

During the Covid-19 pandemic, many communities constituted a minyan over the internet via Zoom and other such platforms in order to continue to engage in public prayer amidst a mandated quarantine, "shelter in place" orders, and general public health emergency. Rabbis Elliot Dorff and Pamela Barmash, as co-chairs of the Committee on Jewish Law and Standards, issued a letter on March 17, 2020, offering guidance on various options regarding a remote minyan.[1] The guidance letter represented various opinions of the members of the CJLS, but was not voted on as on official position. In the letter, they cited the existing CJLS precedent, the responsum written by Rabbi Avram Reisner in 2001 that permitted one to fulfill one's obligations through remote connection but still requiring a minyan of ten in person.[2] Rabbis Dorff and Barmash report that "the majority of us on the CJLS firmly believe that this should remain the rule even in this she'at hadehak (crisis situation)….However, a number of members of the CJLS believe that in the current dire circumstances a more lenient position on constituting a minyan remotely may be acceptable, especially since there have been significant advances in technology." After

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I am grateful to the members of the Committee on Jewish Law and Standards who considered this paper on a "fast-track" basis as we worked to provide immediate guidance to this question. I am indebted to Rabbi Joshua Heller for his extraordinary work in marshalling the relevant sources, arguments and concerns regarding a virtual minyan. His paper is constructive and as such a much more creative work of scholarship than this *mitnaggedic* paper can presume. I am particularly grateful to the thoughtful comments on this paper that were offered by Rabbis Avram Israel Reisner, Elliot N. Dorff, Barry Leff, Amy Levin and Robert Scheinberg.

[1] Elliot Dorff and Pamela Barmash, "CJLS Guidance for Remote Minyanim in a Time of Covid-19." CJLS Guidance for Remote Minyanim in a time of COVID-19 | The Rabbinical Assembly

[2] Avram Israel Reisner, "Wired to the Kadosh Barukh Hu: Minyan via Internet" CJLS OH 55:15.2001. Reisner - internet (rabbinicalassembly.org)

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a brief review of the relevant sources, some of which I will discuss below, Rabbis Dorff and Barmash write: "In this crisis situation in an area in which civil and/or medical authorities decree that it is unsafe for people to gather in person and recommend or order the closure of houses of worship, it is permitted to constitute a minyan whose constitutive participants (ten adult Jews) are not located in one physical place."[3] The letter then offers two options. One approach was to recite devarim shebekedushah, prayers that require a minyan, but that the Torah reading be recited without aliyot, either from a scroll or printed text. The other approach was to skip all prayers that require a minyan except for the mourner's kaddish, which will be addressed below. The letter reiterated the temporary nature of the (unofficial) ruling: "Those who would permit a minyan solely online, whether for all prayers requiring a minyan or only for Mourner's Kaddish, limit this permission to the 'sh'at hadehak' (crisis situation), when it is forbidden or unsafe for ten adult Jews to gather in person for weeks [*sic*!] at a time. This permission is also limited to an area where most of the synagogues have been ordered, or recommended, to close for the crisis. This does not apply to those in an area where the civil and/or medical authorities have not recommended or ordered that houses of worship close for public gatherings." The letter concludes by noting the complexities of employing technology on Shabbat and references the ongoing work of the CJLS on that matter that was to culminate with the Committee's approval, on May 13, 2020, of the groundbreaking responsum by Rabbi Joshua Heller.[4]

On August 31, 2020, the CJLS approved a responsum by Rabbi Pamela Barmash, by a vote of 15-0-1, which authorized that, as one of several options on how to recite the Mourner's Kaddish "when we cannot do so in person:…we may connect virtually with a minyan (whether through our home congregation or another) whose members are meeting virtually to constitute a remote minyan, preferably in our time zone, allowing us to recite mourner's kaddish, along with that minyan. If the mourner or person observing yahrzeit is counting as one of the ten adult Jews required for the minyan, the connection must be through video conferencing, and at least 10 people of countable age must be able to see and hear each other (even if the audio is turned off because of a technological inability to synchronize singing)."[5] This official authorization for a virtual minyan for purposes of saying the Mourner's Kaddish was limited to a time of pandemic where social distancing was mandated.

Prior to the letter of guidance from Rabbis Dorff and Barmash and the responsa by Rabbi Heller and Rabbi Barmash, I wrote a responsum for my own community, which I distributed to rabbinic colleagues in the New Jersey region of the Rabbinical Assembly which I served at the time as president.[6]

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[3] By "adult Jews" the meaning, of course, is Jews over the age of bar/bat mitzvah.

[4] Joshua Heller, "Streaming Services on Shabbat and Yom Tov" CJLS OH 340:3.2020a. Streaming on Shabbat and Yom Tov Heller.pdf (rabbinicalassembly.org)

[5] Pamela Barmash, "How to Recite Mourner's Kaddish while Physically Distancing during a Pandemic," pp. 2-3. CJLS YD 376:4.2020. Mourner's kaddish during pandemic final w code.pdf (rabbinicalassembly.org)

[6] David J. Fine, "Emergency Ruling in Regard to Livestreaming Services," March 14, 2020, unpublished. The paper was deposited in an archive that the Library of the Jewish Theological Seminary was constructing to preserve rabbinic and Jewish communal responses to the Covid-19 pandemic. For the record, I was aware that the CJLS was working on a response to the question, and asked and received permission from Rabbi Dorff to distribute my paper within my region and to anyone else who requested it, with the caveat with which I prefaced the document, that it "represents the opinion of the author and is not an 'official position' of the CJLS nor of the Rabbinical Assembly."

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I was not a member of the CJLS at that time, but argued along the same lines as the letter of Rabbis Dorff and Barmash, that I supported the 2001 precedent of Rabbi Reisner's paper, but that "in the current state of emergency, where most of our congregations have closed their doors in the midst of the containment efforts of the Covid-19 crisis, live streamed services of even a single individual (the shaliah tzibbur) may be deemed a minyan when at least nine others eligible to count in a minyan are connected to the site at the time of the live streaming." Among various sources, I was moved by the statement of Rabbi Joshua ben Levi in the Talmud, that אפילו מחיצה של ברזל אינו מפסקת בין ישראל לאביהם שבשמים, that even an "iron curtain" could not separate Israel from their Father in Heaven.[7] (The sources that explore how far one can be from the physical minyan to be included are tied to the discussion in the gemara about how far " one house" can be defined wherein one must consume the paschal offering, which is specifically applied by Rav Yehudah in the name of Rav to the laws of prayer with a minyan. I differed with the "CJLS Guidance for Remote Minyanim in a Time of Covid-19" issued by Rabbis Dorff and Barmash on two points. Firstly, I was satisfied that there were ten eligible Jews connected over the internet, whereas the "CJLS Guidance," required that the "participants must be able to see and hear each other through virtual means and be able to respond 'amen' and other liturgical replies to the prayer leader." This same requirement was confirmed by Rabbi Barmash in her responsum on reciting the Mourner's Kaddish during a pandemic. Secondly, I felt strongly that if we are permitting a virtual minyan then it should be a minyan in every sense including Torah reading with brakhot.

