

With Righteousness and With Justice, With Goodness and With Mercy

Options for Egalitarian Marriage Within Halakhah

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*Approved on April 14, 2020, by a vote of 9-7-5. Voting in favor: Rabbis Aaron Alexander, Elliot Dorff, Susan Grossman, Judith Hauptman, Gail Labovitz, Daniel Nevins, Deborah Silver, Ariel Stofenmacher, and Ellen Wolintz-Fields. Voting Against: Rabbis Noah Bickart, Baruch Frydman-Kohl, David Hoffman, Jeremy Kalmanofsky, Jan Kaufman, Micah Peltz, and Avram Reisner. Abstaining: Rabbis Pamela Barmash, Joshua Heller, Robert Scheinberg, David Schuck, and Iscah Waldman.*

“What are we to do when the words and gestures that effect marriage do not reflect but distort the event being celebrated in the life of the participants and their community?”<sup>1</sup>

**שאלה:**

- Is there a possibility of egalitarian marriage and divorce for differing-sex couples within a halakhic framework? That is, is there a possibility to make *kiddushin* – and the process of divorce and *get* by which it is terminated – (more) mutual? Alternately, might there a way for a male-female Jewish couple to create a halakhically binding relationship by a means other than *kiddushin*? Relatedly, is it possible to have a ceremony that could make a binding marriage between any two Jewish persons, regardless of the gender identification of either one?
- If a male-female Jewish couple marries in a Jewishly-oriented ceremony other than *kiddushin*<sup>2</sup> – what is the halakhic status of their relationship? Most particularly, if the couple were to decide (individually or mutually) to sever the relationship, should the husband be required, at least out of doubt, to give the wife a *get*? That is, are we to be concerned for the possibility of *kiddushin* or *kiddushin*

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1. Rachel Adler, *Engendering Judaism: An Inclusive Theology and Ethics* (Philadelphia, Jerusalem: The Jewish Publication Society, 1998) 190.

2. Two proposals in particular will be discussed and endorsed below in the body of the teshuvah as options for Conservative Jews. For a review of some additional possibilities that have also been proposed in the growing literature on this topic (and for reasons why I have chosen not to include them here), see Gail Labovitz, “Behold You Are [Fill in the Blank] to Me: Contemporary Legal and Ritual Approaches to *Qiddushin*,” *Love, Marriage, and Jewish Families Today: Paradoxes of the Gender Revolution*, Ed. Sylvia Barack Fishman (Waltham, MA: Brandeis University Press/University Press of New England, 2015) 221–39 and Gail Labovitz, “‘With Righteousness and with Justice’: To Create Equitable Jewish Divorce, Create Equitable Jewish Marriage,” *Nashim* 31 (2017): 91–122.

*misafek*? Is there a means to ensure that a differing-sex couple who wish to marry by a Jewish means other than *kiddushin* will have their wishes respected if their marriage should end, so that they do not need to go through the *get* process?

- Moreover, as a consequence, if no *get* were given or received, could either member of the couple be remarried by a Conservative rabbi (via *kiddushin* or another ceremony) without violating the 1975 Standard of Rabbinic Practice that states: “A rabbi may not officiate at the marriage of a divorced man or woman if a *get* or *hafka*’at *kiddushin* was not obtained”?<sup>3</sup> If no *get* is required, must the rabbi or other officiant to the remarriage nonetheless insure that some form of appropriate ritual severance of the original ceremony (whatever it might be) was performed, and how should a rabbi proceed if no such severance had been previously effected?

### Outline of the teshuvah to follow:

This teshuvah falls, broadly, into three parts:

First, **Section I**: Introduction, **Section II**: Are We Limited to Kiddushin? (Part 1), and **Section III**: Are We Limited to Kiddushin? (Part 2) may be considered the “theoretical” components of the teshuvah and are meant to lay out the background and scope of the issue this teshuvah intends to address. Here I:

- a) delineate the difficulties I see in the current structure of *kiddushin* and in the possibility of redeeming it as an egalitarian practice;
- b) discuss the dichotomy in legal sources between *kiddushin* and *z’nut*, the tendency within halakhah to subsume marriage-like relationships into the rubric of *kiddushin*, and the Conservative stance on civil marriage;
- c) consider the possibility of a third alternative beyond the *kiddushin/z’nut* dichotomy, particularly through the cases and categories of *yeduah b’tzibbur* and *pilagshut* within halakhah.

Next, **Section IV**: Options for Jewish Marriage Without *Kiddushin* comes to the heart of this teshuvah. Here I review and endorse two halakhic mechanisms to create a form a Jewish marriage in which two differing-sex Jews (and indeed two Jews of any gender identity) can marry and if necessary divorce as legal equals, addressing the textual bases and the means to establish the binding force of each:

- a) “*Hitkadshut*”/setting oneself aside – a method which adopts some of the language and form but not the legal force of *kiddushin*;
- b) *Brit Ahuvim*/partnership – a new model based in an entirely other realm of halakhah.

A series of additional ritual and other halakhic concerns that attend a marriage by means other than *kiddushin* are addressed in **Section V**: Additional Details on Effecting and Dissolving Alternative Forms of Halakhic Jewish Marriage:

- a) A blessing for the central legal acts of these ceremonies (i.e., a substitute for *birkat erusin*)
- b) Additional statements in the ceremony and documentation for differentiating this ceremony from *kiddushin*;
- c) Documents that accompany and constitute the marriage;
- d) The means of (equitable) dissolution of such marriages;

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3. *CJLS Summary Index*: Marriage and Divorce, “Standards of Rabbinic Practice” (item 1), 9:13.

- e) Making the marriage conditional;
- f) Applicable Standards of Rabbinic Practice.

The body of the teshuvah then concludes with **Section VI**: Conclusion/*P'sak*.

Finally, two appendices spell out the actual details of performing and documenting a marriage by one of the approved methods here. **Appendix I** is an outline of a wedding ceremony from start to finish, for both *hitkadshut* and *brit ahuvim*. **Appendix II** includes the relevant documents needed to constitute the marriage, establish conditional marriage (if separate from the marriage document itself), and effect/document divorce.

תשובה:

## I. Introduction

Since the rabbinic period, the core act that creates and binds a Jewish heterosexual marriage has been known as “*kiddushin*.” Marriage through this mechanism is already presupposed in the earliest layers of rabbinic legal literature, and indeed serves as the opening to m. Kidd. 1:1:

האשה נקנית בשלש דרכים, וקונה את עצמה בשתי דרכים. נקנית בכסף, בשטר, ובביאה.

A woman is acquired in three ways, and acquires herself in two ways. She is acquired by money, by document, and by sexual intercourse.

Although this mishnah uses the verb ק,ג,ה (to acquire) here rather than ש,ד,ק (to betroth/set aside<sup>4</sup>), other sources both tannaitic and amoraic make clear that the two are used and understood as being basically equivalent and interchangeable. Note, as just one example, the roughly contemporaneous parallel passages expanding on the rule of m. Kidd. 1:1, in t. Kidd. 1:1-3:

האשה נקנית בשלשה דרכים... בכסף, בשטר, ובביאה. בכסף כיצד? נתן לה כסף, [או שוה כסף], אמ' לה הרי את מקודשת לי, הרי את מאורסת לי, הרי את לי לאימתא, הרי זו מקודשת.

A woman is acquired in three ways...by money, by document, and by sexual intercourse. By money how (*is the acquisition effected*)? He gave her money [or the equivalent of money], (*and*) he said to her “Behold, you are betrothed (*m'kuddeshet*) to me,” (*or*) “Behold, you are betrothed (*m'oresset*) to me,” (*or*) “Behold, you are a woman/wife to me,” she is *m'kuddeshet*. (t. Kidd. 1:1)

ובשטר? אפי' כתב על חרש ונתן לה, על נייר פסול, ונתן לה, הרי זו מקודשת.

And by document?...Even if he wrote (*the document*) on a potsherd and gave it to her, (*or*) on blemished parchment and gave it to her, she is *m'kuddeshet*. (t. Kidd. 1:2)

ובביאה? כל ביאה שהיא לשם קדושין, מקודשת.

And by sexual intercourse? Any act of sexual intercourse that is for the sake of *kiddushin*, she is *m'kuddeshet*. (t. Kidd. 1:3)

Since the Tosefta is elaborating on the three methods of *kinyan*, *m'kuddeshet* in these passages must serve to indicate the state of a woman for whom such *kinyan* has occurred; that is, *m'kuddeshet* defines and is apparently synonymous with *nikneit*.<sup>5</sup>

The root ש,ד,ק in the marital context is frequently translated as “sanctify.” I choose not to do so, however, because – as I have argued at length elsewhere – halakhic marriage, including *kiddushin*, is structured metaphorically and legally as an act of purchase and acquisition of property.<sup>6</sup> *Kiddushin*,

4. See just below regarding this translation.

5. Indeed, even in the Mishnah, the parallels to m. Kidd. 1:1 found in m. Edu. 4:7 and m. Ket. 4:4 both substitute ש,ד,ק for ק,ג,ה. And see my further discussion of this point in Gail Labovitz, *Marriage and Metaphor: Constructions of Gender in Rabbinic Literature* (Lanham, MD: Lexington, 2009) 69–73 and/or Gail Labovitz, “The Language of the Bible and the Language of the Rabbis’: A Linguistic Look at Kiddushin, Part 1,” *Conservative Judaism* 63.1 (2011): 32–37.

6. Labovitz, *Marriage and Metaphor*. See especially pp. 2–11 for a discussion of “metaphor” as I use it here, and 38–40 introducing the significance of cognitive metaphor theory to my understanding of rabbinic thinking on marriage. For discussion of *kiddushin* in particular, see also Labovitz, “The Language of the Bible and the Language

moreover, is ritually and legally a unilateral act in which roles, and indeed legal agency vs. passivity, are assigned by gender.<sup>7</sup> *Kiddushin* is primarily performed by the male participant: in what has become common practice, the groom presents the bride with an item of value (a ring) and states “You are set aside (*m'kudeshet*) to me.” He thereby changes her status and “betroths” her to himself, such that she is now exclusively in relationship to him and (sexually) forbidden to any other man; she does not similarly change his status, nor does she acquire a right to sexual exclusivity from him.<sup>8</sup> This is not to say that the will and intent of the woman are immaterial, as b. Kidd. 2a-b makes clear that the woman’s consent is necessary; her consent, however, need only be indicated passively, through her acceptance of the item of value or document that effects the *kiddushin*.<sup>9</sup>

Note also that t. Kidd. 1:1 actually allows several options of what the man might say to the woman, including but not limited to “you are *m'kudeshet* to me.” What links valid statements is that in each case it is the man who makes a statement about the woman’s (now changed) status, indicating her exclusivity to him and/or his control over her and/or her status as his betrothed or wife.<sup>10</sup> Only regarding a betrothal in which the man is the sole and fully active party in initiating the betrothal and stating the intent that his actions change her status and create a betrothal – a principle which the amora Rav Pappa (b. Kidd. 5b) and subsequent halakhic literature summarized under the rubric of “נתן הוא ואמר הוא,” “he gave and he said” – is it absolutely certain that a binding betrothal has taken place.

One particularly glaring practical problem flows from the nature of unilateral marriage through *kiddushin*: it is directly tied to the legal nature of divorce. Because marriage is structured as a unilateral form of acquisition, it is the acquirer, i.e., the husband, who must relinquish his acquisition. *Kiddushin* and divorce mirror each other: divorce too is a unilateral act in which the husband presents his (about to be ex-) wife with the *get*, which explicitly reverses and releases what is enacted at *kiddushin*: “Behold

of the Rabbis”, and Gail Labovitz, “‘He Forbids Her to All’: A Linguistic Look at Kiddushin, Part 2,” *Conservative Judaism* 63.2 (2011): 27–48.

7. This further means that *kiddushin* is based on heteronormative assumptions, and, as will be seen below shortly, this creates challenges both practical and conceptual for the possibility of adapting it for same-sex marital unions. I will also pursue this point further when I come to a discussion of alternate marriage ceremonies.

8. This is a legacy of Judaism’s polygynous roots in the Bible and early rabbinic halakhic literature. Technically, it remains the case despite the ban on polygyny (for Ashkenazi communities) attributed to Rabbenu Gershom Maor ha-Golah; notably, the decree does not negate the legality of a man’s additional marriage undertaken in violation of the ban. Were an already married man to enact any of the valid rites of *kiddushin* with an unmarried woman (whom he is otherwise legally able to betroth), the *kiddushin* would be binding (see *Darkhei Moshe* to Tur E.H. 44 and *Beit Shmuel* 11 to Shulhan Arukh E.H. 44:7), and all the more so a sexual relationship that he engages in with a woman other than his one legal wife does not fall under the legal, Toraitic definition of adultery unless that woman is married to another man. Moreover, while the conditions for lifting the ban on a man are not meant to be easily met, nonetheless the possibility does exist, and is encoded even in one of the earliest known reports of the *takanah*, from the Maharam of Rothenberg (Responsa, Part 4 [Prague printing], *siman* 1022; see also *simanim* 153, 866, and 1015). The *takanah* did not, however, include any possibility of release for the wife except by a divorce freely granted by the husband, even if he violated the *takanah* or otherwise behaved in a way unbefitting to Jewish husbands.

9. A number of proposals are now in use and more widely under discussion that suggest responses the bride can make to actively indicate her willing acceptance of the *kiddushin*, including within the Orthodox world. See, as just a few examples, Beverly Gribetz and Ed Greenstein, “Something Old, Something New,” *JOFA Journal* 1:3 (1999), 1 & 6, and the article “Thirteen ways to enrich your wedding” (no author given) in the same issue, 2; Rabbi Dov Linzer, “*Ani Li’Dodi vi’Dodi Li*: Towards a More Balanced Wedding Ceremony,” *JOFA Journal* 4:2 (2003), 4-7.

See also the discussion of “mutualized” *kiddushin* and/or double ring ceremonies below in this Introduction.

10. See also b. Kidd. 6a for additional expressions that are certainly or possibly valid. Moreover, context matters – when a man makes a statement of this sort to a woman, it must be reasonable for the woman to understand that the man might intend a betrothal, as for example when the two have already been discussing matters related to marriage. Thus, if a man were to say such a phrase to a woman in the context of an actual wedding ceremony, the intent would be considered clear and the *kiddushin* binding (I will return to this point below).

you are permitted to any man.” Again, this act and formula has its origins in the earliest of rabbinic texts (m. Gitt. 9:3), and despite much legal development in the interim, has not significantly changed its underlying basis. The divorce must happen at the husband’s free will and with his full consent (m. Yev. 14:1, t. B.B. 11:5), a criterion that has, if anything, been strengthened over time such that any suspicion whatsoever of coercive pressure brought to bear may be considered by some arbiters to invalidate the *get*.<sup>11</sup> Her consent to divorce, on the other hand, is not required in classical sources (m. Yev 14:1, t. BB 11:5).<sup>12</sup> Already in rabbinic times then, tannaim and amoraim were aware of the phenomenon of the *agunah*, a woman trapped in her married status because her husband was unable to freely give a *get* (due, for instance, to mental instability) or because his whereabouts were unknown (the man who had disappeared or whose death could not be definitively confirmed); neither the woman nor the court had recourse to end the marriage without the husband’s participation. In modern times in particular, there has also arisen another type of *agunot*, sometimes distinguished by the term “*m’suravot get*.” These are cases in which the *get* is withheld by the (ex-) husband as a matter of spite or extortion, thereby preventing the wife from remarrying or even having another relationship under Jewish law. Any relationship she does enter will be deemed adulterous (with the additional result that she may be prohibited from marrying the second man if and when a divorce is forthcoming and/or children born to the relationship will be deemed *mamzerim*<sup>13</sup>).

Indeed, in their paper, “Rituals and Documents of Marriage and Divorce for Same-Sex Couples,” Rabbi Elliot Dorff, Daniel Nevins, and Avram Reisner discussed several reasons why they felt it problematic to extend the model of marriage through *kiddushin* to same-sex couples seeking to marry in a Jewish ceremony, citing these very concerns about the unidirectional (and gendered) nature of this method, and the resulting suffering created when a man refuses to grant his wife a *get*.<sup>14</sup> It is true (as Dorff, Nevins, and Reisner also delineate) that there are multiple ways in which the Conservative Movement and the CJLS have in the past allowed for more egalitarian expressions within the traditional wedding ceremony and have legislated means to eliminate in practice the most egregious abuses that can flow from the model of *kiddushin*, such that the material dangers – for women in particular – are no longer a significant social problem in our communities.<sup>15</sup> Nonetheless, the fundamentally unequal legal

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11. See, as a prime example – or even instigator – of this trend, the view of Rabbenu Tam as found in Tosafot to b. Ket. 63b, ד”ה אבל אמרה מאיס עלי לא כייפינן לה.

12. It is true that according to another decree attributed to Rabbenu Gershom (again, see Responsa of the Maharam of Rotherberg, Part 4, *siman* 1022), a woman must also accept the *get* of her own free will. However, some remedies exist for a man whose wife refuses to accept a *get*, while as already noted above the opposite is less, if at all, the case; similarly, the severity of the penalties that will result from a relationship he conducts despite the absence of a divorce, either for him or for the status of any children he might father, in no way begin to approach those that result for the undivorced woman.

13. But see “Mamzerut,” by Rabbi Elie Kaplan Spitz, [http://www.rabbinicalassembly.org/index.php/sites/default/files/public/halakhah/teshuvot/19912000/conservjud.\\_mamzerut-\\_spitz\\_2018.pdf](http://www.rabbinicalassembly.org/index.php/sites/default/files/public/halakhah/teshuvot/19912000/conservjud._mamzerut-_spitz_2018.pdf).

All links in this teshuvah were valid as of March 4, 2020.

14. Elliot N. Dorff, Daniel S. Nevins, and Avram I. Reisner, “Rituals and Documents of Marriage and Divorce for Same-Sex Couples,” <http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf>; see particularly 4-5.

15. Two of these are pre-nuptial interventions to forestall or circumvent divorce recalcitrance: the Lieberman clause and *kiddushin al t’nai* (conditional marriage). A third method currently in use in the Conservative/Masorti Movement, that is, *hafka ’at kiddushin*, the retroactive annulment of marriage by the order of a *beit din*, is an *ex-post facto* solution, when no prior steps were taken to forestall divorce recalcitrance, or when those steps failed to prevent recalcitrance (which can remain a possibility particularly under the Lieberman clause or other similar pre-nuptial agreements currently in circulation particularly in the Modern Orthodox community).

The original sources on these methods are:

framework of *kiddushin* and *get* remains the means by which many Jewish marriages and divorces, both in Conservative and other contexts, take place.

*Kiddushin* thus presents a challenge to those seeking a more egalitarian expression of Jewish law and ritual, both in a practical way as just outlined, and on a more foundational level in that marriage by a unilateral act and metaphors of ownership is not a model that can comfortably fit with a modern understanding of marriage as a partnership of equals.<sup>16</sup> Indeed, it is not uncommon nowadays for couples each to give the other a ring under the *huppah*, and that in some cases the bride additionally says to the groom, “Behold, you are betrothed to me...” It would seem that modern Jews, including Conservative/Masorti Jews, are already seeking, and even believe they are enacting a model of marriage and *kiddushin* that is mutual and reciprocal.

When viewed from a halakhic perspective, however, mutuality is elusive. There are, broadly, two diametrically opposed ways to understand what happens halakhically in such an instance – neither of which is that the woman has thereby betrothed the man. The open question is only whether his betrothal of her is efficacious.<sup>17</sup> One possibility is that when each person gives a ring to the other – especially if the woman says something parallel to the man’s *kiddushin* formula – the result is an equal exchange, which thereby throws into question or entirely vitiates the nature of the transaction as an acquisition:

When a woman gives a man a ring in return, they are simply exchanging articles of value...Now they have just made a trade, and not effected a change of her status, to a married woman. The legal transaction implied by the groom giving the bride a ring has now been matched one for one, and thereby cancelled. Her status remains unchanged. It is as if the bride has not received anything at all, or as if she has given back the gift.<sup>18</sup>

1) The Lieberman Clause: The proposal for the clause was presented in the “Report of the Joint Law Conference” of 1953: reprinted in David Golinkin, ed., *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927–1970 [Volume Two: The Agunah Problem]* [Jerusalem: The Rabbinical Assembly and The Institute of Applied Halakhah, 1997] 783–84; see rof. Lieberman’s own report on the proposal and the minutes of the ensuing discussion, 810–14. The adoption of the proposal, and the initial version of the clause, is found in “The Steering Committee of the Joint Law Conference, 1953-54, again in Golinkin, 816–22; discussion follows, 823–37.

2) *Kiddushin al T’nai*: Rabbis Eli Bohnen, Edward Gershfield, Benjamin Kreitman, and Seymour Siegel, “T’nai B’kiddushin,” in Golinkin, 914–26.

3) Rabbi David Aronson, “*Kedat Moshe Veyisrael*,” in Golinkin, 731–51.

Further discussion of some or all of these methods, as discussed and employed in both Conservative and Orthodox halakahah/halakhic sources can be found in Mark Washofsky, “The Recalcitrant Husband: The Problem of Definition,” *The Jewish Law Annual* 4 (1981), 144–66, Monique Susskind Goldberg and Diana Villa, *Za’akat Dolot: Halakhic Solutions for the Agunot of Our Time* (Jerusalem: The Schechter Institute of Jewish Studies, 2006), Melanie Landau, *Tradition and Equality in Jewish Marriage: Beyond the Sanctification of Subordination* (London, New York: Continuum, 2012), Labovitz, “Behold You Are [Fill in the Blank] to Me,” 225–28.

16. See also the works of Adler, *Engendering Judaism* and David Greenstein, “Equality and Sanctity: Rethinking Jewish Marriage in Theory and in Ceremony,” *G’vanim* 5.1 (2009): 1–35, each of whom present variants of this point quite forcefully; their alternative proposals will be discussed in detail below.

17. Which is connected to, but not identical to the question of whether such an exchange ought to be permitted even if *kiddushin* is still effected. See the rest of this paragraph and the notes thereto.

18. Rabbi Yosef Resnick, “Is a Double Ring Ceremony Kosher?” [https://www.chabad.org/library/article\\_cdo/aid/482643/jewish/Is-a-Double-Ring-Wedding-Ceremony-Kosher.htm](https://www.chabad.org/library/article_cdo/aid/482643/jewish/Is-a-Double-Ring-Wedding-Ceremony-Kosher.htm). For this reason, many authorities forbid a double-ring ceremony altogether. Others may permit it only so long as a clear distinction is made between his essential legal act of *kiddushin* and her non-legal, voluntary gift to him (for example, by moving her act to a different, later part of the ceremony, or by the rabbi or the bride making a clear statement that her ring is meant solely as a gift and a sign of her desire to enter the marriage).

The more common approach, however, is that once the groom gives the bride an item of value and recites the appropriate formula, his acquisition of her takes hold; any subsequent action or statement on her part is simply legally meaningless. Rabbi Moshe Feinstein, one of the most influential Orthodox *poskim* (legal decisors) of the 20th century, for example, wrote (*Iggrot Moshe, Even Ha'Ezer*, 3:18):

ודאי לענין הקידושין מאחר שכבר נתקדשה כדין הם קידושין גמורים, ומה שגם היא נתנה וגם אמרה מה שאמרה הם דברי הבל ושטות.

Certainly, regarding the matter of kiddushin, since she has already been lawfully betrothed, it is complete kiddushin, and the fact that she also gave (a ring) and said (the formula) – what she said are words of emptiness and foolishness.<sup>19</sup>

Conservative legal sources, until quite recently, were somewhat conflicted on whether such a statement should be permitted. On the one hand, we find the following in the *CJLS Summary Index: Marriage and Divorce* under the heading “Double Ring Ceremony” (9:5): “A rabbi may officiate at a double ring ceremony. There are various formulae for what the woman says, but under no circumstances may she say *הרי אתה מקודש לי*”;<sup>20</sup> similarly the RA Rabbi’s Manual does allow for the bride to give a ring and make a statement to the groom, but does *not* include “*Harei atah...*” as an option.<sup>21</sup> On the other hand, Rabbi Isaac Klein presented a different conclusion:

Some authorities object to this practice...especially if the formula used by the bride is the same as the one used by the groom. Legally, however, there can be no objection. Once the traditional formula has been recited the betrothal is binding, and whatever is added *is of no legal significance*.<sup>22</sup>

Thus, up until now, even in Conservative/Masorti contexts, those who have permitted a “mutualized” *kiddushin* statement presumably did so only based on Klein’s endorsement of the understanding that the woman’s statement is in no way legally efficacious. As of February of 2020, the CJLS adopted a teshuvah by Rabbi Pamela Barmash’s which rules that “Egalitarian *kiddushin* necessitates that the declaration of the groom and the bride in parallel language. Both the statements of the bride and groom are performative utterances.”<sup>23</sup> She further claims that “the egalitarian reconceptualization of *ketubah* and *kiddushin* has consequences for Jewish divorce”; these consequences, however, are not specified in the current teshuvah and therefore cannot be evaluated at this time.<sup>24</sup> Thus, no Conservative/Masorti halakhic authority that I am aware of has yet presented a thorough-going argument that this should be accepted as a reciprocal

19. However, Feinstein proceeds to forbid double-ring ceremonies in any case, because they might create the misapprehension (and even an eventual change in practice) either that it is necessary for both parties to give each other a ring, or that it is acceptable for either party to present the ring. Many Orthodox rabbis continue to follow this reasoning.

20. The source of authority for this ruling is given as “Correspondence of the Chair, 120474” [December 4, 1974], and is (thus) is further deemed “Not an official position of the CJLS.”

21. *Moreh Derekh: The Rabbinical Assembly Rabbi’s Manual*, Perry Raphael Rank and Gordon M. Freedman, eds. (New York: The Rabbinical Assembly, 1998), C-49–50.

22. Isaac Klein, *A Guide to Jewish Religious Practice* (New York: The Jewish Theological Seminary of America, 1979), 396; emphasis added.

23. Pamela Barmash, “Egalitarian Kiddushin and Ketubah,” 23: <https://www.rabbinicalassembly.org/sites/default/files/2020-03/Egalitarian%20Kiddushin%202020%20final.pdf>.

24. Barmash, “Egalitarian Kiddushin and Ketubah,” 24. See my dissent elaborating on my concerns that Barmash’s proposal does not achieve the (admirable) ends she desires: <http://www.rabbinicalassembly.org/sites/default/files/2020-04/Barmash%20dissent%20final.pdf>.



legal act,<sup>25</sup> and when a marriage ends, it is still the rule within the Movement that the formal requirement for severing the bond is for the man to give the woman a *get* regardless of whether “mutual” *kiddushin* took place; in no case is she ever required or even permitted to give him a *get* instead or in addition.

“Mutualized” *kiddushin* gives the appearance of egalitarianism, but at the end of the day in no way addresses the underlying inequities of *kiddushin*, nor does it serve to avert any of the difficulties that may arise from the *get* process.<sup>26</sup> I am also familiar with several proposals to add a more egalitarian cast to the creation of *kiddushin*, and even, in one case, its dissolution. After considering these proposals closely, however, my ultimate conclusion is that each of these proposals falls short of achieving the goal of legal equality between partners for both entrance into and – more particularly – exit from marriage,<sup>27</sup> and/or faces halakhic concerns that make its workability and practicality questionable.<sup>28</sup> Were a new proposal that I considered workable to come to my attention (or were I come up with a means to devise one myself), I would certainly be the first to encourage the CJLS to give it full endorsement. In the meantime, the fact that a differing sex couple may have accepted *kiddushin* “as is” with the thought that it is merely a “quaint anachronism,” or intended an egalitarian ceremony by including a mutual giving of rings and declarations, or even strived to live their subsequent marriage as equal partners, does nothing to protect them (and particularly her) later from the potential legal consequences of the inherent unilateralism of this form of marriage and divorce.

Indeed, Rabbis Dorff, Nevins, and Reisner admit, with admirable intellectual honesty, that the reasons to seek a non-*kiddushin* model for same-sex couples can also stand as reasons why differing-sex partners might be averse to marrying through *kiddushin*, even when the couple still desire a Jewish ceremony of some sort to formalize their marriage. Yet they continue to advocate for these couples to retain the traditional form:

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25. But see Rabbi Jane Kanarek’s analysis of and response to Feinstein’s teshuvah (referenced just above): “Remaking Ritual” *Sh’ma*, June 2010, 5-6. In a somewhat roundabout way, she endorses Feinstein’s understanding of the “risk” of a double-ring (and double declaration) ceremony precisely because she sees it not as a risk but as a desired outcome of mutualizing the ceremony:

“Feinstein understands the power of our ritual actions to effect legal change. He understands that when I do double-ring ceremonies, I am aiming for a certain amount of legal forgetfulness. I do want it to become legally insufficient for only the groom to give a ring and betroth the bride. I want both bride and groom to betroth one another and for both actions to be necessary in for *kiddushin* to be legally binding...When both bride and groom betroth one another, it radically changes the nature of the ownership metaphor that is an inextricable aspect of *kiddushin*...” (6)

Rabbi Danya Ruttenberg cites a similar argument in her blog “The Kiddushin Variations”:  
<https://alternativestokiddushin.wordpress.com/2006/07/31/let-halakha-follow-minhag/>.

See also Jonah Rank and Raysh Weiss, “*Shetarot* (‘Documents’) For a Marriage From One Soulmate to Another”:  
<https://opensiddur.org/prayers-for/marriage/documents-for-a-marriage-from-one-soulmate-to-another/>

Finally, see also Ruttenberg’s discussion (in the name of Dr. – and now Rabbi – Aryeh Cohen) of “Obviation” and the question of the legal effect if the bride is the first to give a ring and recite the formula – and the possibility of using this as an option for a more egalitarian ceremony:

<https://alternativestokiddushin.wordpress.com/2006/08/02/obviation/>

26. See also Rachel Adler’s critique of the symbolism of *kiddushin* even when mutualized, cited below, p. 34. Similar concerns can be found in Jill Jacobs and Guy Itzhak Austrian, “The Choices of Marriage: One Couple’s Attempt to Create an Egalitarian Jewish Wedding Ceremony Within the Traditional Framework of *Kiddushin*,” *Conservative Judaism* 63.3 (2012): 36–37.

27. That is to say, any proposal which gives a veneer of egalitarianism to the wedding/*kiddushin* process, but does not thereby fundamentally alter the underlying unilateral nature of the divorce/*get* process would not meet the goals that I have set out for myself in writing this teshuvah.

28. The interested reader is encouraged to see my analysis at Labovitz, “‘With Righteousness and with Justice,’” 93–97.

While some heterosexual couples may see in these new models of *brit* (covenant) and *shutafut* (partnership) for same-sex couples a basis for abandoning the traditional model of *kiddushin* (sanctification), Conservative Judaism has taught us to respect ancient liturgy and to minimize modifications of text, focusing instead on interpretive evolution.<sup>29</sup>

In taking it upon myself to write this *teshuvah*, I therefore want to state at the outset that despite my own reservations regarding *kiddushin* that I have just amply described, I accept that a statement such as this remains valid for many of my rabbinic colleagues and for the couples whose marriages they are privileged to officiate for. Those who wish to continue to perform marriages and be married through *kiddushin* may readily claim history and tradition to ground their practice<sup>30</sup>; the Conservative/Masorti approach to halakhah does and must recognize such commitments to long-standing law and practice as valid.

Nonetheless, there is a growing population for whom *kiddushin* is simply not a model that can be made to comfortably fit with ideals of equal and egalitarian commitments and obligations between life-partners. It is for both practical and ideological reasons, then, that Jews committed both to egalitarian relationships between men and women (and egalitarianism between how differing-sex couples and couples of same-sex and other gender pairings marry) but also to Jewish tradition and the halakhic system are seeking more egalitarian models to ritual and legally mark their commitments to each other in marriage, and are attempting to create and/or find new options. Indeed, one of the co-authors of the *teshuvah* on same-sex ceremonies has noted that he has “heard reports of some ‘off-label’ use of our ceremonies for straight couples.”<sup>31</sup> To cite Dorff, Nevins, and Reisner once more: “We realize that our conviction does not settle the matter of egalitarian heterosexual marriage ceremonies for some rabbis and couples, and we welcome additional studies on the subject...”<sup>32</sup> This *teshuvah*, then, constitutes an attempt at just such an additional study.

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29. Dorff, Nevins, and Reisner, 4.

30. Although it is highly recommended that they use one of the methods at their disposal to forestall divorce recalcitrance and/or its effects, that is a pre-nuptial agreement such as the Lieberman clause or (the preference of this author, in that it will certainly result in the annulment of the marriage and the freeing of the parties if necessary) *kiddushin al t'nai*.

31. Nevins, personal e-mail, May 31, 2015; similarly Jay Michaelson, “What’s Different (or not) about Same-Sex Marriage,” *AJS Perspectives*, Spring 2013, 54 remarks on this phenomenon.

Given the discussion above in this section about the role of male agency (“נתן הוא ואמר הוא”) and context (see n. 10) in determining whether *kiddushin* has taken place when something other than the standard formula is used, it also occurs to me that this might be a difficulty for differing sex couples hoping to use the ceremonies devised by Rabbis Dorff, Nevins, and Reisner for same-sex couples. That is, the formulae they suggest, when spoken by a man to a woman and accompanied by the giving of a ring – “היינא לי לבת זוג”/“Be, please, my mate” (8) or “היינא לי שותפת”/“Be, please, my life partner” (12) – could, due to considerations of the language (which designates a changed status and a spousal relationship) and the circumstances (a ceremony intended as a wedding), be deemed to be at least doubtful *kiddushin*, thereby necessitating a *get* for dissolution. After reading an earlier draft of this *teshuvah*, Rabbi Nevins agreed: “The argument is for me a ‘kal v’homer.’ IF based on Klein we consider a civil marriage between two Jews officiated at by a judge to require a *Get*, how much more so would a ceremony of Huppah with all the implements of *kiddushin* (*kesef, shtar, yihud*) require it!” Personal e-mail, March 27, 2016 (on the *teshuvah* of Rabbi Isaac Klein regarding civil marriage, see the next section below). Rabbi Reisner too endorsed this understanding in a personal e-mail, Nov. 8, 2016: “This is another reason why the same-sex ceremonies we proposed should not be available to heterosexual couples.”

32. Dorff, Nevins, and Reisner, 4.

## II. Are We Limited to Kiddushin? (Part 1)

Given all the issues that arise from marriage via *kiddushin* – as detailed in the Introduction – it should not be surprising that some Jewish thinkers have begun to consider other models by which Jewish couples (both male-female, and other gender combinations) could create and mark committed bonds to each other, to be exclusive sexual and emotional partners and to create a Jewish household together. Before considering some of the options that have been proposed, however, we first need to turn to what might be a significant impediment to circumventing the structure of *kiddushin*. Is it possible under halakhah for a differing-sex couple to forgo *kiddushin* if they wish to marry in a Jewish manner? Many sources would suggest this is not a viable option; in this section I will survey some of the most influential of these materials. Were we to determine we are obliged to accept these sources as definitive, that would, of course, have to be the end of our inquiry. In the following section, however, I will then present a counter-argument towards an alternative understanding.