My position on Torah reading was driven by a sense that we either have a minyan or do not have a minyan, and that it was important to form a virtual service that was as real as possible for my congregants. I led services from the sanctuary, including opening the ark and reading Torah in what was, physically, an empty room except for me. I held that the Torah reader should recite the aliyot in the absence of other individuals, and that it is permitted for one person to continue to repeat the brakhot one after the other and that that would not constitute a *brakhah levatalah* (an improper blessing) relying on the precedent that a kohen repeats the brakhah to the Torah for the second aliyah if there is no levi.[8] While most rabbinic colleagues whom I have spoken with over the time of the pandemic who did include Torah reading in their virtual service permitted someone to say the brakhot (the *oleh/olah*) to be in a different physical space than the Torah reader (*baal/baalat koreh)*, I held that the brakhot could only be recited in the physical presence of the Torah, based on the requirement in the Shulhan Arukh that הקורא בתורה צריך לאחוז בספר תורה בשעת הברכה , that the person reading from the Torah must take hold of the sefer Torah at the time of the blessing.[9] Even though we do not always insist that the person reciting the blessings take hold of the Torah, the oleh/olah is always able to do so. It seemed to me that a permission to dislocate the oleh/olah from the physical proximity of the Torah scroll would set a

[7] Babylonian Talmud, Pesahim 85b. The Cold War term "Iron Curtain" may derive from rabbinic usage. See Wikipedia, s.v. "Iron Curtain": Iron Curtain - Wikipedia

[8] Shulhan Arukh, Orah Hayim 135:8.

[9] Shulhan Arukh, Orah Hayim 139:11. It is true that the Rema, in his gloss, understands this as a "minhag." It is also true that there is some ambiguity as to whether Karo is referring to the baal/baalat koreh or the oleh/olah. My reading is that the phrase "at the time of the blessing" clarifies that the reference is to the oleh/olah. Besides, that is our general practice, that the baal/baalat koreh stands aside for the oleh/olah to grasp the atzei hayim (scroll handles) during the blessings before and after.

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dangerous precedent that might be used to avoid special efforts to make an aliyah to the Torah accessible to those with limited mobility. During the pandemic, our regular baal koreh kept a sefer Torah at his house, and when he leyned he recited all the brakhot. When I leyned from the sanctuary, I recited all the brakhot. This was an important reminder, I thought, of the importance of physical proximity. Finally, it seemed to me that to recite the brakhot for an aliyah without being physically in the same place as the sefer Torah was like saying the Motzi without a challah.

The first point with which I varied from the "CJLS Guidance for Remote Minyanim" was with the requirement to see and hear the other members of the minyan. I took a more lenient position, basing myself on halakhah that if the third for a zimun (for the Grace After Meals) leaves the building he can still be counted in the minyan for the zimun if they call out to him and he hears them and responds and they hear his response.[10] Rabbi Reisner, in his 2001 responsum, correctly explains that this cannot be used as a precedent for a minyan of ten because the Talmud clarifies, citing a position of Mar Zutra, that the rule is limited to the zimun of three.[11] Because the gemara reports a disagreement on whether the rule could apply to a minyan of ten or just three, I reasoned that the variant opinion could be relied upon in a she'at dehak, an emergency situation, such as, for us, a pandemic.[12]

When I wrote my initial paper in March of 2020 I was not yet as fluent in the differences between livestreaming and Zoom (and other such platforms), a fluency that we have all gained through the past difficult year. Zoom provides the opportunity for a two-way audio and visual connection, and as such it worked, in a way that a one-way streaming platform would not, to satisfy the requirements of the "CJLS Guidance for Remote Minyanim" that the individuals constituting what we have come to call a "Zoom minyan" be able to see and hear each other, based on the leniency of the Shulhan Arukh that one who is outside the synagogue building but מראה להם פניו, causes his face to be seen by them (the congregants within the synagogue) through a window, may be counted in the minyan.[13] Many rabbinic colleagues adhered to this requirement by insisting that ten individuals appear in their screens with the video on, while I permitted a minyan even without ten video screens on as long as I could affirm an audio connection with those who had their video off.

I took some space here to explain my own reasoning and practice of a Zoom minyan as I think it might be relevant that I was somewhat to the left of the CJLS Left in theorizing and implementing a virtual minyan, a context that I hope will add some clarity to my position in this paper. The question that is being addressed here and by Rabbi Heller before the Committee is whether the permission for a "Zoom minyan," a minyan constituted through virtual means, can be continued beyond the public health emergency of Covid-19. Since the reason for the "emergency permission" which varied from the precedented opinion of Rabbi Reisner was the public health emergency, a response to the question posed

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[10] Shulhan Arukh, Orah Hayim 194:2.

[11] Babylonian Talmud, Breakhot 45b; Reisner, "Wired to the Kadosh Barukh Hu," p. 3. Karo clarifies in the same se'if that the rule is limited to the zimun and excludes a minyan of ten.

[12] That, even though the stam of the gemara concludes that the opinion of Mar Zutra is the halakhah (הלכתא) and that the variant opinion is talking about the minyan of ten to include God's name in the zimun and not necessarily the minyan for prayer.

[13] Shulhan Arukh, Orah Hayim 55:14.

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would need to consider what circumstances have changed since Rabbi Reisner's paper was approved in 2001, and to what extent a "Zoom minyan" can be utilized within our communities.

Rabbi Reisner, in his 2001 responsum which the CJLS approved by a vote of 18-2-1, concluded that, despite the possibility of reading the sources about "outside a window" as applying to a virtual connection, "I find myself taken by the traditional response that true community demands proximity of place. One's words can offer comfort, the sigh of one's face or the sound of one's voice can offer support, but they do not replace a hand on a shoulder or the stroke of one's hair, or a hug—though these may be silent. Imagine the deaf and the blind. They are not cut off from affection. But the baby who cannot be touched, the prisoner in isolation, these are ultimately alone. I am not at all convinced that any definition of community, short of proximity, serves, properly, the purpose for which quorum was established."[14] Rabbi Reisner's admission of finding himself "taken by the traditional response" echoed for me the felicitous phrase used by Solomon Schechter in his classic 1896 essay on his theology of Judaism, that at times "the old Adam still asserts itself in me."[15] Rabbi Reisner's point was that despite the advances in technology, our traditional tendencies pull us, sometimes nostalgically, towards what we have known in the past. Rabbi Reisner's articulation of the superiority of personal proximity over distance, cogent arguments that exceed "mere nostalgia," have been articulated in a responsum by Rabbi Elliot Dorff, approved by our Committee during the pandemic on the loneliness caused by isolation.[16] We have learned through the time of Covid-19 how critical technology has been in providing community to people who would otherwise be isolated. I do not envy our rabbinic predecessors who served during the time of the Spanish Flu and other pandemics when individuals had to quarantine without the technological benefits that we enjoyed. There are surely many things we have learned during the pandemic that will effect changes in Judaism, many better discernible by future historians than we who have lived and served through this time. Our responsibility now, is to determine, once the emergency has passed, what innovations are worth retaining and which ones are best left to history.