As noted above in the Introduction, m. Kidd 1:1 designates three means by which a man may “acquire” a woman as his wife: by giving her an item of value, using a document, and by sexual intercourse. The parallel passages in t. Kidd. 1:1-3 further specify how each of these methods is enacted; when 1:3 addresses betrothal through sexual intercourse, however, it also considers the possibility of a sex act *not* for the sake of creating betrothal between a Jewish man and a Jewish woman who are otherwise permitted and free to be married to each other. What this source (along with many subsequent legal and other sources) therefore indicates is that rabbis (and subsequent halakhic decisors) have long been aware of the possibility and reality of Jewish men and women engaged in relationships involving sexual relations and/or long-term commitments to one another outside the rubric of *kiddushin*. These include relationships initiated through what the rabbis deemed to be (toraitically) ineffective *kiddushin*, through legal or ceremonial means other than *kiddushin* (such as through the rites and rituals of another religion, or by civil marriage), or through no set rite or legal act at all (as in the Tosefta). Rabbinic authorities were thus, over the course of Jewish history, called on to evaluate the nature of these relationships and their status under Jewish law.

It would seem to follow from the toseftan sources that any relationship between a man and a woman that was not initiated through *kiddushin*, or initiated through an act that did not meet the full rabbinic criteria of acceptable *kiddushin*<sup>33</sup> ought not to be defined legally as *kiddushin*. In this context we may also take note of the very next paragraph in t. Kidd. (1:4), in which Rabbi Lazar [Elazar] interprets Lev. 19:29 – “[Do not degrade your daughter and make her a harlot,] lest the land fall into harlotry and the land be filled with depravity” – to refer to sexual relations between unmarried partners without marital intent. In Sifra Kodashim perek 7:1, the same verse receives a similar exegesis, anonymously and uncontested:

אל תחלל את בתך להזנותה... לא אמרתי אלא חילול שהוא לשם זנות, ואיזה זה זה המוסר (דין) להבירו בתו פנויה שלא לשם אישות, וכן המוסרת עצמה שלא לשם אישות.

“Do not degrade your daughter and make her a harlot”... I spoke only of defilement that is for the sake of licentiousness. And which is this? This is one who hands his daughter over to his fellow without the intent of marriage, and similarly the one who hands herself over without the intent of

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33. Such as *kiddushin* performed with an item worth less than a *prutah*, without a clear or properly worded statement of intent from him to her, without proper witnesses, etc. On witnesses as an essential element of establishing *kiddushin*, see b. Kidd. 65a-b; and the codification of this principle in Mishneh Torah, *Hilkhot Ishut* 4:6 (and see also 3:1, 3, and 5), and Tur/Shulhan Arukh E.H. 42 (2-5; see also E.H. 27[1], 32[2], and 33[1]).

marriage.<sup>34</sup>

This midrash designates sex without marital intent as a form of *z'nut* (זנות),<sup>35</sup> “licentiousness” or “fornication”; in rabbinic Hebrew, this term encompasses a broad range of sexual acts that take place outside of rabbinically sanctioned parameters even if they do not violate explicit biblical prohibitions such as the incest laws of Lev. 18 and 20.<sup>36</sup> The Sifra may be understood to suggest that *any* intimate relationship between a man and a woman for which intent to create *kiddushin* had *not* been explicitly specified would fall under this rubric. Thus this and a number of rabbinic passages and subsequent halakhic sources<sup>37</sup> strongly imply that marriage via *kiddushin* is ideally the only context in which Jewish men and women should engage in sexual relationships with each other.

Creating such a dichotomy can have some intriguing halakhic implication for long-term and sexually exclusive (particularly on the part of the woman) relationships, as delineated by Rabbi David Novak:

In the rabbinic sources there seem to be only two possible heterosexual unions between Jews: either Jewish marriage (*kidushin*), or fornication (*be'ilat zenut*)...In working up from these sources one has basically two options: (1) everything which is not explicitly *kidushin* is, therefore, fornication; (2) everything which is not explicitly fornication is, therefore, *kidushin*. At this level the argument can move, with equal ease, in either direction. On the one hand, one can argue that Jewish marriage requires that one's intention be for Jewish marriage and *all* that it entails... On the other hand, one can argue that a couple, who have taken upon themselves the public responsibility of living together as husband and wife, can hardly be equated with a couple spending some time together in private lust.<sup>38</sup>

When a relationship exists between a Jewish man and woman that for all intents and purposes appears like a marriage, there may be both motive and means within the halakhic system to “co-opt” the relationship into the known rubric of *kiddushin*, so as not to attribute to licentious intent to the couple.<sup>39</sup>

34. And see also b. San. 76a.

35. Although the verse in Leviticus uses two verbal forms of this root: להזנותה (*l'haznotah*), תזנה (*tizneh*).

36. “*Znut*...is a...[vague] grouping, roughly translating into ‘licentiousness,’ and usually indicates non-biblically prohibited sexual liaisons that are strongly condemned by the rabbis...The use of *znut* almost always refers to some kind of non-marital, non-adulterous sexuality...” Michael L. Satlow, *Tasting the Dish: Rabbinic Rhetorics of Sexuality*, Brown Judaic Studies (Atlanta, Georgia: Scholars Press, 1995) 140; see also Gail Labovitz, “Consent, Agency, and the Semantics of Sexuality in the Babylonian Talmud” (unpublished): <https://www.brandeis.edu/projects/fse/judaism/articles.html>.

37. This view is expressed especially strongly by Maimonides in M. T., *Hilchot Ishut* 1:4. See also S.A., E.H. 26:1, in which Karo equates “זנות דרך זנות/he had sex with her in a licentious manner” with “לשם קידושין/not for the purpose of *kiddushin*.” This source, though not this specific section of it, is cited below in Section III.

38. David Novak, “The Marital Status of Jews Married Under Non-Jewish Auspices,” *Jewish Law Association Studies* 1 (1985): 63. Similarly see Mark Washofsky, “Against Method: Liberal *Halakhah* Between Theory and Practice,” *Beyond the Letter of the Law: Essays on Diversity in the Halakhah in Honor of Moshe Zemer*, Walter Jacob (Pittsburgh: Rodef Shalom Press, 2004) 37.

39. Note also the creation of the category of “rabbinic” *kiddushin*, in a pair of cases in which one or both of a couple are not considered to have the legal/mental capacity to enter “Toraitic” *kiddushin*: the marriage of the deaf-mute (typically in rabbinic experience such a person could not be properly educated, nor communicate his/her intentions and desires to others, and was hence legally classified as mentally incompetent) who was able to communicate by gestures, and the minor girl whose father had died (the father being the only one with the legal right to bindingly betroth her prior to her reaching maturity) for whom her mother/brother(s) arranged a marriage; see, for example, b. Yev. 112b-113a in which both cases are discussed (the fatherless minor is also discussed in the prior chapter of the mishnah and gemara). Significant in either case is that although the marriage is not to be deemed

At the heart of this approach is the rabbinic principle/ assumption זנות בעילתו בעילתו זנות, a man does not intend his sex act to be licentious sex, which appears in several locations in the Talmud. Most relevant to our purposes here is the discussion in b. Gittin 81b.<sup>40</sup> The mishnah to which this passage is commentary describes a couple who have previously been married and divorced, who then (after the divorce) share a room in an inn. Beit Hillel and Beit Shammai disagree as to whether the woman needs a second divorce document (Beit Hillel rule yes, Beit Shammai no); the gemara then attempts to clarify the parameters of their dispute:

ור' יוחנן דאמר כי האי תנא; דתניא, א"ר שמעון בן אלעזר: לא נחלקו ב"ש וב"ה על שלא ראוה שנבעלה - שאינה צריכה הימנו גט שני, על מה נחלקו? על שראוה שנבעלה, שבש"א: אדם עושה בעילתו בעילתו זנות, ובה"א: אין אדם עושה בעילתו בעילתו זנות. ומתני' דאוקימנא בלא ראוה שנבעלה, במאי פליגי? דאיכא עדי יחוד וליכא עדי ביאה, ב"ש סברי: לא אמרי' הן הן עדי יחוד והן הן עדי ביאה, וב"ה סברי: אמרינן הן הן עדי יחוד והן הן עדי ביאה.

And Rabbi Yohanan holds like this tanna, as it was taught: Rabbi Shimon ben Elazar said: They Beit Hillel and Beit Shammai did not dispute about [a case in which] they did not see that she engaged in sexual intercourse – that [in that case] she does not need a second divorce document. About what did they dispute? When they did see that she engaged in sexual intercourse, for Beit Shammai say that a man may intend his sex act to be licentious [i.e., non-marital] sex, and Beit Hillel say a man does *not* intend his sex act to be licentious sex.

And as for the Mishnah, which we established as referring to [a case in which] they did *not* see that she engaged in intercourse – about what did they dispute? When there are witnesses to the seclusion [the man and woman being alone together] and there are not witnesses to sexual intercourse – Beit Shammai hold [that] we do *not* say that witnesses to seclusion are equivalent to witnesses to sexual intercourse, and Beit Hillel hold [that] we *do* say that witnesses to seclusion are equivalent to witnesses to sexual intercourse.

The case hinges on the question of whether there is reason to be concerned that the couple has reestablished *kiddushin* and their marital relationship by means of sexual intercourse. As the gemara analyses the dispute in the mishnah, it thus considers these factors: 1) is possible to presume intent (notably the man's intent) for *kiddushin* even when not explicitly stated? and 2) if there is credible evidence that the couple were alone together such that sexual intercourse could have or even was likely to have taken place, but no definitive evidence that it did take place, should it nonetheless be assumed that it did?

Given that Jewish law has typically followed Beit Hillel, two things thus emerge from the passage, each framed as a broad legal principle. The first of these is the legal presumption אין אדם עושה בעילתו בעילתו זנות (hereinafter: *ein adam...*), a man does not intend his sex act to be licentious sex. As already noted, this principle also appears a few additional times in the Babylonian Talmud, in a few additional distinct circumstances. As in this case, the issue at hand in each is the possibility that the

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*kiddushin* according to the strictest interpretation of the law, the rabbis incorporate the relationship into a form of “*kiddushin*” nonetheless, and therefore because the couple would be living together in the manner of a married couple and with the understanding that they are married to each other (particularly that she is sexually exclusive to him), sexual activity between them would be legally considered licit and not *z'nut*.

On the modern approach of our Movement to the deaf and their participation in ritual and other halakhic activities, see Rabbi Pamela Barmash, “The Status of the Heresh and of Sign Language”:

[www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/2011-2020/Status%20of%20the%20Heresh6.2011.pdf](http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/2011-2020/Status%20of%20the%20Heresh6.2011.pdf).

40. Other relevant passages/cases are found in Bavli Yevamot 107a (but see Elyakim G. Ellinson, *Non-Halachic Marriage: A Study of the Rabbinic Sources* [Tel Aviv: The Dvir Co. Ltd., 1975] 116, n. 4 [Heb.] on differences between this case and the others) and 109b-110a, Ketubot 72b-73a, and Kiddushin 65a-b.

couple, and more particularly the man, were of the intent to initiate *kiddushin* through sexual intercourse. Since the alternative is to define the sex act as *z'nut*, outside the bounds of proper Jewish behavior, the proposal here is to give the man the “benefit of the doubt” through a presumption that his intentions instead must certainly have been legitimate, i.e., marital. Second is Beit Hillel’s assertion that הן הן עדי יהודי (hereinafter: *hen hen edei yihud...*), witnesses to seclusion of a man and a woman together are deemed equivalent to witnesses to sexual intercourse between them. Even though it is not known for certain that a sexual encounter took place, the seclusion itself is sufficient grounds to be concerned, or even presume outright, that one did. Putting these two factors together, the legal result is that at least in this case there do not need to be either witnesses to the sexual act itself or an explicit statement of intent in order to establish a reasonable concern that *kiddushin* may have taken place; rather, if the couple have been in seclusion together in circumstances conducive to sexual contact, there is at minimum a suspicion and at maximum a legal presumption that a) sexual intercourse has taken place, and b) the man intended the intercourse as an act of betrothal.<sup>41</sup>

When subsequent authorities begin to develop their legal stances on heterosexual sexual relationships between Jews outside of *kiddushin*, it is considerations about the scope of this case (and others like it) and most particularly the legal principles that emerge from it that take center stage. In essence, the question becomes: how broadly may the principles of either *ein adam...* and/or *hen hen edei yihud...* be applied? Do all Jewish men (or couples) fall under the presumption that they would prefer marital intimacy to illicit sexual activity? By what criteria can it be determined if a sexual encounter should be deemed licentious, or something more binding? In a similar vein, how broadly may we define the “witnessing” of seclusion between a man and a woman in order to invoke a presumption that sexual activity has taken place between them? If it is publicly known that a couple is cohabiting, either without the preliminary of a ceremony of any kind, or as a consequence of a ceremony other than *kiddushin*, is this sufficient to be considered valid testimony to sexual relations between them? And summed up in a single question: When there is good reason to believe that a Jewish man and a Jewish woman are in an extended and exclusive sexual relationship with each other, how broadly should we invoke the possibility that at least potential *kiddushin* has been enacted through sexual intercourse, and thus how broadly should we thus (attempt to) require that the couple go through the *get* process when severing their relationship, at least out of doubt?<sup>42</sup>

In the modern era, this question has become especially pressing in response to civil marriage – marriage administered by secular governmental authority – first introduced in Holland in 1580. In the Conservative/Masorti Movement the governing teshuvah on this topic remains “Civil Marriage,” written by Rabbi Isaac Klein in 1938,<sup>43</sup> and so it is the arguments of that paper that I will review most thoroughly here.<sup>44</sup> In order to understand some of the underlying principles of that teshuvah (or indeed, many

41. The woman’s understanding of what is happening during the seclusion and/or sex acts is not considered directly, but most likely her participation alone is taken as her consent. See further discussion in Section III below.

42. For further discussion of these questions more in the vein of a “history of the halakhah” in this area, see Gail Labovitz, “Presumptuous Halachah: On Determining the Status of Relationships Outside Jewish Marriage,” *Studies in Jewish Civilization* 27 (Mishpachah: *The Jewish Family in Tradition and Transition*) (2016): 57–78.

43. Which can be found in Isaac Klein, *Responsa and Halakhic Studies* (New York: Ktav Publishing House, Inc., 1975) 1–12. More strictly speaking, this is the binding teshuvah for the Conservative/Masorti Movement in the Diaspora, since there is no option of civil marriage within Israel. On the Israeli alternative of “ידוע בציבור”/known to the public, see below, Section III.

44. For summaries and analyses of how a number of prominent Orthodox poskim have addressed these considerations since this question first arose, see Abraham Hayyim Freimann, *The Order of Betrothal and Marriage After the Completion of the Talmud* (Jerusalem: Mosad ha-Rav Kook, 1964) 362–84, Ellison, 170–96, and Ariel Picard, “‘According to the Law of Moses and Israel’: The Essence of Marriage According to the Halakhic Decisors of the Twentieth Century: Civil Marriage as a Test Case,” *Democratic Culture in Israel and in the World* XII (2011): 141–95.

teshuvot on civil marriage/cohabitation), however, we must first review the two most influential (post-Talmudic) pre-modern sources on this question: the view of Maimonides as expressed in a pair of inter-related rulings in the Mishneh Torah, and a teshuvah of Rabbi Yitzhak ben Sheshet, known as the Rivash.

The first relevant ruling of the Rambam occurs in connection to his discussion of the case of the previously divorced couple at the inn, in Mishneh Torah, *Hilkhot Gerushin*, 10:19:

הורו מקצת הגאונים שכל אשה שתבעל בפני עדים צריכה גט, חזקה שאין אדם עושה בעילתו בעילת זנות, והגדילו והוסיפו בדבר זה שעלה על דעתם עד שהורו שמי שיש לו בן משפחתו חוששין לו...שמא שחרר שפחתו ואחר כך בא עליה, ויש מי שהורה שודאי שחרר שאין אדם עושה בעילתו בעילת זנות. וכל הדברים האלו רחוקים הם בעיני עד מאד מדרכי ההוראה ואין ראוי לסמוך עליהן, שלא אמרו חכמים חזקה זו אלא באשתו שגירשה בלבד...שהרי היא אשתו ובאשתו הוא שחזקתו שאינו עושה בעילתו בעילת זנות עד שיפרש שהיא בעילת זנות... אבל בשאר הנשים הרי כל זונה בחזקת שבעל לשם זנות עד שיפרש שהוא לשם קדושין...

Some of the Geonim ruled that any woman with whom a man had sexual intercourse in the presence of witnesses needs a divorce document, on the presumption that a man does not intend his sex act to be licentious sex. And they expanded and added to this matter that arose in their minds such that they ruled that [in the case in which] one who has a child by his slave woman, we are concerned regarding him...lest perhaps he freed his slave woman and [only] afterwards had sexual intercourse with her, and there is one who rules that he certainly freed [her] since a man does not intend his sex act to be licentious sex.<sup>45</sup> And all these things are extremely far-removed in my eyes from the ways of proper ruling and it is improper to rely on them. For the sages did not articulate this presumption except regarding his wife whom he divorced...since she is [has been] his wife, and it is with his wife [e.g., only with a woman with whom he has already had a marital connection] that it is presumed of him that a man does not intend his sex act to be licentious sex, until he specifies that it is licentious sex...But with all other women, every fornicator<sup>46</sup> is under the presumption that he had sexual intercourse for the purpose of licentiousness, until he specifies that it is for the purpose of *kiddushin*.