Twenty years ago, when Rabbi Reisner was researching for what was then a "cutting edge" responsum on the internet minyan, Rabbi Heller was helping the Jewish Theological Seminary's efforts to establish a "distance learning" platform. Everyone in the field of education has learned how to use "distance learning" during the pandemic. I have learned what an important tool it can be and believe that it will continue to be offered as an alternative or supplement to in-person learning. Colleges and universities in the summer of 2021 have offered, if they were not doing so already, online seminars for incoming first-year students to begin learning, earning credits, and meeting fellow students and professors before the start of the semester in September. But having experienced distance learning first-hand (as both a teacher and a parent) after resisting it for so long, I am more convinced than ever that it is a poor substitute for face-to-face learning where one must fully encounter one's teacher and fellow students. The most recent CDC recommendations that all schools re-open for in-person learning in the

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[14] Reisner, "Wired to the Kadosh Barukh Hu," p. 4.

[15] Solomon Schechter, Introduction to *Studies in Judaism,* First Series (Philadelphia: Jewish Publication Society, 1896), p. xx.

[16] Elliot N. Dorff, "Loneliness, Family and Community During the Pandemic" CJLS HM 427:8.2020. Loneliness and Community During the Pandemic Sept 14.pdf (rabbinicalassembly.org)

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fall of 2021 acknowledges "the toll remote learning has taken on students."[17] The same holds true for the internet minyan. While Zoom has provided wonderful opportunities for distant relatives and friends to connect for a shiva minyan or a bar/bat mitzvah service (besides providing for public prayer during a pandemic), those opportunities, while worthy to find a way to preserve, are no substitute for an in-person communal gathering.

Rabbi Reisner's main argument is that one may fulfill one's religious obligations through an internet connection, but not count in the minyan and serve as an agent for others. Contrasting the sources that require that the members of the minyan "be seen" by each other with the rule that one fulfills one's obligations to hear the shofar by passing a synagogue on Rosh Hashanah and hearing the shofar from the street when one has intention thereby to fulfill the obligation to hear the shofar, Rabbi Reisner decides, following the conclusions of the Tosafot on Pesahim 85b and Eruvin 92b, that to constitute a minyan one must be "inside" but in fulfilling one's obligation one may be "outside." So too over the internet, one can respond to kaddish and fulfill one's obligations, but the minyan must be constituted in person.

Has anything changed since Rabbi Reisner's responsum was approved that might warrant a different conclusion? The two obvious possibilities are the advent of technology and the experience of the pandemic. The technology has certainly improved, but Rabbi Reisner did consider a "real-time two-way audio-video connection, wherein the individual, though unable to reach the other minyonnaires, is able to converse with them and see and be seen by them."[18] The fact that Zoom is better and more available than what was used in 2001 does not mean that it is substantively novel. And while Rabbi Reisner was not imagining a pandemic as we have all experienced, he did write that "only in rare and exigent cases, with regard to shut-ins and hospital patients, those traveling or simply resident in distant parts, in hurricane or blizzard conditions, is the advantage of this use of distant-connection to the minyan compelling"[19] I do not know that being shut in during a pandemic is substantively different than the special circumstances that Rabbi Reisner lists. I would add living under hostile conditions where it is unsafe to leave one's home to the list of circumstances where one would want to use an internet minyan.[20] Rabbi Heller, in a responsum approved earlier this year by our Committee, offers some clarity on the definition of an "emergency situation" and how to define its cessation.[21] But clearly Rabbi Reisner understood that there were circumstances, of both short and long duration, when individuals would have trouble attending worship services in person. And besides, the question posed addresses the possibility of a Zoom minyan post-Covid when there is no more emergency. It seems, in my opinion, that neither

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[17] "CDC Advocates Fully Reopening Schools in Fall," *New York Times,* July 10, 2021, p. A1. https://www.nytimes.com/2021/07/09/health/cdc-schools-reopening-guidelines.html?smid=url-share

[18] Reisner, "Wired to the Kadosh Barukh Hu," p. 8,

[19] Ibid., p. 6.

[20] As I explained to my children when the first Covid-19 "shelter in place" orders were issued in 2020, "This is like living in a war, except there is no war." At that time I was the only one leaving the house, officiating at multiple burials each day. It was the closest I came to serving as a front-line chaplain.

[21] Joshua Heller, "Are We There Yet? Pandemic's End and What Happens Then" CJLS HM 427:8.2021ɣ. heller pandemic end teshuva.pdf (rabbinicalassembly.org)

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the advent of technology nor the experience of the pandemic effects the reasoning offered in 2001 by Rabbi Reisner, especially beyond the time of the Covid-19 crisis.

The argument put forth to our Committee by Rabbi Heller presupposes that the experience of virtual minyan over the course of the pandemic has created a new reality where the Zoom minyan can serve the Jewish people for purposes beyond keeping communities together as an emergency measure when they were not able to hold in-person services, and that this new reality merits a re-reading of the sources and a "non-temporary" ruling.[22] As Rabbi Heller writes: "The 'Zoom Minyan' became popular in ways that were not anticipated. Many communities that offered one found that attendance increased compared to the number of Jews attending before the pandemic. Many smaller communities that did not have the numbers to sustain a daily minyan suddenly found that they were able to do so through Zoom. Individuals who had previously not been able to participate in daily communal prayer began doing so."[23] Clearly there are reasons (we can call them "communal") why one might support a Zoom minyan. I will attempt here to first respond to the halakhic arguments posed by Rabbi Heller, after which I will respond to the communal concerns, and then finally turn to practical conclusions.

Following an excellent summary of the sources on the meaning of the minyan for prayer and that full sanctification of God requires a "public," Rabbi Heller reminds us that what is at issue is not the need for "public" but the determination of how a "public" is constituted. Rabbi Heller concludes with an aggadic passage from the gemara where Rabban Gamaliel demonstrates how God's presence is infinite and can be felt anywhere.[24] Rabbi Heller suggests that this aggadic teaching "opens the door for us to consider whether physical distance necessarily limits our experience of God's presence."[25] Surely feeling "the experience of God's presence" is a goal of public worship, not always met. I would suggest that while one might certainly experience God's presence through a virtual minyan, and that while one might also experience God's presence while praying alone, nevertheless our tradition teaches us that one is best situated to "experience the divine" when in community. One of the shortcomings of Zoom is the asynchronous audio, which led most communities to decide that it was best to put everyone on "mute" except for discussion and, perhaps, the Kaddish. The loss of being able to sing together poses a serious detriment to the quality of what a minyan should be. Martin Buber preserves a story that serves as a more recent aggadic source on the importance of proximity for the music of worship. As Joey Weisenberg retells the tale:

> The musician needs his fellow musicians, and the whole community, as much as the they need him. Several hundred years ago it would be tough to find a cantor without his *meshoyrim,* his choristers, who would harmonize spontaneously with his melodies and *nusah.* One story tells of a well-loved *hazan* who died and was summoned to sing before the

[22] Joshua Heller, "Counting a Minyan via Video Conference" CJLS OH 55:14.2021a. [*Link to follow*.] I say"non-temporary" because as Conservative rabbis we should know that no rulings are ever fully permanent.
[23] Ibid., p. 2.
[24] Babylonian Talmud, Sanhedrin 39a; Heller, "Counting a Minyan via Zoom," p. 8.
[25] Heller, "Counting a Minyan," p. 9.