In the Rambam's understanding, if the principle is taken to its logical extreme, we would have to be concerned about the possibility of *kiddushin* any time there was reasonable evidence of sexual contact between a Jewish man and an unmarried Jewish woman – which we also know from b. Gitt. 81b means evidence not necessarily of the sex act itself but even seclusion of the couple together (*hen hen edei yihud...*). Yet the Rambam's rhetoric suggests that such a conclusion does not comport with reasonable conclusions about human behavior. While it might be nice to suppose that all Jewish men had “honorable” intentions when engaging in sexual relations outside of already established marriages, such an assumption stretches the boundaries of credulity. Rather, Maimonides argues, the Bavli invoked this principle only in a small set of circumstances, all of which share a common feature, which is that some form of marital relationship had already been established at some time between the couple.<sup>47</sup> Only when there is reason to suspect that the man's thoughts and intentions are already focused on a marital relationship can we legally presume that his intent in *this* sexual encounter is for the sake of (re)establishing marriage. This reading is confirmed in the Rambam's discussion of the status of the slave

45. See, for example, the case referenced by Hai Gaon in Responsa of the Geonim, *Sha'arei Tzedek, helek 3, sha'ar 1, siman 17*. On the relationship between Maimonides' rulings and the earlier sources, see Ellinson, 119.

46. Note that the word in the Hebrew is punctuated as זִנָּה, that is, in the masculine, according to Mechon Mamre (see [www.mechon-mamre.org](http://www.mechon-mamre.org)) and in the “Rambam la-Am” edition (Jerusalem: Mossad Harav Kook, 1987), hence this translation.

47. See the passages listed in n. 40 above.

child in regards to his father's estate (is he an heir to it, or part of it?) in the laws of inheritance (Mishneh Torah, *Hilkhot Nahalot* 4:6):

מי שהיתה לו שפחה והוליד ממנה בן והיה נוהג בו מנהג בנים, או שאמר בני הוא ומשוחררת היא אמו, אם תלמיד חכם הוא או אדם כשר שהוא בדוק בדקדוקי מצות הרי זה יירשנו...ואם משאר הדיטות הוא ואין צריך לומר אם היה מן המפקירין עצמן לכך הרי זה בחזקת עבד לכל דבר ואחיו מאביו מוכרין אותו

One who had a slave woman and fathered a child from her, and acted towards him [the child] in the manner of [legitimate] children, or if he says “He is my son and his mother has been freed” – if he were a scholar or a man of good reputation who is very punctilious in the details of the commandments, then this [child] inherits from him...But if he [the father] were from among the other ordinary folk – and it goes without saying if he was among those who act freely in this [type of behavior] – then this [child] is under the presumption of being a slave in all matters, and his [biological] brothers from his father may sell him...

Although Maimonides does not invoke the principle of *ein adam...* directly here, he is clearly trying once again to limit the scope of its applicability by distinguishing cases in which the father was known to be a scholar and/or religiously scrupulous man, whereas other more “ordinary” Jewish men do not get presumptions of having acted in a proper manner.<sup>48</sup>

The Rivash's responsum, #6, discusses the case of a female forced convert from Majorca during the Inquisition, who had married another forced convert under Catholic rites. The woman bore a child, but the husband subsequently went abroad and disappeared. The woman was eventually able to return to a Jewish community and Jewish practice. Since both parties were Jewish by birth, were there grounds to consider the marriage between them a Jewish marriage, *kiddushin* at least after the fact, in which case the woman would need to (locate and) receive a *get* from the man before being allowed to remarry in the Jewish community? Broadly stated, the Rivash presents two key arguments to make the case that the “marriage” is not *kiddushin* and that the woman does not need a *get*.<sup>49</sup>

First is the assertion that only relationships established knowingly and intentionally as *kiddushin*, through the recognized and correctly performed procedures of *kiddushin* (the couple are eligible for *kiddushin*, the *kiddushin* is properly witnessed, etc.), thereby have the status of *kiddushin*:

אין ספק כי האירוסין או הנשואין, תקראם כמו שתראה, שנעשו בנימוסי עובדי כוכבים ובכהני במות', שאין בהם חשש קדושין, אף אם היו בהם עדים כשרים, שהרי לא נתקיים בהם נתן הוא ואמר הוא...מ"מ בכאן הרי לא נתן לה כלום, רק שהכומר מברך אותם בקול גדול ונותן טבעת לכל אחד.

There is no doubt that the betrothal or marriage rites, call them what you wish, which were done in the religion of idolaters and by the priests of their gathering places – there is not even a suspicion of *kiddushin* in them, even if there were valid witnesses at them, because [the requirement of] “he gave and he spoke” was not fulfilled by them [the rites performed]... In any case, in this situation he did not give her anything; rather only the priest blesses them aloud and gives a ring to each one.

He quickly moves on, however, directly to the question of whether the presumption *ein adam...* should be relevant here. It was, after all, known to others, including other originally Jewish forced converts, that the

48. See also Terumat haDeshen, 209, who makes a similar argument.

49. As a colleague on this committee has noted, it is possible and perhaps even likely that the Rivash wrote this teshuvah in the long tradition of *poskim* seeking localized solutions to rescue individual women from specific cases of potential *aginut*, and did not intend any sort of more generalized statement about the nature of marriages within the Catholic Church and/or outside of Jewish rites (i.e., *kiddushin*). Nonetheless, there is by now a long halakhic history of reading the teshuvah in this broader manner, and I will therefore do the same.



couple lived together as husband and wife. Under the additional principle of *hein hein edei yihud...* perhaps that knowledge of the cohabitation between the man and the woman (not to mention her pregnancy!) should be sufficient to presume sexual contact between them:

אבל מה שיש לעיין הוא במה שנתייחד עמה בפרסום, ועמדה תחתיו ונתעברה ממנו... ולפי דבריהם בכיוצא בזה דגיסי אהדדי, וגם שלקחה להיות לו לאשה, היה נראה לכאורה שצריכה הימנו גט כל שיש עדים שנתייחד עמה, אף על פי שאין שם עידי ביאה. דבה"ג אמרינן הן הן עידי יחוד הן הן עידי ביאה, וכיון שנבעלה אמרינן לשם קידושין בעל, דאין אדם עושה בעילתו בעילת זנות.

But rather, what needs to be looked into is that he was secluded with her in a publicly known way, and she remained under him (lived as his wife) and became pregnant from him... And according to their words [i.e., the views of those Geonim who ruled broadly], in a case such as this where they are familiar with each other, and also he took her to be his wife, it would seem at first glance that she needs a *get* because there are witnesses that he was secluded with her, even though there are no witnesses to a sex act [itself]. And in a case of this sort, we say witnesses to seclusion are equivalent to witnesses to sexual intercourse, and since she engaged in sexual intercourse, we say that he had sex with the intent of *kiddushin*, because a man does not intend his sex act to be licentious sex.

Can it therefore be presumed (or at least possible) that the sexual act was done with the intent of legitimate (Jewish) marriage, i.e., *kiddushin*?

The Rivash's response, however, is to turn to the Rambam's argument (and those of others as well) against a broad application of the *ein adam...* principle:

אמנם הרמב"ם ז"ל דחה הוראה זו בשתי ידיים... דאפי' לדעת אותם הגאונים ז"ל שסוברין דבסתם אמרינן לשם קידושין בעל, הכא בנדון זה לא בעל לשם קידושין. דכיון שהתנו בנישואין בחקות העובדי ככבים ובבית במותם מפי הכומר, הרי הוא כאילו פירשו שאין דעתם לשם קדושין כדת משה ויהודית, אלא בדרכי עובדי ככבים, שאינן בתורת קדושין וגיטין. וא"כ אינה כנשואה, אלא שהיא אצלו כמו פלגש בלא כתובה וקדושין... ובנדון זה ודאי אין לך פרוצין יותר מאלו ההולכים ברצון נפשם לפני עבודת ככבים להשתחות שם, ומעשיהם מוכיחים בפריצותם ובקלותם...

However, the Rambam, *z"l*, deflected this ruling with all his power (literally: with both hands)... For even according to the view of those Geonim *z"l* who held that in general we say that he had sexual relations for the purpose of *kiddushin*, here this man under consideration did not have sexual relations for the purpose of *kiddushin*. For since they married in marriage rites under the law of the idolators and at their gathering place by the word of the priest, it is as though they made clear that their intent was not for *kiddushin* according to the laws of Moses and Jewish women, but rather for the ways of idolaters, who are not under the law of *kiddushin* and *gittin*. And if this is so, she is not like a (Jewishly) married woman, but rather she is with him like a *pilegish*,<sup>50</sup> without a *ketubah* or *kiddushin*...

And in the case under consideration, certainly you do not have more brazen people than these, who go of their personal desires to idolatry to bow down there, and their acts demonstrate their brazenness and their irreverence...

The fact that the wedding took place as a Catholic ceremony does not mean only that the rites were substantially different ritually and legally than Jewish marriage. Rather, the choice of ceremony in the rites of another religion is to be understood as an active rejection of *kiddushin* as the basis of the

50. This concept will be discussed below in Section III.

marriage; the nature of the ceremony itself creates a presumption that the man had no intent at any time to create a Jewish marriage between himself and the woman. Indeed, if, as the Rambam ruled, that only a person of good reputation and Jewish practice can even *perhaps* be presumed to have acted engaged in a sex act with only legitimate intent, then participation in Catholic – in the words of the Rivash, “idolatrous” – rites itself removes one from possible consideration on this account, and in fact creates the opposite presumption, that the intent was of brazenness and disregard for proper Jewish sexual morals.

With these sources in mind, we can now turn to Klein’s teshuvah. It begins by presenting five possible arguments against deeming civil marriages as having the status of *kiddushin* or doubtful *kiddushin*, based on both talmudic and the medieval sources. These are:

1. The lack of proper witnesses;
2. Following Maimonides’ limiting readings in *Hilkhot Gerushin*, “In all the cases cited from the Talmud there was some act preceding intercourse which justified our assumption that the relations were licit...In our case, since we discount the ceremony in court since it was of no value from the point of view of Jewish law, it would seem that we cannot invoke the principle of *ein adam oseh b’ilato b’ilat zenut*.”
3. Following the reasoning of the Rivash, “if in the case of Marranos where one has no choice in the matter, we still take it as an indication of an objection to religious marriage, in the case of civil marriage, where this course is chosen voluntarily, we certainly have to assume it as an indication of an objection to being married *kedat Moshe v’Yisroel*.”<sup>51</sup>
4. *Kiddushin* by means of sexual intercourse requires intention for *kiddushin*; in this case, that intention is not clear.
5. As Maimonides makes clear (particularly in *Hilkhot Nahalot*), the principle of *ein adam...* should be applied “only to people who abide by the law and Jewish moral standards...People who do not submit to a religious marriage are counted among those to whom the principle would not apply.”<sup>52</sup>

Klein then proceeds to suggest counter-arguments for each of the five concerns, as follows:

1. A civil marriage establishes the relationship between the couple as well-known publicly, and this public knowledge functions in the place of witnesses.<sup>53</sup>
2. Although the civil ceremony is not a halakhically valid act, it certainly indicates an intention to be married, and therefore may be counted as the sort of “previous arrangement that would lead us

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51. But note, as Klein also hints, that the Rivash does treat this somewhat as a choice rather than fully compulsory. See further discussion several notes below, regarding Klein’s response to this challenge. There is also an extensive body of literature on civil marriages under circumstances where religious marriage (Jewish and sometimes other faiths as well) was not readily accessible and even dangerous (such as in the former Soviet Union and other communist states). In such cases there is certainly reason to consider whether couples would have desired to legitimate their relationship through a religious ceremony had such been possible (and might therefore establish *kiddushin* through sexual intercourse), although not all conclude that this is the outcome even in such circumstances. Overviews on this question may be found in Freimann, 368–72, and Ellinson, 183–84.

52. Klein, 6–8.

53. Klein notes that talmudically a couple may be treated as legally married based on the principles of *hazakah* (a reasonable presumption) and *kol* (a rumor). Furthermore, he cites here the commentary of the Beit Shmu’el to the Shulhan Arukh, E.H. 26:1 (and see the Vilna Gaon’s commentary as well).

to believe that the parties concerned desire to become husband and wife” that Maimonides sets as a prerequisite to apply the principle of *ein adam*...<sup>54</sup>

3. The choice of civil marriage need not be (and under modern circumstances may not be best) understood as an act of rejection of Jewish marriage, but rather may stem from ignorance. “Under these circumstances, we surely cannot assume that the parties have definite objections to being married *K'dat Moshe v'Yisroel*.”<sup>55</sup>

4. Although the intent of the couple is not explicit, the principle of *ein adam*... entails within itself a presumption that “a person will, wherever possible, do the right thing and will rather act in a way that will be licit and legitimate.”<sup>56</sup> To be indisputably licit (in Klein’s view, which would follow the logic outlined above in this section), sexual relations must take place within the context of *kiddushin*; what follows is an inclination to attribute to the man/the couple the intent to create *kiddushin* through their sexual contact, even in the absence of a clear statement of that intent.

5. What Maimonides would have deemed necessary to define someone as a “kosher” Jew need not be the same as the standards we would apply in our own time. Rather than focusing on ritual practices (such as the observance of menstrual laws), we may judge that “Our experience is that the moral standards of those who have become united through civil marriage, as far as marital fidelity and the purity of their family life, is concerned, compares very favorably with the standards of those who have had the benefit of a religious marriage.”<sup>57</sup>

In sum, then, Klein comes to the decision that “in the case of civil marriage a *get* is necessary.” According to the *CJLS Summary Index: Marriage and Divorce*, “Civil Marriage/Divorce” (item 2; 9:3), this remains the operative position of the Movement, albeit affirmed by the committee chair rather than a vote of the CJLS: “A *get* is required after the civil divorce of a civil marriage. (Correspondence of the Chair, 032961, 032966. Not an official position of the CJLS.)”<sup>58</sup> One might even argue that this approach is enshrined in the language of the Rabbinical Assembly’s Standard of Rabbinic Practice that states: “A rabbi may not officiate at the marriage of a divorced man or woman if a *get* or *hafka*’at *kiddushin* was not

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54. Klein, 9.

55. Klein, 10. I would also add a slight modification/variant to Klein’s analysis of how the scenario described in the Rivash’ teshuvah might be similar or different from the case of civil marriage. That is, if one wants to apply or extend the reasoning of the Rivash regarding the forced converts to civil marriage, one must come to a personal judgment: is the critical factor in the case before the Rivash that the marriage rites were something, anything, other than *kiddushin* and thus did not meet the criteria for valid *kiddushin*, or is it the very “choice” of Catholic rites in particular, i.e., the rites of a religion contrary to Judaism, that negates any validity under Jewish law? It is reasonable to understand the choice to marry by non-Jewish religious rites (and the Rivash does treat this as a choice despite the religiously coercive conditions under which this couple lived; hence all the more so when no coercion is present) as a deliberate rejection of Jewish practice. Civil marriage, on the other hand, can be framed as religiously neutral and hence not in and of itself a repudiation of Jewish definitions of marriage (indeed, it often coexists with marriage by *kiddushin*, in that civil law in Western, democratic countries typically requires a civil license and registration while in no way precluding a religious ceremony as well); rather, it can then be evaluated in terms of other factors such as its content, the legal rights and responsibilities it entails, and/or the social expectations regarding the commitments the couple are making to each other – and the correspondences or lack thereof with Jewish understandings of marriage. See my discussion of this point in Labovitz, “Presumptuous Halachah,” 73–75.

56. Klein, 11.

57. Klein, 11.

58. On the position of the Israeli *Va’ad haHalakhah* regarding the Israeli institution of couples registering as “ידועה”/“בציבור”/“known to the community” rather than as married, see in Section III just below.

obtained.”<sup>59</sup> If we are limited to *kiddushin* as the only legitimate form of Jewish marriage (so much so that other forms of marriage outside of Jewish practice can be and sometimes are subsumed into it), then by definition we are also limited to *get*, with all its liabilities and potential for abuse, as the means of Jewish divorce.

### III. Are We Limited to *Kiddushin*? (Part 2)

The sources in the previous section (II) on the whole suggested and/or were predicated on the presumption that halakhah only allows for two possibilities when it comes to understanding the nature of sex acts between a male and a female Jew who are eligible to be married to each other: sex within the permitted boundaries of *kiddushin/nissuin*, or *z'nut*. Does this mean that there is no possibility for creating an alternative to *kiddushin* for heterosexual Jewish couples who wish to marry within a Jewish and halakhic framework, yet who also seek a rite and legal basis for their bond to each other that is not based on a metaphor of unilateral designation/possession? Once again, before we can actually turn to proposals for such ceremonies, we must now see if there are any alternatives within halakhah to this dichotomous classification of male-female sexual and emotional relationships.

Among the questions that follow are two broad – and inter-related – aspects of how we are to evaluate the halakhic viability of proposing new form of binding Jewish marriage:

a) Must we always be concerned for doubtful *kiddushin* any time two differing-sex Jews live together in a long-term sexual and romantic relationship? Does a presumption of a desire for “appropriate” Jewish marriage (*ein adam...*), whether at the time of the ceremony or at a later time (and thereby enacted through sexual intercourse), *always* override any other statements of intent made by the couple either explicitly or implicitly by their choice to forgo a ceremony or have a non-*kiddushin* ceremony, such that their marriage much be evaluated as at least doubtful *kiddushin*? More particularly, what of ceremonies that are neither secular (like civil marriages) nor taking place in a non-Jewish religious context, but quite the opposite, deliberately and openly seek to side-step *kiddushin* while also incorporating distinctly Jewish elements ritually and legally? Is such a move possible?

b) If we accept that these ceremonies (or particular examples of these ceremonies, as below) do not effect *kiddushin*, are we nonetheless left with no option but to dismiss the resulting relationships as forms of impermissible *z'nut*? Are there means and grounds by which they can be understood as a legitimate connection between a man and a woman, at least after the fact – or even connections that from the outset have legal binding effect in their own right?