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> heavenly courts. When he arrived, the cantor insisted he wouldn't be able to sing beautifully without his bass singer there to join him. So the heavenly court waited until the bass singer died, and then the two sang together again in heaven. Music is meant to be sung together.[26]

This Hasidic tradition beautifully imagines that heaven itself will stand by until two Jews can sing together. Jewish prayer is not supposed to be limited to one voice with everyone else "muted." Jewish prayer is meant to involve multiple voices, sounding polyphonic rather than monophonic. Zoom makes that very difficult. Even though it is possible to "unmute" to say "amen" (as the 2020 "CJLS Guidance on for Remote Minyanim" requires) or to allow for multiple voices albeit asynchronous, it is most common on Zoom for the shaliah tzibbur to be the only voice that is heard. Additionally, we have all experienced the "frozen screen" and extended time lags where we are not able to be heard or seen live by others.[27] Of course, there have certainly been in-person minyanim where the participants have sat in silence and are in various ways not been fully "present." However, I would suggest that physical presence compensates for inaudible responses in a way that a screen on Zoom cannot.

Rabbi Heller cites Joshua ben Levi's statement that even an iron curtain cannot divide the Jewish people from God, here in the context of the Priestly Blessing where there is an obstruction between the kohen and the blessee.[28] However, the fact that the same passage from the gemara states that unlike individuals in front of the kohanim but with an obstructed view (who are included), that individuals behind the kohanim are excluded from the blessing, clearly indicates that we are talking about physical proximity.

Rabbi Heller's discussion of the halakhah that individuals eating in two separate homes who can yet see each other can combine for the zimun is suggestive.[29] However, the halakhah is clearly related only for those eating and forming a zimun (and at that, likely only for the zimun of three, not ten), not for coming together for prayer in a minyan. The distinction between the two types of quorums, for zimun and for minyan for public prayer, is more than a mere technicality. One generally eats at one's own table from one's own food, but one prays together in community.

Rabbi Heller discusses a series of sources that detail leniencies for inclusion in the minyan, either by visual sight even if outside the room, or if only in audio range if obstructed within the room. In citing the classic source in the Shulhan Arukh that if one stands "behind" the synagogue but "causes his face to be seen" through a window is included, Rabbi Heller writes: "The person standing behind the synagogue is clearly not in the same physical space but is counted because he is visible."[30] However, it seems to me that the trend of the halakhah is to expand the definition of the "room" or "building" as much as possible so that a minyan can be maintained, but in all cases the ten constituting the quorum are still physically

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[26] Joey Wiesenberg, *The Torah of Music: Reflections on a Tradition of Singing and Song* (New York: Hadar Press, 2017), p. 62, following Martin Buber, "The Cantor of the Ba'al Shem Tov" in *Tales of the Hasidim* (Tel Aviv: Schocken, 1991), pp. 61-63). With thanks to Rabbi Rachel Salston for referring Wiesenberg's book to me.

[27] I thank Rabbi Amy Levin for this point.

[28] Babylonian Talmud, Sotah 38b; Heller, "Counting a Minyan," pp. 9-10.

[29] Shulhan Arukh, Orah Hayim 195:1; Heller, "Counting a Minyan," pp. 10-11.

[30] Shulhan Arukh, Orah Hayim 55:14; Heller, "Counting a Minyan," p. 12.

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near each other where they can either see or hear each other. All that has changed is an expansion of the boundary of the physical space. Even the case that Rabbi Heller cites of someone in a building adjacent to a synagogue but "causes his face to be seen" through the window can count still represents a circumstance of one physical space where the boundaries of that space are expanded.[31]

Rabbi Heller attempts to expand our sense of the boundaries of physical space beyond a two-dimensional plane by citing the discussion in the Arukh Hashulhan that considers the inclusion of one in a loft facing the synagogue but within sight (i.e. "a room with a view"). However, the Arukh Hashulhan restricts his leniencies to she'at dehak and only to make the tenth.[32]

Overall, while there is a tradition of leniencies in the halakhic tradition to help a community "make a minyan," they are all focused on the definition of physical proximity. To apply these leniencies to virtual distance, where there is clearly physical space in between the worshippers that is not included in the minyan, is an expansion of their application that, while perhaps suggested by new technology, is not by any means the only way to read those sources. One could just as easily, or likely more easily, read them as restricting a minyan to a space of physical proximity. Furthermore, the leniencies, which are all constructed as expansions of physical proximity, are all (some explicitly and some implicitly) offered as extraordinary because of a pressing situation, a she'at dehak. As a general practice, one would not want to include the next door neighbor from his or her terrace in the minyan; one would always prefer to have ten in the synagogue. Rabbi Heller suggests that we might extend these she'at dehak rulings to a general practice of constituting a virtual minyan. I was comfortable applying these sources to the she'at dehak of the Covid-19 pandemic, as explained above. Rabbi Heller is suggesting that we apply them beyond a she'at dehak to the general practice of forming a minyan. However, none of these sources were intended to be used before one tried to gather a minyan in person. Even the sources on the design of the synagogue where one might not see everyone at the same time because of an obstruction do not represent an ideal situation. It has often happened that I lose my minyan when someone walks in the hallway. At that point I usually call out and if the person answers me then I consider the minyan to still be in effect. The problem with applying such leniencies *lehathila,* from the start, is that one is essentially lowering the bar on the formation of a minyan. While Rabbi Heller explains from the outset the appeal of the "Zoom minyan" for communities that have trouble forming a minyan, we must be mindful of the harm that such a ruling may have on communities that have been able to form minyanim and will now find it harder to do so because reliance on the internet is so much easier.

The classic leniency on minyan formation is the widespread custom of opening the ark to make "the tenth." I have never served a community that did not ask me about that and insist that they had "always done it in the past." The custom is an ancient practice attributed by the gemara to Rav Huna and rejected by Rav Nachman, and apparently the stam: אמר רב הונא תשעה וארון מצטרפין. א"ל רב נחמן וארון גברא הוא?—"Rav Huna said: 'Nine and the ark count [for a minyan].' Rav Nachman said to him: 'Is the ark

[31] Chayim David Azulai, Mahazik Berkha to Orah Hayim 55; Heller, "Counting a Minyan," pp. 12-13.
[32] Arukh Hashulhan , Orah Hayim 55:20; Heller, "Counting a Minyan," pp. 13-14.

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a person?'"[33] While the custom has survived, it is modified by the codes so that the ark is replaced by a human (in response to Rav Nachman's challenge), albeit a minor. As the Shulhan Arukh states: יש מתירין לומר דבר שבקדושה בתשעה וצירוף קטן שהוא יותר מבן שש ויודעה למי מתפללין, ולא נראין דבריהן לגדולי הפוסקים, that there are those who are lenient and permit a minor to count as the tenth in the minyan as long as he is older than six and understands to whom we pray, but this is not accepted by the major poskim. The evolutionary line from the Ark to the minor can be discerned from the gloss of the Rema: ואפילו על ידי חומש שבידו אין לצרפו. מיהו יש נוהגין להקל בשעת הדחק, that even when the boy is holding a humash in his hands one should still not include him, but there are those who practice this leniency in a she'at dehak.[34] The cited leniency involves a minor who understands what is going on, because the distinction of the attainment of bar mitzvah age is a technicality that can be waived to make the tenth. The Rema, while disagreeing with the practice, tells us that they would have the boy hold a humash to indicate that he is able to read it (thus suggesting eligibility for the minyan in a more discernible way than the theological standard suggested by Karo). The idea that a Torah as a Torah can count in a minyan is of course absurd. The fact that Karo and the Rema prefer a pre-Bar Mitzvah boy over the inanimate ark, but still oppose the leniency, suggests both its longstanding use as a she'at dehak and its long-standing opposition by rabbis. My father, Rabbi Robert Fine, always opposed this custom in the congregations he served and taught me to do the same. As he would explain it, the custom might make sense in a village in the Old Country where there were only ten Jewish men over bar mitzvah. It should not apply in our communities where it is not that we do not have enough Jews as that the Jews choose not to come to synagogue. Jewish non-observance should not constitute the she'at dehak that the Rema was conceding. The effect of the employment of this leniency, my father taught, would essentially be to reduce the requirement of a minyan from ten to nine. The same concern should apply to the question of a Zoom minyan. By permitting a leniency that was originally intended only as a she'at dehak to general practice, we will in essence be lessening the standards of forming a minyan and relieving our communities of the incentive to gather ten for public prayer.[35] Even the limitation of a Zoom minyan to a she'at dehak for "a a community which faces other emergent conditions, including not being able to constitute a regular minyan otherwise" as Rabbi Heller suggests, will likely be employed by congregations that are not too small to maintain a minyan because they have too few Jews, but rather have too few Jews who will commit to come to synagogue to maintain a minyan.[36] I do not believe that the benefits of a Zoom minyan merit the potential costs.

Rabbi Heller proposes a number of suggestions of potential precedents for "virtual presence." I will discuss them in order.

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[33] Babylonian Talmud, Brakhot 47b. With thanks to Rabbi Robert Scheinberg for bringing the Talmudic source for this custom to my attention, and for his insight on the evolutionary history of the leniency.

[34] Shulhan Aukh, Orah Hayim 55:4.

[35] See further the section below, "On the Use of She'at Dehak (A Pressing Circumstance)" for my argument on why she'at dehak should not be employed for a non-temporary circumstance.

[36] Heller, "Counting a Minyan," p. 48.

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Rabbi Heller discusses the sources on seeing the new moon through a reflection on water, or through the clouds or in a lantern (glass), rather than clearly and directly.[37] He bases the use of this precedent as concern with counting a distorted presence as "the real thing," positing that with technology one can determine whether one is watching a live versus a recorded service. But one could read the sources on testifying to having seen the moon within the broader context of giving maximum discretion to the court on the intercalation of the month (all this before the calendar was set in the fourth century). I read these sources as more about establishing rabbinic authority vis-à-vis the calendar than about the reliability of reflections. And besides, the witness is significantly physically distant from the moon, however the moon is perceived.

Rabbi Heller mentions a halakhah about seeing the flame of Havdalah through a reflection (a lantern or a mirror).[38] However, the source appears to insist that one must see and use the light, rejecting the more lenient option.

Rabbi Heller discusses various halakhot about whether seeing something through glass or a mirror counts as seeing it directly. The key issue is that a reflection of nudity through a glass or mirror counts as seeing nudity directly, thereby prohibiting one from reciting the Shema (or Amidah).[39] The suggestion is that the reflection counts as the real thing, like the screen on an internet minyan. However, it seems to me that the issue is clearly one of distraction, not the presence of nudity. That is, if one sees nudity through a reflection from someone from another room, that would constitute nudity that prohibits one from reciting the Shema, just as if one saw nudity through an open window, or perhaps from the roof of King David's palace. This is made clear by the following se'if in the Shulhan Arukh: היתה ערווה כנגדו והחזיר פניו ממנה או שעצם עיניו או שהוא בלילה או שהוא סומא, מותר לקרות דבראיה תלה רחמנא והא לא חזי לה, that if one sees the nudity but turns his face away or closes his eyes or it is nighttime or he is blind, in all these cases he is permitted to say the Shema because the concern is seeing and this is not seeing.[40] In this case, what we are concerned about is the distraction of the sight of nudity, not its physical presence. Nudity on a television screen would prohibit one from reciting the Shema just as would nudity in a photograph or illustration. It should not need to be live to form a distraction, and for this reason the analogy is not

[37] Babylonian Talmud, Rosh Hashanah 24a; Heller, "Counting a Minyan," pp. 21-22.
[38] Jerusalem Talmud, Berakhot 8:6; Heller, "Counting a Minyan," p. 23.
[39] Babylonian Talmud, Berakhot 25b; Heller, "Counting a Minyan," pp. 23-24. See Shulhan Arukh, Orah Hayim 75:5. I put aside the other issue of seeing human waste through a reflection because Rabbi Heller explains that that is more an issue of smell than sight since if it is covered by a translucent lantern one can then say the Shema.
[40] Shulhan Arukh, Orah Hayim 75:6.

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apt.[41] Indeed, as Rabbi Heller concedes as well, a Zoom minyan carries a higher potential of viewing individuals in an inappropriate context than when in a physically public place.[42]

Rabbi Heller addresses sight that is aided through eyeglasses or a telescope, with the obvious analogy to a computer screen. He cites contemporary poskim who assert that "eyeglasses do not impede the performance of almost any mitzvah."[43] But the question is not whether one may use assistive technology. We permit the use of a microphone, just as we would the use of hearing aids. These are no different than eyeglasses or contact lenses in assisting one's hearing or sight of the agent of public worship. Rabbi Rachel Salston has suggested to me that, ironically, an internet broadcast could reach a remote worshipper faster than a sound system can transmit to the rear of a large sanctuary. However, in my opinion it remains the physical proximity to the service that is critical, not the aided transmission of sound or video. One attending a live football game, for example, will likely require the aid of the stadium's sound system and large screens to both hear and see what is happening on the field. However, watching a game live on television from one's living room is never the same as being present in person. One is connected with the event in person when one is in physical proximity, no matter how high up one's seat is and whether or not one can hear with one's unaided eyes and ears, in a way that cannot be duplicated when watching remotely.[44] So too, a remote connection to a minyan or service is better than nothing, but it is not a substitute for being in-person.[45]

Rabbi Heller acknowledges the distractions while one is on a device.[46] I would add to that that one can easily keep one's video on, while muted and working in other "windows," "present" only so that one is "seen" by the others and thereby count in the minyan. That kind of non-presence is of a far greater magnitude than sitting in a pew and reading a book (or even checking one's email on one's phone while in a minyan). The potential distractions while being connected to a minyan via the internet are sufficient to oppose constituting a minyan through the internet when not a case of she'at dehak.