The Masorti *Va'ad Halakhah* in Israel has addressed points relevant to these questions in a teshuvah authored by Rabbi Pesach Schindler and adopted unanimously in 1990-91 (5751),<sup>60</sup> regarding the status of the relationship of a couple recognized as partners under Israeli legal provisions (judicial and legislative) for those who are “ידועים בציבור” (“Publicly Known”).<sup>61</sup> To be fully clear from the outset,

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59. *CJLS Summary Index: Marriage and Divorce*, “Standards of Rabbinic Practice” (item #1), 9:13. But see also the end of Section VI below.

60. “תשובה בעניין קשרים בינו לבינה ללא חופה וקדושין,” available on-line at [https://responsafortoday.com/wp-content/uploads/2018/05/vol4\\_9.pdf](https://responsafortoday.com/wp-content/uploads/2018/05/vol4_9.pdf).

61. This status is typically based on two criteria: 1) cohabitation and an intimate and long-term committed relationship (sexual and emotional) in the manner of a married couple, and 2) a shared household, particularly in the sense of shared financial responsibilities. That a relationship falls into this category may be adjudicated by a civil court (frequently when the relationship ends and one of the parties attempts to claim a right to alimony, child support, an inheritance, survivor benefits, etc.), or, more recently, couples may proactively claim the status by means of contractual arrangements and/or “Domestic Union Cards.” Once it is determined that a couple share this status, they become eligible/responsible for many if not all of the rights and responsibilities that married couples have towards each other, and hence the status is often referred to as a form of common-law marriage.

Schindler states that such arrangements are (in relation to question set “a” above) not *kiddushin*, but also (“b”) not a legitimate alternative to *kiddushin* and hence not a valid option for Israeli Masorti Jews, based precisely on the sharp dichotomy between legitimate sexual expression within marriage effected by *kiddushin* and any other sexual activity (even within an exclusive and committed relationship) that has already been discussed at length above. It is not my purpose here to question the *Va’ad’s* determination regarding the specific Israeli situation and the permissibility of entering a relationship of *ידועה בציבור*. Nor do I have any reason (positive or negative) to know if Schindler would have found the implications I will draw from his teshuvah compatible with his own thoughts on this topic; indeed the tenor and content of his teshuvah certainly allow for the likelihood that (at least at the time he wrote it) he would not. That said, I will argue that the underlying rationales given in the teshuvah for distinguishing a “publicly known” “common-law” relationship from *kiddushin* are valid, and that those very same considerations should also allow for distinguishing between new Jewish legal and ritual rethinkings of marriage and *kiddushin*. This will then help clarify how a couple can establish such a relationship in a way such that it should not be ruled to be a form of even doubtful *kiddushin*, and such that the couple can separate without the need for the uni-directional granting of a *get*.

The teshuvah rules that these relationships do not have the status of *kiddushin* for several reasons. First and foremost, they do not involve any of the formalities of *kiddushin*, such as the giving of an item of value (or a document), proper witnesses, or a clear and comprehensible declaration of intent for *kiddushin*. Nor is a *ketubah* typically written or given to the woman. Moreover, whereas Klein cites the talmudic principles of *hazakah* and *kol* (and the common knowledge that the couple have lived together as husband and wife with the quite reasonable assumption that this includes sexual relations) as reasons why a civil marriage might be valid as *kiddushin* even in the absence of witnesses, Schindler argues for the opposite outcome in this case, suggesting that these are valid concerns only when there is some doubt that *kiddushin* might have taken place. In this instance, rather, the couple themselves assert that there has been no *kiddushin*:

"קול" או שמועה על קדושין חייב להיות מוחזק על ידי סימנים מובהקים של חיי אישות המכוון את הקול לקדושין כראוי. במקרה כזה "אנן סהדי" מחזקים את החזקה. אבל במקרה של "מכחישים בברי" כשבני הזוג עצמם אינם טוענים "קדושין כראוי" כל הסימנים והחזקות נופלות.

A “rumor” or pronouncement regarding *kiddushin* must be supported by clear indications of married life which direct the rumor towards “proper *kiddushin*.” In an instance like this, [the principle of] “we are witnesses” [to the likelihood of sexual intimacy]<sup>62</sup> strengthens the presumption. But in the case of “they object with certainty” when the members of the couple themselves are not claiming “proper *kiddushin*” all of the indications and presumptions fall away.<sup>63</sup>

In the Israeli context (although the teshuvah itself does not quite explicitly say this), where if a Jewish man and woman wish to marry within the state they must do so through the Rabbinat and by means of *kiddushin*,<sup>64</sup> the choice to cohabit instead through the mechanism of *ידועה בציבור* almost certainly must be interpreted as a knowing and conscious rejection of marriage through (the Rabbinat and hence

62. That is, the fact that the couple is open about the existence of the relationship means that the general public becomes something like the equivalent of witnesses, based on the near certainty that sexual intimacy takes place between them.

63. Schindler, 100, n49; see also 94.

64. The only other choice if one wants to be registered as married is to marry civilly outside of Israel. Note, however, that even in such a case, should the couple come to divorce, they will again have no choice but to do so through the auspices of the Rabbinat, which may decide to require that a *get* be given.

through) *kiddushin*; that is, it cannot be chalked up, as Klein would allow in the case of civil marriage outside of Israel, as a choice made out of ignorance. The same counter-arguments apply to any other reason why one might be concerned that *kiddushin* applies after the fact or out of doubt, such as the principle of *ein adam*...<sup>65</sup> The couple themselves are clear that their relationship is *not* based on marriage by means of *kiddushin*, and there are thus no grounds whatsoever by which *kiddushin* might be suspected, presumed, or imposed.

Many of the sources I surveyed above, particularly in Section II, are replete with assumptions regarding how parties to a relationship (and perhaps more specifically the male parties; see below) conceptualize that relationship, and/or regarding how various actions that they might take can be construed as *prima facie* evidence about their intent, consent, and (unstated) preferences. But this poses a fundamental question not just of outcome, but of basic method: should we, as modern, Conservative/Masorti halakhists, consider ourselves bound by blanket presumptions about human (or at least Jewish, male) nature from a time/social situation very different from ours (and perhaps not entirely true even then), such as *ein adam oseh be'ilato be'ilat z'nut*, and posit legal outcomes from those premises? Or should we instead address ourselves to the people right before us, whose very choices of a given marital ceremony (as well as the underlying assumptions built into those ceremonies) are highly suggestive of motive and intent to actively forego *kiddushin* – and only then determine how to respond legally?<sup>66</sup> Schindler's teshuvah, as we have seen, leans towards the latter course, and charts a path for us as well. It assists in providing halakhic backing for taking people at their word (especially when it is coherent with their actions) that they do not intend to effect *kiddushin* by their ceremonies, and that in fact to the contrary they deliberately mean to *avoid* creating *kiddushin*.

Finally, before moving on, we must revisit and emphasize the requirement that *kiddushin* demands consent from *both* parties. A woman must accept the token (or document) of *kiddushin*, even if passively rather than actively, and must accept that a sex act is done with the intent to create *kiddushin*. Absent the woman's consent, *kiddushin* does not take effect. The question then becomes, why should a woman's consent to *kiddushin* be presumed, in spite of clear indications that *her* intent was otherwise?

This issue has been discussed at some length in regards to another proposal to alleviate the possibility of *igun* and the withholding of a *get*, that is, *kiddushin al t'nai*, conditional marriage. There is a crucial objection that some have raised to the effectiveness and/or permissibility of this method: if the condition were to be invoked<sup>67</sup> and the marriage thereby deemed void *ab initio*, this would mean that the couple had (legally) never been married – and hence all sexual contact between them would be rendered

65. Schindler, 95.

66. In this regard, see also Rachel Adler, "Innovation and Authority: A Feminist Reading of the 'Women's Minyan' Responsum," *Gender Issues in Jewish Law: Essays and Responsa*, Ed. Walter Jacob and Moshe Zemer (New York, Oxford: Berghahn Books, 2001) 3–32, in which she analyzes the writings of Orthodox poskim regarding the phenomenon of "women's prayer groups." She observes an important phenomenon not only in the most prominent teshuvah in opposition, but in others including at least one in support of the innovation: even though the women central to the development of these groups are known and identifiable, and they themselves and/or their writings on this subject could be consulted, instead "There is a 'gentlemen's agreement' to converse *about* rather than *with* these mothers of inventions so that their accomplishments may be reframed for the purposes of the responsa literature as problems detected by one rabbi and referred to another for solution" (5). The authors are then free to substitute their own assumptions about the motives and intentions of the women who have founded and participate in such groups, and evaluate them accordingly.

See also Adler, *Engendering Judaism*, 203 for an application of this insight to our case, determining the status of a relationship not established through *kiddushin*.

67. For example, if the marriage were made conditional on the man giving and the woman accepting a *get* within a set time after a civil divorce and then that time elapsed without a *get* being given/accepted.

non-marital and therefore (presumably) licentious.<sup>68</sup> Might the man then prefer to be married unconditionally, and therefore nullify the condition and enact *kiddushin/nissuin* unconditionally through sexual intercourse? In response to this potential problem, Rabbi Eliezer Berkovits, author of the most extensive work advocating for the halakhic permissibility and use of *kiddushin al t'nai*, argues (among several arguments against such a conclusion) that no matter the man's intent, *kiddushin* cannot be created in this case because the woman is highly unlikely to forgo or agree to forgo the condition, given that it is made for her benefit. Indeed, one may add to Berkovits' argument that it is questionable whether the principle of *ein adam...* classically applies to women at all. When the Talmud and the halakhic discourse that followed from it invokes the principal *ein adam...*, who exactly is the "adam" being spoken of? Is the principle understood to apply equally to men and women? Perhaps we should take note of the androcentric terms in which the principle is couched. All the talmudic sources which invoke the principle discuss it in terms of the man's approach to the relationship rather than the woman's, and though they do not absolutely preclude that women could hold similar concerns, there is no text that I am aware of that specifically applies the principle to women.<sup>69</sup> Nor is the status of a man's sexual relations necessarily of legal import to his female partner, further removing any likely motivation she might have for preferring an unconditional marriage over a conditional one.<sup>70</sup>

In 1968, a teshuvah – highly influenced by and reliant on Berkovits' monograph – was brought to and adopted by the CJLS to make this procedure halakhically valid within the Conservative/Masorti movement.<sup>71</sup> According to this ruling, the couple must make their intent for a conditional marriage clear and known at the time of the enactment of the *kiddushin* (even if/though they have previously signed documentation to this effect),<sup>72</sup> but once having done so at that time, there is no further concern that either party might still be able to cancel the condition at a later date. In this the CJLS teshuvah relies on the most lenient understanding, articulated by Berkovits, that once the condition is made (or referenced with the full understanding of the couple) at *kiddushin*, it need not be repeated at any later time. Berkovits presents several arguments on behalf of this conclusion. Each of these is equally applicable to the case of a marriage performed by a means other than *kiddushin*, if that intent is made clear at the moment of the ceremony.<sup>73</sup> These include:

\* If one accepts the analysis that the nullification of a marriage, triggered by the fulfillment of a condition of the sort Berkovits is advocating, does *not* thereby render the sexual intercourse that took

68. Though not all halakhic authorities believe this to be the outcome in any case, given that the couple had been in an exclusive relationship with the intent and assumption that sexual relations would take place within marriage, and hence those relations ought not to be considered licentious; see Arukh HaShulkhan E.H. 157:17, and the arguments in Eliezer Berkovits, *T'nai b'Nissuin u'baGet: Berurei Halakhah* (Jerusalem: Mossad Harav Kook, 1966) 32–37 and 60 (and for a paraphrase/summary in English, see Yehudah Abel, *Confronting 'Iggun: A Combination of Three Possible Solutions to the Problem of the Chained Wife in Jewish Law*, Agunah Research Unit [Liverpool: Deborah Charles Publications, 2011] 13–16).

See also Bernard S. Jackson, *Agunah: The Manchester Analysis*, Agunah Research Unit (Liverpool: Deborah Charles Publications, 2011) 119–23 (3.51–56; and particularly 3.54 for Berkovits' arguments).

69. See Jackson, 127 (3.63): "there is, in fact, an argument that 'Eyn 'adam 'oseh be'ilato be'ilat zenut does not apply to a woman."

70. "...she need not concern herself as a matter of *halakhah* with the resultant, retroactive 'extramarital' status of his relations if he fails to divorce her properly." Michael J. Broyde, "A Proposed Tripartite Agreement to Solve Some of the *Agunah* Problems: A Solution Without Any Innovation," *Jewish Law Association Studies XX* (2010): 10.

71. Bohnen, Gershfield, Kreitman, and Siegal.

72. Bohnen, Gershfield, Kreitman, and Siegal, in Golinkin, 924; this is reiterated in *Moreh Derekh*, C-36.

73. As will be seen below at the end of Section IV and in Appendix I, the ceremonies endorsed here substitute other legal acts in the place of *kiddushin*, but otherwise proceed almost entirely like the traditional wedding ceremony already in practice.

place during the marriage retroactively licentious, then there is no reason for the husband to want or need to nullify the condition at all.<sup>74</sup> Similarly, in the next portion of this section I will present arguments that the presence or absence of *kiddushin* need not be the sole determinant here, and that sexual relations within a marriage constituted by one of the means endorsed here are not halakhically licentious – thus the husband has no reason to need to change the underlying nature of the marriage at a later date.

\* If the husband is indeed concerned about the possibility of retroactively having engaged in non-marital sex, one may ask why he would agree to make the condition in the first place. His willingness to enter into the marriage conditionally may therefore be seen as an affirmation that this issue is not of concern to him.<sup>75</sup> So too his willingness to enter a marriage established on a halakhic basis other than *kiddushin*.

\* *Kiddushin* and *nissuin* are almost always performed today at a single occasion, one almost immediately following the other. There is little reason to think that the condition which the couple agreed to at *kiddushin* would be unacceptable to one or the other of them only a few minutes later at *nissuin*.<sup>76</sup> Similarly, non-*kiddushin* agreements/commitments should remain acceptable when the rest of the marriage ceremony is performed just thereafter.

\* The woman is highly unlikely to forgo or agree to forgo the condition, given that it is made for her benefit. Since *kiddushin* may only happen with a woman's consent, it should be halakhically impossible for the man to create unconditional *kiddushin* through *nissuin* or consummation of the marriage solely of his own intent and accord.<sup>77</sup> So too in the cases and ceremonies we are discussing here. Since the purpose of having a non-*kiddushin* ceremony is to have a marital act that is egalitarian both in form and in legal outcome, what reason would the woman in particular have for changing the entire underlying basis of the marriage to a form significantly less materially advantageous to her own interests? Since *kiddushin* may only happen with a woman's consent, it should be halakhically impossible for the man to annul a condition on *kiddushin* – or create *kiddushin* when it was not originally intended – through *nissuin* or consummation of the marriage solely of his own intent and accord.<sup>78</sup>

74. Berkovits, *T'nai b'Nissuin u'baGet*, 32–34, 52–53.

75. Berkovits, *T'nai b'Nissuin u'baGet*, 52–53. On this and the immediately prior argument described here, see also the paraphrase in Abel, *Confronting 'Iggun*, 18: “Why, he argues, even make a condition if you know you are going to forego it later because of the fear of promiscuity?” Similarly, he continues in note 35: “Or for any other reason. Obviously, according to R. Berkovits's earlier argument...that there is no retroactive promiscuity..., there is no need to repeat the condition at all because there is no reason to fear that he might want to cancel it...”

76. See Berkovits, *T'nai b'Nissuin u'baGet*, 49.

77. Berkovits, *T'nai b'Nissuin u'baGet*, 37–41, 52–53.

78. Berkovits, 37–41, 52–53.

In this regard, note also the claim of Dr. (and Rabbi) Meir Simha Feldman that many/most modern women (particularly those who are not religiously observant or knowledgeable) would reject the premises of *kiddushin* were such premises and their potential consequences fully understood. Moreover, he claims that this has the further result of calling into question whether most women are in fact consenting to *kiddushin*, as legally required, with the result that the validity of the *kiddushin* in such cases should be doubtful: “there is a presumption, moreover an evident presumption, and moreover explicit statements from their mouths, that they consent only and solely to a commitment of faithfulness, and not to something like this from which they cannot be freed without the will of the husband...Therefore, there is great doubt if their *kiddushin* are valid according to the Torah or even rabbinically.” Meir Simha Feldblum, “The Problem of *Agunot* and *Mamzerim*: A Proposal for a General and Comprehensive Solution [Heb.],” *Dine Yisrael* 19 (5757–5758): 210 (see also Ruttenberg's summary and discussion at <https://alternativestokiddushin.wordpress.com/2006/07/31/the-daaf-factor/>). A similar point is also recognized in this rather surprising source: “...if the Jewish public, especially the female Jewish public found out about it, Jewish marriage with its greater contemporary liabilities and fewer contemporary assets, would become an option fit only for fools.” Novak, 76.

Finally, in light of all the arguments just above, it should also be evident that the couple's day-to-day self-presentations as married spouses should in no wise be assumed as a statement of change of intent/consent of either.



To sum up so far: If a ceremony (other than a purely civil ceremony) is very obviously something other than *kiddushin*,<sup>79</sup> and more particularly if the couple make their intent explicit by a statement of their own or by active consent to a statement from the officiant at the time of the ceremony (and additionally in their marriage documents) before valid witnesses,<sup>80</sup> then there is no need, indeed no good justification, for imposing any of the strictures of *kiddushin* in such an instance. Most particularly, while there may be other considerations that need to be addressed were a couple to decide to terminate their relationship, no *get*, even *m'safek*, should be suggested or imposed.