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[41] Rabbi Heller raises the sensitivity that "as modern readers we cannot ignore that this and many other sources approach this question…place a focus on how men react to women's bodies, and must acknowledge the concerns raised by that focus" (Heller, "Counting a Minyan," p. 24, n. 91). While I am in no way disagreeing with this remark, I would suggest that the halakhah is concerned with the distraction of exposed genitalia in general during prayer, whether male or female. The immediately previous siman in the Shulhan Arukh (Orah Hayim 74) addresses when one's own genitalia are exposed. I would suggest that this halakhic concept might be traced back to the law in Exodus 28:42 mandating that kohanim wear "linen breaches to cover their nakedness." The Shulhan Arukh first mentions one's own nudity and then the sight of the nudity of others. The concern is that nudity is inappropriately distracting to one engaged in reciting the Shema and prayer.

[42] Heller, "Counting a Minyan," pp. 26-27, on "well known cases" in the Atlanta community.

[43] Ibid., p. 25.

[44] Full disclosure: the author is a long-time New York Jets season ticket holder.

[45] As another example of the inferiority of remote transition, I recently returned from a rabbinic solidarity mission to Israel following the hostilities with Hamas (I was in Israel the last week of June 2021). While I had seen video and photographs of the destruction caused by the rockets hitting Israel from Gaza, nothing could prepare me for the experience of going to Ashkelon and Sderot and seeing the destruction of homes and buildings with my own eyes (albeit through my eyeglasses).

[46] Heller, "Counting a Minyan," pp. 34-36.

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On the Use of She'at Dehak (A Pressing Circumstance)

While this paper does not argue that a Zoom minyan is permitted during a time of emergency (besides the summaries of the "CJLS Guidance" and my own earlier position), neither does it argue that one could not employ a Zoom minyan as a she'at dehak. The determination of a she'at dehak is ultimately up to the individual rabbi. It could be due to any number of circumstances, such as continuing concerns regarding the spread of Covid-19, a road closure at the synagogue, a burst pipe and flooding in the synagogue, bad weather where the municipality asks residents to stay off the roads, or a military attack or, God forbid, another pandemic. In all such circumstances, the individual rabbi may decide to organize a Zoom minyan because of the she'at dehak. This paper would not oppose that, only arguing that any such permission must be temporary, limited to the duration of the specific emergency.

Following this reason, I cannot support the proposal offered by Rabbi Heller that a she'at dehak might be defined as "a community which faces other emergent conditions, including not being able to constitute a regular minyan otherwise." and that in such circumstances a minyan can be formed "via visual virtual means."[47] While rabbis should be optimistic regarding the potential of their communities to grow, nevertheless, a determination that a community is unable to maintain a minyan is descriptive of the community, and as such is not a timely emergent circumstance. Were we to support such a leniency, the pressure on rabbis to just "open a Zoom link" whenever a minyan were needed would be extraordinary. Any time a minyan failed to form would be deemed a pressing situation, a she'at dehak. The distinction between communities that really cannot form a minyan and those that can if they tried a little harder would prove impossible to discern. And as has been pointed out by colleagues on the CJLS, large congregations also have trouble forming minyanim. As a practical matter, Rabbi Heller's suggestion would likely be used to permit a virtual minyan whenever an in-person minyan fails to form.

Rabbi Heller and I disagree on the application of the concept of she'at dehak, "a pressing circumstance." Rabbi Heller would apply the concept, in this case, to a congregation that has trouble constituting a minyan in person. I would apply it only to temporary circumstances.[48] In his responsum on the end of the Covid-19 pandemic, Rabbi Heller defines a she'at dehak as "an expansive category within Jewish law. The essence of she'at hadehak is that in a pressing, but by no means life or death situation, one may rely on a minority (typically more lenient) view that is normally not accepted as normative."[49] While I agree that a she'at dehak need not refer to a life-or-death emergency, I do contend that it can only properly apply to a limited temporary circumstance. The very words *she'at,* meaning "hour of" or "circumstance of" and *dehak,* meaning "pressing" or more loosely "special case" seem to indicate that the term, as an halakhic tool, cannot be used to apply to a general non-temporary circumstance. While a

[47] Heller, "Counting a Minyan," p. 48.

[48] I am grateful to Rabbi Barry Leff for encouraging me to clarify this distinction between my and Rabbi Heller's conclusions.

[49] Heller, "Are We There Yet?" p. 3.

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congregation or its rabbi might view the inability to constitute a minyan in person as temporary, that is not the same as a circumstance of specific duration where the concept of she'at dehak would be more properly applied.

Rabbi Heller, in his earlier responsum, presents the key halakhic sources that define the concept of she'at dehak. They merit review here, as the way we read them fundamentally effects the practical differences between Rabbi Heller's position on the "Zoom minyan" and my own.

Rabbi Heller cites the gemara in Brakhot where the story is told of two rabbis who got drunk at a wedding and when they awoke it was already dawn and they had not recited the evening Shema. Rabbi Joshua ben Levi permits them to say the evening Shema after dawn as a she'at dehak.[50] The gemara relates this to the Mishnah's testimony about Rabban Gamaliel who permitted his sons to recite the Shema after midnight when they came home late from a wedding.[51] In both cases, the pressing circumstance is that one came home late from a wedding (i.e., drunk from a party), and in such a case the more lenient position, that both Rabbi Joshua ben Levi and Rabban Gamaliel disagreed with in general, was applied by them in these special circumstances. Clearly, the mishnah and gemara are reporting a specific circumstance of limited duration. The two rabbis who came before Rabbi Joshua ben Levi, or the sons of Rabban Gamaliel, did not (we may assume) generally get drunk at parties and arrive home just before sunrise having forgotten to recite the evening Shema. The leniency that permitted them to recite the evening Shema beyond its regularly set duration was limited to that one evening. That is not analogous to a community that cannot form a minyan in person on a regular basis.

Rabbi Heller next cites another application of the principle of she'at dehak by Rabbi Joshua ben Levi, this time ruling on the validity of a get (bill of divorce) that was written in the day but only signed at night.[52] But in this case again, the circumstance is limited and pressing. The get is being challenged, and a specific woman's status was in question. Rabbi Joshua ben Levi applied a leniency as a she'at dehak, but in general did not hold that a get may be written during the day and then signed at night. Rabbi Joshua ben Levi might not have applied the leniency had the relevant parties been present to execute a new get properly drawn up and executed at one time. The source shows that the principle of she'at dehak may be used in special circumstances in order to avoid women becoming agunot ("chained" to a marriage that is essentially over save for the technicality of the lack of a proper get). Its application is limited to specific cases, not to applied to general practice. The analogy can hardly be applied, in my opinion, to the case of a community that regularly finds it difficult to form a minyan.

More suggestive to the question before us is the halakhah that Rabbi Heller cites about the application of she'at dehak to bread baked by non-Jews on Shabbat. The general principle is that one may not ask a non-Jew to perform a labor for us on Shabbat that is forbidden for Jews to perform. The Shulhan Arukh states: פת שאפה עכו״ם לעצמו בשבת, יש אוסרים ויש מתירים; ובשעת הדחק או לצורך מצוה, כגון סעודת ברית מילה או לצורך ברכת המוציא, יש לסמוך על המתירים—"Bread baked by a non-Jew for himself on

[50] Babylonian Talmud, Brakhot 9a; Heller, "Are We There Yet," p. 3.