Where Schindler's teshuvah is significantly more challenging to the next step of my path here, however, is in its adherence to the dichotomy of either permitted *kiddushin* or forbidden/licentious relationships even when sexually exclusive and long-term, as is the case for Israeli "common-law" partnerships. In fact, though, the situation as it has developed over the course of halakhic history is actually even more complex than has yet been admitted. The apparent dichotomy of legitimate *kiddushin* and prohibited *z'nut* is complicated by the development in rabbinic law and sources not only of cases in which relationships such as civil marriage are subsumed into *kiddushin*, but also by circumstances in which a couple may have an exclusive (that is, at least the woman is exclusive to the man) sexual relationship without entering any form of marriage (*kiddushin* or otherwise), which is nonetheless considered if not permissible at least something other than *z'nut*: פלגשות (*pilagshut*).<sup>81</sup> Based on biblical examples and on the few passages on the topic found in the talmudic sources, and subsequently on the actual presence of similar practices in some of the communities in which Jews found themselves (particularly but not exclusively medieval, Islamicate contexts), halakhah authorities have thus admitted into the halakhic system – if sometimes grudgingly and/or with the intent to forbid, as will soon be seen – a recognized form of non-marital relationship between a man and woman.

Since *pilagshim* appear at several locations in the Tanakh,<sup>82</sup> the rabbis were not at liberty to simply dismiss the institution, though in the classical period of the tannaim and amoraim they gave it minimal attention at best. Of course, the rabbis, as was their wont, did not simply accept *pilagshut* as it appears in biblical texts, and their understandings of *pilagshut* respond to their own model of marriage. Since it is the rabbinic understanding on which later halakhic understandings are built, for our purposes here the key foundational text is a very short passage from b. San. 21a:

מאי נשים ומאי פלגשים? - אמר רב יהודה אמר רב: נשים, בכתובה ובקידושין, פלגשים - בלא כתובה ובלא קידושין.  
What is [meant by] "wives" and what is [meant by] "concubines"? Rav Yehudah said [in the name of] Rav: Wives – with a *ketubah* and *kiddushin*; concubines – without a *ketubah* and

79. Though the degree of resemblance between a ceremony and *kiddushin* might itself be a concern that needs to be adjudicated; I will return to this point in the Conclusion/*P'sak* of this teshuvah.

80. See further discussion of this point and of documentation of the marriage below in Section V, and as applied in Appendix I and II.

81. Commonly rendered in English as "concubinage," but note Michael J. Broyde's suggestion that this term be translated as something like "faithful sexual companion": "Jewish Law and the Abandonment of Marriage: Diverse Models of Sexuality and Reproduction in the Jewish View, and the Return to Monogamy in the Modern Era," in *Marriage, Sex and Family in Judaism*, eds. Michael J. Broyde and Michael Ausubel (Lanham, Maryland: Rowman & Littlefield Publishers, 2005), 96 and 111, n47.

82. Even if we exclude concubines linked with non-Israelite men, examples may be found in Gen. 25:6 (Abraham) and 35:22 (Jacob); Judges 8:31 (Gideon) and 19-20 (multiple verses; this is the episode of the "Concubine of Gibeah"); multiple instances in II Samuel (Saul, David); I Kings 11:3 (Solomon).

For a somewhat more extended version of the discussion that follows, see Labovitz, "'With Righteousness and with Justice'," 101–04.

without *kiddushin*.

That is, to the rabbis the critical distinction between marriage and concubinage comes directly out of their own marriage laws, based on whether marital acquisition through *kiddushin* took place or not (and whether the woman has the rights and protections granted by the *ketubah*).<sup>83</sup> This definition then carries the additional implication that no *get* would be needed to terminate a *pilagshut* relationship.

Among medieval halakhic authorities, Maimonides on the one hand and Nachmanides on the other (or statements attributed to them) lay the groundwork for three broad perspectives towards *pilagshut* that developed in medieval discourse and persist in subsequent halakhic literature. Maimonides argues for complete functional prohibition on *pilagshut* as an option for “everyday” Jewish couples. In M.T., *Hilkhot Melakhim* 4:4, he presents this previously unprecedented ruling:<sup>84</sup>

וכן לוקח מכל גבול ישראל נשים ופלגשים, נשים בכתובה וקדושין, ופלגשים בלא כתובה ובלא קידושין אלא ביהוד  
בלבד קונה אותה ומותרת לו, אבל ההדיוט אסור בפילגש

And similarly he [the king] may take wives and concubines from within the entire boundary of Israel, Wives – with a *ketubah* and *kiddushin*; concubines – without a *ketubah* and without *kiddushin*, but rather he acquires her through seclusion [together, as a representation of sexual activity] and she is permitted to him. But the ordinary person is forbidden to have a concubine.

This restriction corresponds with Maimonides’ views more generally on sexual contact in the absence of *kiddushin* between the partners. In both *Sefer haMitzvot* (*lo ta’aseh* 355) and M.T. *Hilkhot Ishut* 1:4, he declares that sexual contact in the absence of *kiddushin* is entirely forbidden, a prohibition he associates with that against relations with (for the man) or as (for the woman) the “*kedeshah*” of Deut. 23:18.<sup>85</sup> Since in the language of the Talmud, *pilagshut* does not entail *kiddushin*,<sup>86</sup> it would consequently have to fall into his category of inappropriate sexual relationships.<sup>87</sup> Although the institution technically exists within the legal system, it would be functionally impermissible for a couple to create such a relationship, and sex between them would instead be categorized as licentiousness. Schindler (and others who take a similar position) relies on this prohibitory stance regarding *pilagshut* to maintain the dichotomy of *kiddushin* and all other relationships even when exclusive and long-term.<sup>88</sup>

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83. Several manuscript variants and subsequent commentaries and citations that suggest alternate readings that might complicate this understanding. See Ellinson, 41–43 and Goldberg and Villa, 207, n414. Similarly, y. Ket. 5:2 (29d) offers a different, if related, distinction between wives and concubines; see Ellinson, 43–47. However, it is the Babylonian tradition, and more particularly this version of the printed text (or similar understandings of the manuscript variants) that is most commonly cited in later writings on this topic, and which typically underlies subsequent halakhic discourse.

84. Though it may be noteworthy that the previously cited passage from b. San. 21a appears in the larger context of commentary to m. San. 2:4, which in turn addresses the biblical commandment of Deut. 17:17 that an Israelite king may not take an excessive number of wives.

85. “לא תהיה קדשה מבנות ישראל.” *Etz Hayim* translates: “No Israelite woman shall be a cult prostitute...” Maimonides’ understanding is something like “whore,” not only in the sense of a sex-worker for pay, but also of a woman who does not limit herself to an exclusive sexual partner. Note that his reading elides the second half of the verse: ולא יהיה קדש מבני ישראל/nor shall any Israelite man be cult prostitute. See also his somewhat different interpretation in *Hilkhot Na’arah Betulah* 2:17.

86. But note also his use of the word “acquire.” Nachmanides, in his responsum on this topic (see below), explicitly states, in contrast, that the concubine is not acquired (קנויה לו) by the man.

87. But see also Ellinson, 56–60 and Goldberg and Villa, 210.

88. See Schindler, 91–3.

Nachmanides, both in direct response to Maimonides (see his commentary to *Sefer haMitzvot*, 5)<sup>89</sup> and in a responsum written to his colleague (and cousin) Rabbi Yona Gerondi,<sup>90</sup> challenges Maimonides' approach. He argues that so long as the relationship is one in which the woman is sexually exclusive to the man, such that there will be no doubts regarding the paternity of her children, the relationship is entirely permissible to any Jewish couple, in practice as well as in theory.<sup>91</sup> However, the responsum includes an additional line that lends itself in another direction:

אתה רבינו, ה' יחיך, במקומך תזהירם מן הפילגש, שאם ידעו ההיתר, יזנו ויפרצו ויבואו עליהן בנדותן.  
But now, Rabbenu, may the Lord give you life, in your locale warn them (away) from the concubine, for if they knew of the permission, they would fornicate and be licentious and have sexual relations with them during their menstruation.

Ellinson has argued convincingly that this statement is not original to Nachmanides.<sup>92</sup> Nonetheless, its presence in the responsum and attribution to Nachmanides allows for a spectrum of intermediary positions between almost total prohibition or full permissibility. In these views, concubinage is considered to be permissible in theory but is to be discouraged in practice for such reasons as the social stigma to the woman and/or her family, the degrading effect on sexual standards in the community, or even that a woman in such a relationship is embarrassed to go to the mikvah as required.<sup>93</sup>

Regardless of one's stance on the permissibility of *pilagshut*, however, one of the intriguing effects of having this concept in the legal record is that it becomes an alternate means for "classifying" a variety of extended sexual relationships that a Jewish man and Jewish woman might enter into – if no *kiddushin* was formally enacted, then the relationship is not *kiddushin* (such that a *get* would be needed to sever them), but if exclusive, then neither is it outright licentiousness. As Adler writes, "Into this category, earlier halakhists tossed a wildly ahistorical muddle of relationships...For the traditionalist, however, what all these long-term relationships have in common is their claim to be other than *kiddushin*."<sup>94</sup> One can see this, for example, in S.A. E.H. 26:1, as the Rema interprets a ruling from Karo (which is, in turn, based on a short teshuvah of the Rosh, 32:13):

אין האשה נחשבת אשת איש אלא על ידי קדושין שנתקדשה כראוי...ואפילו בא עליה לשם אישות בינו לבינה, אינה נחשבת כאשתו, ואפילו אם ייחדה לו, אלא אדרבא כופין אותו להוציאה מביתו. הגה: דבודאי בושה היא מלטבול, ובא עליה בנדתה...אבל אם מייחד אליו אשה וטובלת אליו, יש אומרים שמותר והוא פלגש האמורה בתורה...וי"א שאסור, ולוקין על זה...

89. And see also the Ra'avad's commentary to M.T. *Hilkhot Ishut* 1:4.

90. The responsum can be found in the collected responsa of the Rashba, which includes a section of responsa attributed to Nachmanides; the responsum in question is *siman* 284.

91. Nachmanides does claim at one point that the Maimonides too does not forbid a *pilegsh* to an ordinary Israelite, in direct contradiction to the text as known to us both from manuscripts and citations; later sources assume that the critical phrase must have been missing from the text that was before Nachmanides. See Ellinson, 60, and Goldberg and Villa, 213. However, Nachmanides' responsum does not rest solely on this point.

92. His reasons include its awkward placement in the responsum and its style, not to mention its seeming incompatibility with the rest of Nachmanides' argument and stance as articulated here and in other writings. Ellinson, 73–79.

93. See Ellinson, 68–69 for medieval examples of this stance, and 82 for a 15th century example (Rabbi Shlomo Luria); similarly Goldberg and Villa, 225, list this as one of five possible stances towards *pilagshut* (three prohibitory stances based on different grounds for a prohibition, this intermediary position, and a permissive stance); additional taxonomies of positions are suggested in Broyde, "Jewish Law and the Abandonment of Marriage," 96–100, and Shmu'el Ariel, "פלגשות אינה 'הבירות'," *Akdamos* 17 (2006), 48–59.

94. Adler, *Engendering Judaism*, 204.

[Karo] A woman is not considered the wife of a man [i.e., a legally married woman] except by *kiddushin*, that she was betrothed properly...And even if he had sexual relations with her for the sake of marriage [only] between him and her [i.e., with no legal witnesses], she is not considered as his wife, and even if she is secluded with him – but rather, on the contrary, we compel him to expel her from his home.

[Rema] Comment: since certainly she is ashamed to immerse [in the mikvah, after menstruation], and he has sexual relations with her as a menstruant...But if he designates himself a woman, and she immerses for him, there are those who say that it is permitted *and this is the pilegesh spoken of in the Torah*. And there are those who say it is forbidden and we give lashes for this... (emphasis added)

Isserles seems to allow for the possibility of a sexual relationship, under the rubric of *pilagshut*, that is entered into without the rites of *kiddushin* but on the understanding that the woman is sexually exclusive to the man.<sup>95</sup> As Ellinson comments, “Any established relationship without *kiddushin* is considered to be *pilagshut*...”<sup>96</sup> This, in turn, extends to how a variety of modern forms of relationships are to be halakhically understood: “A fixed and faithful connection – its legal status is as a connection of concubinage... So long as there is no place for *kiddushin* to take effect between the members of the couple, then the definition of the connection is like that of *pilagshut* regarding all its halakhic-legal consequences.”<sup>97</sup>

To be absolutely clear, nothing in this discussion should be construed as an argument in favor of reviving or revising *pilagshut* in its classical form, in the absence of any other ceremonial element, as a means of circumventing *kiddushin* and its attendant inequities and material dangers.<sup>98</sup> That *pilagshut* is not a good option for women may be one of the few things upon which traditionalists and feminists agree, though for different reasons. Traditionalist sources commonly invoke the lower social status of the concubine (both historically and in the general outlook of the legal sources) as compared to the “proper,” fully married wife, and/or stress that the concubine lacks such “protections” of marriage such as the provisions of the *ketubah* and the husband’s obligation to maintain her financially. Feminists note that the concept has androcentric assumptions built into its very vocabulary: the woman’s role and status is marked by the term *pilegesh*, while the man’s status is not affected nor linguistically marked. Moreover, as with *kiddushin*, the concubine is expected to maintain sexual exclusivity to the man, with no corresponding obligation on his part. No mutual (or even unilateral) obligations of financial or other material support of the parties one for the other are inherent in the *pilagshut* relationship (though they

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95. But note also the ambivalence expressed by the Rema (citing various views without deciding himself between them) as to whether this certainly the case and (hence) whether such arrangements are in fact permitted.

96. Ellinson, 81.

97. Ellinson, 96. Within this category Ellinson would include not only those classified/registered as *ידועה בציבור*, but also partners to a civil marriage. While it is not the purpose of this teshuvah to directly challenge Klein’s teshuvah which currently guides Conservative/Masorti practice on the status of civil marriage (see Section II above), it does seem to me that the questions, considerations, and sources presented here, not to mention significant social changes that have taken place between the 1930’s and the current moment, all suggest that we might do well to at least reopen and reconsider our stance.

98. But note the recent proposal of Zvi Zohar to just that end: “Halakhic Positions Permitting Pre-Marital Sexual Intimacy,” *Akdamot*, 17 (2006), pp. 11-31 (Hebrew) (and see the several responses, and Zohar’s response to them, in the same issue).

may be negotiated and documented if the couple so desires). As Adler pointedly asks, “would you rather be a permanent possession or a long-term lease?”<sup>99</sup>

Yet as Adler also points out, *pilagshut* does open a space for a different sort of possibility when rethinking halakhah in this area: that is, *pilagshut* might serve “as a placeholder for relationships differentiated from *kiddushin*.”<sup>100</sup> What *pilagshut* and Adler’s consideration of it *does* allow for, therefore, is a stance that will define relationships established through potential new ceremonies that avoid the trappings of *kiddushin* as indeed *not* constituting *kiddushin*, but also as open to being categorized as something other than the sort of entirely extra-marital licentiousness that would have to be discouraged.<sup>101</sup> The options I will describe and endorse just below are *not* to be understood as *pilagshut*. Nonetheless, at the heart of the argument here is my assumption, and the assumption of those whose writings and ceremonies I will now examine, that there is a place for a third category besides *kiddushin* and *z’nut*: ceremonies that are deliberately Jewish and halakhic in conceptualization, language, and even legal grounding, binding on the participants and thereby giving their (sexual) relationship legitimacy – but based on something other than acquisition and unilateral declarations, i.e. *kiddushin*. As Rabbi David Greenstein writes, to a similar end, “But to make an equation between the classically defined concept of concubinage and this new alternative to *qiddushin* is to fail to recognize the essential difference between the new theory of marriage espoused by that alternative and the traditional theory of marriage under which concubinage was subsumed.”<sup>102</sup>

Finally, before concluding this section, I would like to add a few words about the very real conflict between classical halakhic categories regarding marriage and promiscuity and common modern day practice, in which couples often engage in sexual activity and cohabitation prior to marriage. More particularly, a Conservative/Masorti attempt to struggle with and address this conflict can be seen in the 1996 publication “‘This is My Beloved, This is My Friend’: A Rabbinic Letter on Intimate Relations,” written by Rabbi Elliot Dorff on behalf of the Commission on Human Sexuality convened by the Rabbinical Assembly. The Letter states clearly that “Judaism posits marriage as the appropriate context for sexual intercourse.” It rejects, as a matter of course, any and all sexual acts that are “adulterous, incestuous, or involuntary,” but also condemns “casual and promiscuous sexual encounters.” Yet what follows is then an extended discussion of non-marital relations that are “not adulterous, incestuous, forced, *or promiscuous* [emphasis added],” but rather “between two unmarried adults which take place in the context of an on-going, loving relationship.”<sup>103</sup> The Letter then proceed to delineate a series of conditions that should be met and norms that should be abided by even in such relationships outside of marriage. This results in the conclusion that under such circumstances, “committed, loving relationships between mature people who strive to conduct their sexual lives according to the concepts and values described above can embody a measure of morality, although not the full portion available in marriage”

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99. Adler, *Engendering Judaism*, 205. See also Greenstein, 22. For a particularly scathing rejection of *pilagshut* as a redeemable model from a feminist perspective, see Bonna Devora Haberman, “Divorcing Ba’al: The Sex of Ownership in Jewish Marriage,” in *The Passionate Torah, Sex and Judaism*, ed. Danya Ruttenberg (New York and London: New York University Press, 2009), 45.

100. Adler, *Engendering Judaism*, 205.

101. In this vein, see also Feldblum, and his description of the category of “דרך קידושין,” a marriage enacted “in the manner of *kiddushin*,” but which (he argues) is not Toraitic or rabbinic *kiddushin* (and hence no *get* is required for dissolving the relationship), nor *pilagshut*, and yet also not *z’nut*. See also Ruttenberg’s discussion, <https://alternativestokiddushin.wordpress.com/2006/08/03/derech-kiddushin/>.

102. Greenstein, 22. As he continues: “Concubinage was, indeed, a way for couples to establish a relationship without resort to *qiddushin*. But it was still, in essence, an acquiescence to that theory of marriage in that it was a non-egalitarian relationship...It is this basic acknowledgement of the validity of the traditional theory of marriage that allows the opponents of concubinage to aver that concubinage should be prohibited.”

103. All citations to this point are from p. 30 of the Letter.

(p. 35). The discomfort with deeming such relationships “promiscuous” solely by virtue of taking place outside of marriage is noteworthy, and speaks to a recognition that this is no longer how most Jews, even those involved in Jewish life and practice, think of sexual relationships in our everyday modern existence. If this is the case for relationships that take place in the absence of any ceremony or formal commitment, how much more so must we evaluate as valid relationships in which the couple do commit publicly to each other and declare before the Jewish community their intent to make a Jewish home together. The norms laid out in the Letter certainly should apply, and indeed should not be objectionable to, those who choose to marry by the ceremonies endorsed here rather than by *kiddushin*. In that case, we cannot deem their relationships to be promiscuous, and ought rather to recognize their fundamental “measure of morality” and coherence with the Jewish values embraced by our Movement.

#### IV. Options for Jewish Marriage Without *Kiddushin*

At this point, we are finally able to turn to actual proposals for Jewish marriage by means other than *kiddushin*. In this section, I will survey two options that to my mind most strongly consider this as a legal as well as ritual concern, and will therefore endorse these options in particular as viable options at this time for Conservative/Masorti Jews.<sup>104</sup> It should also be noted at the outset that while my primary purpose in this teshuvah is to provide new egalitarian options for differing-sex couples, both of these ceremonies are designed to be usable by any Jewish couple regardless of the gender identities of the partners. Moreover, these represent two different approaches; not unlike the ceremonies devised by Rabbis Dorff, Nevins, and Reisner for same-sex couples, one option invokes the language and/or structure of *kiddushin* while deliberately seeking to do so in such a way that *kiddushin* itself does not actually take hold, while the other eschews the language and conceptual underpinnings of *kiddushin* altogether, and instead seeks to create a ceremony and binding commitment between partners out of other elements of the halakhic system. I will address the core ritual/legal act at the center of each, with an eye to how such acts can create a legally binding relationship between the marital partners, and how, concomitantly, each would be undone in a divorce process.

##### a) A *kiddushin*-like model (התקדשות)

“The challenge is thus laid before those who are not willing to be apologetic about their alienation from traditional marriage theory and ceremony to proceed assertively toward a new version of effective *qiddushin*.”<sup>105</sup>

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104. For additional models that I am currently aware of but chose not to include/endorse here (and the reasoning behind those choices), see Labovitz, “With Righteousness and with Justice”. Nor do I wish to claim that I have presented an exhaustive list of possible options, either those that have already been proposed and/or tried, or those that might yet be imagined by a creative Jewish thinker who is both committed to egalitarian relations between men and women and a knowledgeable halakhic innovator. While this teshuvah endorses only these two options at this time, adopting it would not preclude the possibility of the CJLS considering another option as yet unknown to this author or as yet undeveloped, at such time as it came to the Committee’s attention.

To borrow the words of Rabbi Aaron Alexander in his concurrence to the CJLS adoption of ceremonies for same-sex marriage rites, “In the spirit of recognizing that no one ceremony has yet to emerge (and may never do so) we submit this paper as simply our take on what is no doubt a monumental work in progress”:

<https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/2011-2020/alexander-same-sex-concurrence.pdf>, 1.

105. Greenstein, 23.

Rabbi David Greenstein<sup>106</sup> argues for foregoing *kiddushin* in its traditional form, in that it relies on a “theory of marriage” that is built on exclusive sexual access for the man to the woman that is (as has already been reiterated here many times) non-reciprocal and hence, in conjunction, assumes heteronormativity. He does, however, embrace the concept of sexual exclusivity that *kiddushin* and the metaphor of ownership represent on a symbolic as well as a legal level when it is understood as mutual: “...there really is a profound sense of exclusive ownership that stems from the feelings of love and relationship that are sanctified by a marriage...Moreover, the feeling works in two directions – both the claim of ownership over another as well the sense of being owned by another can be equally present and significant.”<sup>107</sup> Mutualizing traditional *kiddushin*, however, does not suffice as a corrective in his view, for reasons that rest on legalistic grounds (in keeping with the view of Klein, cited above, which allows an outside authority to accept the husband’s act of *kiddushin* as binding while treating the wife’s reciprocal statement as legally meaningless) as well as on those of ideology.<sup>108</sup> Rather,

if we wish to craft a marriage ceremony that is adequate to the basic elements of the relationship it is to celebrate and sanctify, we must seek to give expression to this newly understood sense of acquisition – *qinyan*. We might attempt to craft a ceremony that is both radically different in message while being only subtly different in form or formula...<sup>109</sup>

His proposed alternative is to turn to a form of marital declaration that is mentioned but explicitly rejected as non-binding in rabbinic and later halakhic writings, as found in Mishneh Torah (*Hilkhot Ishut* 3:2 and 6):<sup>110</sup>

נתנה היא ואמרה לו הריני מקודשת לך, הריני מאורסת לך, הרי אני לך לאשה, או בכל לשון הקנאה, אינה מקודשת... הדברים שיאמר האיש כשיקדש צריך שיהיה עניינם שהוא קונה אשה לא שיהא עניינם שהקנה עצמו לה, כיצד הרי שאמר לה או כתב בשטר שנתנו לה הריני בעליך, הריני ארוסיך, הריני אישיך וכל כיוצא בזה, אין כאן קידושין כלל...  
If she gave [the money/token of *kiddushin*] and said to him “I am betrothed (מקודשת) to you,” (or) “I am betrothed (מאורסת) to you,” (or) “I am a wife to you,” or in any language of bestowal (i.e., of herself to him), she is not betrothed... (3:2)

The words which the man should say when he betroths, their subject must be that he acquires a woman/wife, and their subject should not be that he bestows himself to her. How so? If he said to her or wrote in a document that he gave to her “I am your husband,” (or) “I am your betrothed,” (or) “I am your man/husband,” or anything of the sort, there is no *kiddushin* here at all... (3:6)<sup>111</sup>

On this basis, Greenstein proposes a ceremony in which each partner, rather than attempt to “acquire” the other, instead presents the other with a ring and makes a statement of commitment to giving oneself exclusively to a spouse: “הרי אני מתקדש/ת לך,” “Behold, I am betrothed/set aside for you” (or, in Greenstein’s own translation, “I hereby sanctify myself to you...”). As he explains: “the gift of the ring is declared by this formula to exemplify a gift of self...each is creating a change of status to themselves and

106. Rabbi Greenstein is a member of the Rabbinical Assembly, but the article is an independent work which has not been previously considered by any official arm of the Movement.

107. Greenstein, 18; emphasis in the original.

108. Greenstein, 26. See also the discussion of Rachel Adler’s work, below.

109. Greenstein, 19–20.

110. For a similar proposal, coming from an Orthodox and Israeli perspective, see Feldblum, “The Problem of *Agunot* and *Mamzerim*.” See also Labovitz, “With Righteousness and with Justice,” 104–07 and the sources cited there for further considerations of this work.

111. These laws are derived, in turn, from t. Kid. 1:1 and b. Kid. 5b (see also Rashi, *ד”ה אין כאן בית מיהוש*).

dedicating that changed status to the other...”<sup>112</sup> Our CJLS colleague Rabbi Avram Reisner has felicitously suggested that such a ceremony be called *התקדשות* (*hitkadshut*; something like “self-betrothal” or “setting oneself aside”),<sup>113</sup> a name that I will adopt from this point forward.

The most significant conceptual and legal/procedural challenge I see with *hitkadshut* is that while it explicitly aims to avoid effecting *kiddushin*, it is somewhat less clear what by what alternative means a marriage enacted by this declaration might be considered legally binding on the participants. Greenstein emphasizes that the relationship created by his ceremony is *not* to be understood as *kiddushin*, and even describes it as non-halakhic at one point, in the sense that it is not to be understood as conforming to previously established marital law:

This approach does not apologize for not being *halakhic*. It is firmly convinced that it is both legitimate and, indeed, preferable to the traditional approach...An explicit declaration setting forth the egalitarian nature of the wedding and the disavowal of any desire to have the marriage abide by presently hallowed halakhic standards avoids the *halakhic* tendency to reinterpret inexact statements as valid when they are uttered during a “conversation regarding marital matters...”<sup>114</sup>

Intertwined with this question is that of how bonds formed by *hitkadshut* are to be undone. Indeed, it may be argued that the need to *legally* undo an act is itself a marker that the initial act had legally binding force. Yet the article does not delineate how such relationships are undone with the same degree of specificity given to the ceremonial creation of the relationship; Greenstein refers his readers in single end-note to the work of Rachel Adler (see below).<sup>115</sup>

A likely response to this concern can be elicited, however, when Greenstein turns to an element of the traditional *kiddushin* declaration that has not been mentioned before now in this teshuvah: the statement that the betrothal is done “כדת משה וישראל” “according to the law of Moses and Israel.” Greenstein emphatically includes it in the *hitkadshut* declaration that the partners make to each other. This then leads him to redefine his prior claim that his ceremony is decidedly (and deliberately) non-halakhic:

Some would argue that a purposely non-*halakhic* ceremony cannot presume to state that it is done in keeping with this phrase. Nevertheless, our position is that declarative statements such as this do not only refer backward, to some inviolate set of norms, but also can produce the necessary emergent commitment to new norms.<sup>116</sup>

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112. Greenstein, 27. Further down on the same page, Greenstein writes that an additional advantage of this method is that it can be used for a same-sex pairing: “The trivial truism that traditional *qiddushin* has never applied to gay couples contributes nothing toward determining the essential nature of *qiddushin* as we value it...this approach recognizes that gender roles are not determinative in defining a sacred relationship.” For the wedding of a same-sex couple who did actually put together a ceremony with language similar to that suggested by Greenstein – with different/additional reasoning for grounding this language halakhically – see Orrin Walpert, “A Traditional Same-Sex Jewish Wedding,” available on-line at <http://ritualwell.org/sites/default/files/Wolpert%20Ceremony%20for%20Public%20Distribution%20with%20images.pdf>.

113. In light of the fundamental shift to true mutuality in both the underlying legal and conceptual basis of a marriage performed in this manner, I am even willing to consider “self-sanctification” as a translation here.

114. Greenstein, 26. See n10 above.

115. Greenstein, 27 and 33, n77.

116. Greenstein, 27.



Greenstein goes on to further suggest that the phrase carries in it implications that marriage and halakhah more broadly are dynamic and socially constructed institutions that grow and develop over time and as social norms and ideas change, and that – following particularly an interpretation of the interpretation of Rashi to b. Ket. 3a – it is the rabbinic leaders of the Jewish people who determine what “marriage” is, what the halakhah of marriage is:

כל המקדש - כל המקדש אשה על דעת שהנהיגו חכמי ישראל בישראל הוא מקדשה שיהיו קיימין קידושין לפי דברי חכמים...

Anyone who betroths - Anyone who betroths a woman, he betroths in accordance with the understanding that the sages of Israel put into practice in Israel, that *kiddushin* should be valid according to the words of the sages...

Of the sages of the classical rabbinic texts, he writes “They understood that they were called to refract the practices of the community of Israel through the lens of their commitment to creating a community of holiness, expressed as a *dat Moshe v’Yisra’el*”; from this he concludes that “So, too, it is our obligation to promote a *dat Moshe v’Yisra’el* – a religious practice that is faithfully rooted in the traditions of Moses and Israel even as it is faithful to our own best understanding – as *Yisra’el* – of what makes a relationship sacred.”<sup>117</sup>

In this instance, I also think guidance may be found in the means by which Rabbis Dorff, Nevins, and Reisner conceptualized the legal force of their proposed marriage rites for same-sex couples. That is, it is precisely by this appeal to rabbinic authority that they seek to make the same-sex commitment ceremonies of their teshuvah halakhically binding: “As rabbinic interpreters of halakhah, we believe that our ruling is an authentic expression of דת משה וישראל, the laws of Moses and Israel.” And on the following page: “Thus, even though the halakhic mechanism for binding the couple together is distinct from the traditional model of *kiddushin*, the result is still a Jewish marriage.”<sup>118</sup> Their “rites and rituals” also includes an additional element that might be applied here to add further binding force to the marital commitment: “A document of ‘covenant’ committing the couple to live a life of mutual fidelity and responsibility is read and witnessed. This covenant is affirmed at the rings ceremony and constitutes the halakhic mechanism for binding the couple together as a family.”<sup>119</sup> Although (as Greenstein himself notes at one point<sup>120</sup>) in traditional halakhah it is *kiddushin* that makes a marriage binding, and the *ketubbah* has does not have constitutive effect in and of itself, the document does nonetheless create (or at least record) binding commitments. In this case, then (as also in Rachel Adler’s proposal discussed just below), a “ketubbah”-style agreement can itself serve to establish “a mutual acceptance of sexual fidelity as well as financial responsibility for each partner’s welfare” and “religiously, legally and morally binds the couple together in marriage.”<sup>121</sup>

117. Greenstein, 28. Additionally, perhaps it is even the couple themselves who imbue the ceremony with legal meaning. Responding to an earlier draft of this teshuvah, Greenstein suggested to me that these marriages are binding “because the participants *want* them to be binding. That is what they mean to accomplish by having a wedding ceremony.” E-mail correspondence, March 7, 2016.

118. Dorff, Nevins, and Reisner, 2 (n5), 3. It is true that they continue in n5: “That said, we realize that the model of ceremony that we here offer is discontinuous with the model created by our ancient rabbis, and that it is not yet established and accepted by the majority of rabbis in our time,” and that therefore their marital declarations for the partners to make to each other end “בעיני אלהים ואדם”/“in the eyes of God and humanity” instead. See also Alexander’s concurrence, in which he writes, “I agree with the authors that their original ruling in 2006 was ‘an authentic expression of דת משה וישראל,’ and see no reason for rabbis and couples to exclude that powerful reference from a marriage ceremony they engage in together.” (2)

119. Dorff, Nevins, and Reisner, 3.

120. Greenstein, 24.

121. Dorff, Nevins, and Reisner, 5–6.

b) Beyond *Kiddushin* (ברית אהובים/שותפות)

“To treat both parties consistently as persons rather than property, we would have to reframe the legal portion of the ceremony in terms of partnership law rather than property law as it is currently categorized. Only then would the ceremony’s legal component accurately reflect the kind of marriage to which egalitarian couples mean to pledge themselves.”<sup>122</sup>

The second model was first proposed by Dr. (and now Rabbi) Rachel Adler, in her critical work of feminist theology *Engendering Judaism*, under the name “Brit Ahuvim,” “Lovers’ Covenant.”<sup>123</sup> The term “Brit/Covenant” in the name is central Adler’s conceptualization of marriage and the ritual and legal means by which a marriage ought to be created and maintained. Adler rejects the model of acquisition and ownership altogether:

The problem with marital *kinyan* is not simply that it is unilateral, but that it commodifies human beings. The groom’s commodification and acquisition of the bride is not rectified by the bride’s retaliation in kind...The vocabulary and constitutive assumptions of *kiddushin* cannot be made to reflect a partnership of equals.<sup>124</sup>

Thus she must instead find another basis on which to establish relationship: “We have just reached a point in history where it is possible to envision, and sometimes to realize, marriages in which two remain two, marriages that are not incorporations but covenants...This intention is not reflected in an act of acquisition. It can only be expressed by an act of covenanting.”<sup>125</sup> The turn to “covenant” is also significant to Adler for its differences from agreement by contract. First and foremost, in Adler’s understanding a covenant can endure even when its terms are violated, in a way that contracts cannot or do not: “the partners are committed ultimately to one another and not merely to the terms they have promised to fulfill. To the extent that this covenantal commitment is realized in the relationship, it can survive breaches in contractual obligations.”<sup>126</sup> So, to take one of the most extreme examples, unlike *kiddushin* which technically (if not always in practice) should not be continued after adultery committed by the female partner, *b’rit ahuvim* can be maintained after sexual/emotional betrayal committed by either party if the two spouses decide that reconciliation is their preferred course.

122. Adler, *Engendering Judaism*, 169–70.

123. Adler, *Engendering Judaism*, most particularly Chapter 5, “*B’rit Ahuvim*: A Marriage Between Subjects,” 169–207 (and the “Appendix” containing sample documents, 214–17). While Rabbis Dorff, Nevins, and Reisner also use this title for their ceremonies for same-sex partners, their ceremonies are distinct ritually and legally from Adler’s original proposal.

124. Adler, *Engendering Judaism*, 191. Although I am presenting Adler’s work after Greenstein’s here, his article appeared chronologically after her book, and some of his comments about ownership and marriage (and the distinction between taking possession of someone else vs. giving oneself freely to another) are expressly presented as a critique of her position.