[51] Mishnah Brakhot 1:1.

[52] Babylonian Talmud, Gittin 18b; Heller, "Are We There Yet?" p. 3.

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Shabbat: there are those who forbid and those who permit [a Jew to eat it on Shabbat]; but in a she'at dehak or for the sake of a mitzvah, for example, the meal following a circumcision or in order to say a Motzi [which is required to fulfil the mitzvah of holding a Shabbat meal], one may rely on the lenient position."[53] Here, it appears that the principle of she'at dehak can be applied to the regular mitzvah of saying a Motzi on Shabbat, which might be analogous to forming a minyan. However, I would argue that it would be highly unusual for one to not have procured sufficient bread to make a Motzi on Shabbat or celebrate a brit milah. The *Sitz im Leben* (real life circumstances) of this halakhah only make sense as a case where one was not able to procure bread because of some emergency or other special circumstance. In general, one always prepares to have bread for Shabbat, as symbolized by the two challah loaves referring to the command in the desert to harvest an extra portion of manna on Friday for Shabbat.[54] The lack of bread on Shabbat in this particular halakhah was of limited duration. The Shulhan Arukh does not say that the non-Jew can always bake fresh bread for Jews on Shabbat because we like fresh bread. Additionally, while one might argue here that the Shulhan Arukh extends the use of she'at hadehak to any case of צורך מצוה, of the "need for a mitzvah" (which might be applied to other mitzvot like forming a minyan), I would argue that a close reading of the text proves the opposite. The Shulhan Arukh separates the term צורך מצוה, the need of a mitzvah, from שעת הדחק, a pressing need, with the word או, that is, "or." One may apply the leniency of bread baked by a non-Jew on Shabbat because of a she'at hadehak *or* for the sake of a mitzvah like the meal following a brit milah or to say Motzi at the Shabbat meal. Rather than understand the meal following the circumcision or Motzi on Shabbat as examples of a she'at dehak, I contend that they are offered as examples of צורך מצוה, "the need for a mitzvah," which was one of the two categories where this leniency could be applied. The other category, she'at dehak, is not defined by the Shulhan Arukh, probably because it could be any other kind of pressing circumstance where there was insufficient bread to eat on Shabbat. Perhaps the phrasing of the halakhah was meant to tell us that the leniency of permitting bread cooked by non-Jews on Shabbat could be applied for the purely ritual purposes of saying Motzi, even if there were no real exigent circumstances of insufficient food to eat. Nevertheless, in both cases the circumstances were unusual, limited to the specific shortage of bread on a specific Shabbat, not the general convenience of partaking of fresh bread. Rabbi Heller might have argued that a minyan might be constituted virtually לצורך מצוה, for the sake of a mitzvah, rather than בשעת הדחק, in a pressing need. I assume I would still disagree with his conclusion were he to argue that, but he does not. The fact that the Shulhan Arukh separates "for the need of a mitzvah" from "in a pressing need" would seem to suggest that ritual requirements short of other pressing concerns fall under a different category of special leniency While suggestive for our case, I do not see how this source can be used to argue that a community that regularly has trouble forming a minyan in person is a she'at dehak.

Finally, Rabbi Heller cites the Rema who permits a wedding to be held on Shabbat when it began late because of a dispute and to then delay the wedding would have caused embarrassment to the bride and groom.[55] The she'at hadehak was the delay of the wedding, the potential embarrassment, and the

[53] Shulhan Arukh, Orah Hayim 325:4; Heller, "Are We There Yet?" p. 3.

[54] See Exodus 16.

[55] Rema to Shulhan Arukh, Orah Hayim 339:4; Heller, "Are We There Yet?" p. 4.

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potential loss of funds. The Rema was certainly not saying that one can regularly hold weddings on Shabbat. He applied a leniency in this case because of a specific circumstance, not a general occurrence.

Rabbi Heller summarizes his own discussion of she'at dehak as follows:

> Types of situations that might be seen as she'at hadehak might include a power outage, running out of food, a situation of severe conflict, or where people will be embarrassed if a solution is not found. There is always a temptation to take a such a precedent and stretch it as far as it might go. However, she'at hadehak opinions should not be used as a primary plan or a "default" option. They should only be relied on by individuals or communities facing unusual circumstances. They reflect how far we can stretch when faced with a situation that is beyond our control and not the ideal.[56]

I fully agree with this assessment of the principle of she'at dehak. The principle is meant to be applied, as Rabbi Heller explains, to "unusual circumstances," and reflects the flexibility that the halakhah grants to the individual rabbi to a "bend the rules" when necessary. A community that regularly has trouble forming a minyan is not facing an "unusual circumstance." For a circumstance to be "unusual" it must be of specific limited duration and occurrence. A recurring situation, such as difficulty to constitute a minyan in person, especially when applied to communities that regularly have trouble doing so, would not seem to satisfy Rabbi Heller's standard for the application of she'at dehak in his earlier responsum. In my opinion, the principle of she'at dehak clearly cannot apply.

Practical Conclusions

There is no doubt that the practice of "Zoom minyan" over the pandemic made public prayer more available and accessible to so many. Once the end of the emergency is reached, our communities should adopt themselves to employ technology to continue to make services and other synagogue programming accessible to those who are either in a different geographical location or unable to attend in person for other reasons (such as health, occupation, etc.). A livestream or other internet connection can be made available. When Rabbi Reisner's responsum was approved twenty years ago his decision that one could say Kaddish remotely was a matter of theory for far too many. Now, it is very practical, and we are in a position, given our experience with technology over the course of the pandemic, to fulfill the potential of Rabbi Reisner's responsum.

Nothing in this responsum is intended to address the issue of the use of technology on Shabbat. Rabbi Heller's 2020 responsum on livestreaming on Shabbat thoroughly explores those issues, and may be further supplemented by forthcoming work.[57] In fact, many rabbinic colleagues have been eager to

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[56] Heller, "Are We There Yet?" p. 4.

[57] See also the concurring and dissenting opinions to Rabbi Heller's paper on livestreaming on Shabbat, on the CJLS website at OH 340:3.2020. Any forthcoming work on the Shabbat question will be at OH 340:3.

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stop using Zoom on Shabbat, but interested in retaining it during the week to maintain a minyan. That is the specific question addressed here.

Communities that cannot form a minyan without Zoom can join a community that has an in-person minyan and broadcasts through Zoom or other platforms.[58] The "host congregation" can use a large screen and mics to ensure that those joining virtually feel a "part" of the minyan as much as possible. The fostering of such relationships between congregations would serve to recreate a precedent of older times when the closest larger communities would take on responsibilities for smaller communities. Smaller and larger communities could find ways, in addition to virtual minyan access, to support each other, such as extension of Jewish educational and clergy services.

While I made note in this paper of my support for a "Zoom minyan" as a she'at dehak during the time of Covid-19, the conclusions of this paper are not dependent on one's position regarding that question. My argument is that whether or not the "Zoom minyan" was permitted during the public health emergency, it should not be permitted when the emergency is alleviated. Rabbi Heller's responsum, approved earlier this year by our Committee, gives maximal discretion to the individual rabbi and community in determining when the state of emergency is lifted.[59] Once the individual rabbi and community make that determination, the she'at hadehak that would permit constituting a virtual minyan is no longer in effect.

A note on shiva: Throughout the time of the pandemic, I worked with families who did not want a "Zoom shiva" and families who did. For those who did, the virtual minyan was quite powerful as it provided an opportunity for consolation of the mourner by friends and relatives from across the world who would not have been able to visit in person. However, I would not support the continuation of a Zoom shiva minyan beyond the time of emergency because of the concern that if a community knows that it can form a minyan over Zoom there will be little incentive to visit the mourner in person, and as comforting as a Zoom shiva can be, it is no substitute for visiting a mourner in person, sitting with them, looking at the pictures of the deceased, looking together at a wedding or bar/bat mitzvah album, and sharing a cup of coffee. Indeed, synagogues build communities of support by teaching its members how to make "shiva calls." That being said, the rabbi can also facilitate a "Zoom shiva chat" or even a more formal "Zoom shiva memorial" so that the mourner can benefit from how we have learned to utilize technology. We can facilitate that without using Zoom to constitute the minyan.

Should an individual mourner prefer a Zoom shiva minyan, either because he or she is uncomfortable with mixing because of Covid-19 or other health issues even though the state, the rabbi and the community have lifted the state of emergency, or for any other reason, the rabbi might still opt to facilitate such a virtual minyan for the mourner with the understanding that the rabbi's authority as mara d'atra does not extend into the private homes of our members. When in someone else's home, we can respect a variant approach to the question of Zoom minyan, especially one that is equally validated by our Committee. Whether the rabbi is comfortable leading such a minyan or not is an individual

[58] As suggested by Rabbi Robert Scheinberg. See Heller, "Counting a Minyan," p. 40.

[59] See Heller, "Are We There Yet?"

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decision, as the chief role of the rabbi in this context is as a pastor not as an halakhic authority. I suggest that a community would be able to make a distinction between what a rabbi permits for the sake of consolation of a mourner in a house of mourning and what a rabbi permits for the synagogue itself. I have often found myself leading a shiva minyan in front of a table containing cold cuts and cheese on the same platter. In the case of a Zoom Shiva, the family has chosen an alternative approach within our Movement. If we learn to live with their choice of menu, *kal vahomer* (all the more so) should we respect their choice of halakhic approach to the constitution of a minyan.

While I contend that a congregation can make the distinction between a Zoom minyan hosted by a private home (whether a house of mourning or not) and the synagogue, I do not believe that a distinction would hold between permitting a Zoom minyan on weekdays only but not Shabbat and festivals. Once a minyan is permitted via the internet on a weekday, the pressure on the rabbi to count the individuals connected on Shabbat and holidays will be significant, unless of course one does not utilize the internet connection on Shabbat.

A note on the Mourner's Kaddish: The 2020 "CJLS Guidelines for Minyanim in a Time of Covid-19" issued by Rabbis Dorff and Barmash details an option to permit a Zoom minyan for the recitation of Mourner's Kaddish only. There are significant sources cited such as Mishnah Megillah 4:3 that omit Kaddish from the list of liturgies that require a minyan, as well the decision by Rabbi Yitzhak Zilberstein permitting the recitation of kaddish where people are scattered in a field (i.e., a cemetery) but can still see each other.[60] Besides the fact that the omission of Kaddish from the list in the Mishnah, as well as from the Talmud, is the definition of an "argument from silence," the precedent of Yitzhak Zilberstein still assumes physical proximity. That precedent is useful as a she'at dehak when we are officiating at a burial and are lacking a minyan. That context might be extended to a Zoom minyan over the course of a pandemic, as permitted as an option in Rabbi Barmash's responsum, "How to Recite Mourner's Kaddish While Physically Distancing During a Pandemic."[61] But that context does not extend, it seems to me, to general practice. Besides, the absence of Kaddish in the Mishnaic and Talmudic lists of *devarim shebekedushah* that require a minyan is compensated for by the Shulhan Arukh, which places the laws of the constitution of a minyan specifically in the context of saying Kaddish. The very title of Siman 55 in the Shulhan Arukh is "Laws of Kaddish."[62] While one might consider a burial where one could not gather a

[60] Mishnah Megillah 4:3; Babylonian Talmud, Megillah 23b; Yitzhak Zilberstein, Hashukei Hemed to Brakhot 21b (p. 135).

[61] Barmash, "How to Recite Mourner's Kaddish," p 2.

[62] Granted, one might distinguish the Mourner's Kaddish from the statutory kaddishim like Hatzi Kaddish and Kaddish Shalem, especially as the Shulhan Arukh, while discussing minyan in the context of Kaddish, is not specifically discussing the Mourner's Kaddish. However, it seems to me that such a distinction might be difficult to maintain. In some congregations the Kaddish Derabbanan is considered a Mourner's Kaddish. In a shiva minyan and on Tisha b'Av we omit the Titkabel line making the Kaddish Shalem essentially a Mourner's Kaddish. Would such kaddishim be considered statutory and require an in-person minyan, or non-statutory and be permissible for a "Zoom minyan"? Besides the difficulties posed by separating the laws for Mourner's Kaddish from the other kaddish doxologies, we should also consider that allowing for a mourner to say Kaddish is often a chief motivation for attending minyan. While Rabbi Heller writes that "It is unfortunate that for some, Kaddish has become the 'tail that wags the dog' for participation in daily minyan," (Heller, "Counting a Minyan," p. 42), we should not be too

minyan as a she'at dehak and include virtual participants in a minyan to say Kaddish, one should not apply that leniency, or others for a cemetery, to general use.

Beyond the halakhic arguments for or against an internet minyan, the most significant "communal" concern is the potential harm to the nature of community. While our tradition teaches us that God is accessible through prayer in any place and any time (even through an "iron curtain"), nevertheless we gather for prayer not in a "house of God" but in a "house of assembly" a *bet kenesset.* In an age of assimilation and waning Jewish identity, the institution of the synagogue plays a critical role in bringing Jews together. One does not need a minyan to pray. What one does need a minyan (and a synagogue) for is to meet other Jews and find community. Virtual extensions of synagogue services and programs should be utilized as useful tools, but never as a replacement for the meeting of each other *panim el panim,* face-to-face.

PSAK DIN

While some permit a remotely constituted minyan in a she'at dehak (pressing circumstance)—in this case the crisis of the Covid-19 public health emergency—the circumstance of the she'at dehak must be of a temporary nature of specific duration, and as such cannot be extended to a community that has trouble forming a minyan. In "normal" circumstances, the conclusion of Rabbi Reisner's responsum from 2001 is sustained that one may join a minyan remotely to fulfill one's obligations but that a minyan cannot be constituted remotely.

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quick to eliminate motivations for attendance, even if "unfortunate." And while forming a minyan to pray should support positive motivations, the instinct to support mourners and provide community for them is not at all negative (while still "unfortunate" for the mourner). Rather, such an impulse speaks to the importance of in-person community which we should be careful not to harm.

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