125. Adler, *Engendering Judaism*, 192.

126. Adler, *Engendering Judaism*, 193–94. Adler also discusses this aspect of covenant in relation to the biblical metaphor of the relationship between God and Israel as that between a husband and (unfaithful) wife; see 156–67.

See also my analysis of the functioning of this distinction in Adler’s work in Gail Labovitz, “Engendering Halakhah: Rachel Adler’s *Berit Ahuvim* and the Quest to Create a Feminist Halakhic Praxis,” *Revisioning Ritual: Jewish Traditions in Transition*, Ed. Simon J. Bronner (Oxford: The Littman Library of Jewish Civilization, 2011) 175–78.

That said, the legal model Adler finds most apt to the sort of marriage she hopes to establish is that of שותפות, partnership.<sup>127</sup> Rabbinic texts regularly consider persons functioning as partners in various economic contexts, such as investing in trade goods, or owning property such as animals, slaves, or real estate in common. One also finds references to two or more persons who have “placed in a purse,” a symbolic/legal gesture of pooling resources (for example, m. Ket 10:4 and t. Ket 10:4). Maimonides, in *Hilkhot Shluhin v’Shutafin* 4:1 and 3, specifies that it is this process that functions as the legal commitment to a partnership and the act that invests the partners with rights and liabilities regarding the profits or losses of the business transacted with the partnership funds/property:

כשירצו השותפין להשתתף במה יקנה כל אחד מהן ממון חבירו להשתתף בו, אם במעות נשתתפו יביא זה מעותיו ויביא זה מעותיו ויטילו אותן לכיס אחד ויגביהו את הכיס שניהם  
השותפין שהטילו לכיס זה מנה וזה מאתים וזה שלש מאות ונתעסקו כולן בממון ופחתו או הותירו השכר או הפחת ביניהם בשוה לפי מניינם ולא לפי המעות

When partners want to become partners, by what [means] does each acquire [rights in] his partner’s money, to be a partner in it? If they are partnering with money, this one brings his money and this one brings his money, and they place them together in one purse and both of them lift the purse. (4:1)

The partners who “placed in a purse” – this one [contributing] one hundred and this one two hundred and this one three hundred – and all used the money, and they [the assets] diminished or grew, the profit or the loss is [divided] among them equally, according to their number and not according to the money (*i.e.*, *the proportional size of each initial investment*). (4:3)

A critical point here is that while there is an acquisition, it is not an acquisition of persons. As Adler notes, “Because the laws of partnership developed out of the laws of joint ownership, the partnership is regarded as a kind of property in which the partners have invested.” What is acquired when the partnership is created is both rights in the benefits of the investment and also “legal obligations for maintaining the partnership and its projects.”<sup>128</sup> Most importantly, this is a model in which the legal relationship “is formed by mutual agreement, and each party has the power to terminate it.”<sup>129</sup>

127. Note that there are already hints of the use of this term, if not the full legal concept, in reference to marriage in the Yerushalmi (y. Ket 7:6 - or 7 in some versions - 31c; on the correct reading of the word here as שותפות/partnership, see Saul Lieberman, *Hilkhot ha-Yerushalmi* [New York: The Jewish Theological Seminary, 1947], 61) and the marriage documents found in the Cairo Genizah, as discussed further in the note to the end of this paragraph.

128. Adler, *Engendering Judaism*, 192.

129. Adler, *Engendering Judaism*, 192. On how *b’rit ahuvim* is dissolved, see below.

For the moment, however, let me note that as documented by Mordechai Akiva Friedman, the terminology of שותפות/partnership for a marital relationship is mentioned in several of the marriage contracts found in the Cairo Genizah; especially intriguingly, the term appears in each instance in a clause detailing circumstances in which *either* member of the couple, no longer desiring the “partnership” of the other, has the right to initiate the divorce process. To be sure, this clause does not necessarily mean that the wife can leave the marriage entirely of her own volition or that a court could end the marriage on her behalf; most likely it indicates rather that the court would intervene at the wife’s request to compel the husband to grant a divorce (and she might forfeit certain rights regarding the collection of her *ketubbah*). Nonetheless, Friedman writes, “This felicitous term is particularly befitting in a stipulation which describes man and wife as equal partners in the business of marriage, each of whom can withdraw from the partnership at will.” See especially Mordechai Akiva Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study*, vol. 1 (Tel Aviv and New York: Tel Aviv University, The Jewish Theological Seminary of America, 1980) 329–30 (and 312–46 more generally), and the documents listed in n56 there.

Although in later halakhic developments, it became possible (and even typical) to seal partnerships by *kinyan sudar* or even by the verbal agreement of the partners, it is the original symbolic act of “placing in a purse” that Adler adapts as the central legal/ritual act of *b’rit ahuvim*.<sup>130</sup> The two persons being united in marriage each place a personal item of value that represents that individual’s contribution of resources to the partnership (this could be an item of personal significance, or the wedding rings that the couple will subsequently wear) into a bag; the two then lift the bag together and thereby each acquire their share and responsibilities in the partnership. Again, there is no acquisition of persons (*kiddushin*), but rather the acquisition of the partnership. Additionally, the document in which the couple details their commitments and obligations to each other – which Adler refers to as both a “partnership deed” and a “covenant document,”<sup>131</sup> thereby bringing together her two metaphorical structures – is an essential and constitutive part of the legal act: “The *b’rit* document is one of the elements that effectuates a partnership of equals.”<sup>132</sup> That is, when the couple “pool their resources” and raise those items up together, they thereby acquire their share in the partnership, but also the obligations of the partnership, which are detailed in the document. Among the stipulations Adler recommends are sexual exclusivity, joint responsibility for children, and a commitment to care for one another towards the end of life. However, the provisions that the couple make to each other are also negotiable (both at the outset and over the course of the marriage), as with any partnership agreement, and she also encourages couples to add or vary the stipulations in accordance with their individual circumstances; for example, they might include understandings regarding the care and support of children from a previous relationship or of an elderly parent.<sup>133</sup>

As noted above, a critical advantage of partnership law as a model for marriage is that it does not replicate one of the outstanding problems of the *kiddushin* model; it is not unilateral in either its process of creation or its process of dissolution. Just as either partner may initiate proceedings to end the partnership under most circumstances, so either partner has the ability to initiate a divorce of a marriage enacted by *b’rit ahuvim*. Adler’s suggested process for dissolution of *b’rit ahuvim* is given a much briefer description than the ceremony that initiates the relationship, but at its core is the adjudication of a *beit din*: “This procedure should be conducted by a court of three learned Jews.”<sup>134</sup> If needed, the couple may turn to a trained mediator or a *beit din* (chosen according to the traditional method one judge selected by each of the litigants and a third selected by agreement of the first two) to assist them in resolving issues such as dividing marital property, arrangements regarding children, and any residual financial arrangements. The dissolution of the relationship and the agreed upon terms should then be documented

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130. Because *kinyan sudar* figures in the traditional ceremony including *kiddushin* (when the groom accepts up himself the obligations detailed in the *ketubbah*), Adler expresses concern for the possibility of a misperception as to the nature of the act being performed were *kinyan sudar* to be used. Similarly, it is nearly impossible for a mutual and simultaneous acquisition of the sort that is instead used in the ceremony to be mistaken for the acquisition of *kiddushin* itself.

I would add as a personal observation that much as *kiddushin* is an act of acquisition/*kinyan*, but also differs in some important aspects of legal form and effect from most other forms of *kinyan* in Jewish law, so too the use of this older, original form in the marital *shutafut* ceremony can serve to mark this act as grounded in *shutafut* for its legal efficacy but also as different in meaning and effect from other purely economic partnerships under Jewish law. For example, much as other purchases can be shared, resold, rented or lent out, etc. while this is not true of a wife acquired by *kiddushin*, so too a common partnership can involve however many people agree to take part but a marital partnership is between two partners only.

131. Adler, *Engendering Judaism*, 193.

132. Adler, *Engendering Judaism*, 196.

133. Adler, *Engendering Judaism*, 194. See the examples presented with the marriage documents in Appendix II.

134. Adler, *Engendering Judaism*, 199.

by the court in both Hebrew and the vernacular, and the document signed by two halakhically valid witnesses.<sup>135</sup>

Ceremonially, a wedding conducted using either of these options proceeds in a manner nearly identical to a wedding using *kiddushin*, with the central statement of *hitkadshut* or the creation/acceptance of the *shutafut* taking the place in the process usually held by *kiddushin*. Full step-by-step directions for such ceremonies appear as Appendix I at the end of this teshuvah.<sup>136</sup>

## V: Additional Details on Effecting and Dissolving Alternative Forms of Halakhic Jewish Marriage

In this section, then, I draw towards a close by addressing some final related issues and requirements: These are:

- \* A blessing for the act binding the marriage;
- \* Further distinguishing this marriage from *kiddushin*;
- \* Documents;
- \* Divorce;
- \* A condition that may be placed on the marriage;
- \* Standards of Rabbinic Practice

### *A blessing for the act binding the marriage*

Before delineating a complete ceremony, some words are in order about the question of reciting a blessing to accompany this act, as happens in a marriage by *kiddushin*. The first known version of *birkat erusin*, the betrothal blessing, appears in b. Ket. 7b:

ברכת האירוסין מאי מברך? רבין בר רב אדא ורבה בר רב אדא, תרוייהו משמיה דרב יהודה אמרי: בא"י אמ"ה אשר קדשנו במצותיו וצונו על העריות, ואסר לנו את הארוסות, והתיר לנו את הנשואות על ידי חופה וקדושין. רב אחא בריה דרבא מסיים בה משמיה דרב יהודה: בא"י מקדש ישראל על ידי חופה וקדושין. מאן דלא חתים, מידי דהוה אברכת פירות ואברכת מצות, ומאן דחתים, מידי דהוה אקידושא.

The *erusin* blessing – what does one bless? Ravin bar Rav Ada and Rabbah bar Rav Ada, both of them said in the name of Rav Yehudah: “Blessed are you, Adonai, our Lord Sovereign of the world, Who sanctified us with His commandments and commanded us regarding the forbidden relations [that is, the incestuous and/or adulterous connections outlined in Lev. 18 and 20], and forbid us betrothed women, and permitted us married women by means of *huppah* and *kiddushin*.” Rav Aha the son of Rava closed it in the name of Rav Yehudah: “Blessed are you, Adonai, Who sanctifies Israel by means of *huppah* and *kiddushin*.<sup>137</sup>”

The one who does not seal it [add a final blessing] – it is similar to the blessing(s) for produce or the blessing(s) for commandments. And the one who does seal – it is similar to *kiddush* (for Shabbat or a holiday).

135. On the text of such a document, see Section V and Appendix II below.

136. For Adler and Greenstein’s own outlines of their ceremonies, see Adler, *Engendering Judaism*, 197–98 and Greenstein, 34–35.

137. The words “by means of *huppah* and *kiddushin*” do not appear in the Vatican 130 manuscript, and it also omits the reference to God’s name; i.e., the closing blessing there is ברוך מקדש ישראל – Blessed is the One who sanctifies Israel. See further discussion below.

The blessing said to this day is nearly identical in wording, and fundamentally identical in its implications and meaning.<sup>138</sup> Yet the traditional liturgy is not appropriate for the purpose of a truly mutual and egalitarian act of creating a marital bond.<sup>139</sup> Most notably, it is worded in such a way as to speak in a male voice and address only the groom and male attendees at the ceremony. In our context here, its content fits neither the specifics of what is about to happen nor the nature of the egalitarian commitment the couple are seeking to make to each other. Adler does not include an alternative blessing in ceremony (she suffices with the blessing over wine), while Greenstein argues for a revised version of the classic text (for his specific suggestion, see n. 149 below). Presuming that act that binds a couple together, whether it is *hitkadshut* or *brit/shutafut*, should be recognized as a sacred act and a sacred moment for both them and the community, it seems to me only proper that there ought to be a blessing, leaving only the question of what that blessing ought to be.

One valid option, already approved by the CJLS, would be to use either of the two versions of a blessing offered by Rabbis Dorff, Nevins, and Reisner for same-sex couples<sup>140</sup>:

אלהינו ואלהי אבותינו ואמותינו השקיפה ממעון קדשך מן-השמים וברך את-הרעים האהובים הכרתים ביניהם ברית אהבים. ברוך אתה יי הטוב והמטיב.

Our God and God of our Patriarchs and Matriarchs, look down from Your holy abode, from heaven, and bless these loving companions who are together creating a Covenant of Lovers. Praised are You, Adonai, who is good and does good.

אלהינו ואלהי אבותינו ואמותינו השקיפה ממעון קדשך מן-השמים וברך אתהרעים האהובים המשותפים יחד היום בשותפות חיים, וזכם שישבו לפניך באהבה ובאהבה בשלום וברעות. ברוך אתה יי הטוב והמטיב.

Our God and God of our Patriarchs and Matriarchs, look down from Your holy abode, from heaven, and bless these loving companions who are together participating in a Covenant of life-long partnership. May they dwell before You in love, harmony, peace, and companionship. Praised are You, Adonai, who is good and does good.

Adler suggests that the couple use the traditional blessing said upon seeing a rainbow, as they lift the bag

138. It has two additions:

a) והתיר לנו את הנשואות לנו – and permitted to us women married **to us**. This addition enters the tradition in the rishonic period and is attributed to Rabbenu Tam. It is meant to clarify that not all married women are (sexually) permitted to a man, but rather that his own wife becomes permitted to him by marriage (and not just by *kiddushin*).

b) in the concluding blessing (which is now accepted by all as part of the blessing), מקדש עמו ישראל – Who blesses **His people** Israel. This additional word does appear in the Pesaro printing (1510) of the Talmud.

139. Both Adler and Greenstein offer important critiques of this blessing and its implications about the nature of marriage and gender: Adler, *Engendering Judaism*, 177–79, Greenstein, 24–26 (see also 2–3). See also Jacobs and Austrian, 33–36.

Indeed, I find it telling that our Rabbi’s Manual offers “Interpretations” rather than (anything even approaching) a literal translation of this blessing even for a non-egalitarian, non-fully mutualized ceremony: *Moreh Derekh*, C-46–7.

140. See their brief comment to the effect that they “have avoided creating new blessing formulas...,” Dorff, Nevins, and Reisner, 6–7; actual versions of the blessing appear on 8 (using “הרעות האהובות” for a couple composed of two female partners), 9, 12 (again for female partners) and 13.

of pooled items to create their partnership: בא"ה אמ"ה זוכר הברית ונאמן בבריתו וקים במאמרו/Blessed are You... Who remembers the covenant, and is faithful to His covenant, and fulfills His word.<sup>141</sup>

Could we, however, also have a blessing that more closely hews to the form of the traditional blessing? To answer this question (before then providing a suggested *nusach* for such a blessing), we must consider both the general topic of innovation around blessings and liturgy, and also the particular nature and text of the traditional *erusin* blessing. The two most relevant CJLS teshuvot for this topic are “Commemorating the Shoah,” by Rabbi Ben Zion Bergman (adopted by the CJLS in 1988) and “Regarding the Inclusion of the Name of the Matriarchs in the First Blessing of the עמידה,” by Joel Rembaum (adopted in 1990).<sup>142</sup>

The topic of the first of these is creating a blessing to accompany the lighting of a memorial candle on *Yom HaShoah*, and more particularly a proposal that the blessing be constructed in the form of a blessing before performing a commanded ritual act: בא"ה אמ"ה אשר קדשנו במצותיו וצונו להדליק נר של (יום) שואה/ Blessed art You, Lord our God, King of the Universe, who has sanctified us by His commandments and has commanded us to light the lamp of (the Remembrance Day of the) Shoah. This Bergman forcefully rejects, in that such a blessing would suggest that this new ritual should be treated as a מצוה, that is, a halakhically obligated act, which it is not.<sup>143</sup> Since, however, *birkat erusin* is already framed in this way as a blessing for a mitzvah (albeit quite problematically, as will be discussed shortly below), I believe there is a difference between this case and one in which an entirely new mitzvah blessing would be composed; that is, I am not adding a mitzvah here (to the extent there even is a mitzvah here; again, see below), but rather reframing it in light of our egalitarian understanding.

The concern therefore becomes that of changing (some of) the wording of the already extant blessing. Here Rembaum’s teshuvah is relevant in that it considers altering the wording of an already established blessing within the daily prayer liturgy. Although the point at issue in the teshuvah is specific to the liturgy and even more so the composition of the Amidah, which has its own body of halakhic regulations that therefore might not carry over directly to our case, nonetheless it lays out guidelines for evaluating proposed changes that could be applied here:

...the notion of liturgical variation is not rejected by Talmudic tradition. The Rambam and his commentators are tolerant of liturgical change as long as it takes place within certain normative parameters...The inclusion of references to the Matriarchs in the עמידה blessing of the אבות in no way changes the ענין of the prayer...the language of the blessing, including references to שם ומלכות, remains unchanged, and the התימה-פתיחה structure of the blessing, required by virtue of its being the first in a sequence of blessings, remain intact.” (488)

Thus, if we were to follow something like the guidelines set out by Rembaum, an adapted blessing would have to maintain the subject of the original, and its *petikhah-hatimah* structure (both in terms of structure and theme).

141. Adler, *Engendering Judaism*, 196. Obviously, the themes of covenant and faithfulness in this blessing match the covenant and reciprocal pledges of faithfulness being made between the couple.

142. [https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/bergman\\_shoah.pdf](https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/bergman_shoah.pdf) and [https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/rembaum\\_matriarchs.pdf](https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/rembaum_matriarchs.pdf) respectively.

143. “While I certainly believe that Jews should remember the Holocaust and commemorate it, I am not ready to assert that it must be commemorated in precisely that manner. The other side of the coin is that every mitzvah implies an עברה (a transgression) for its breach. By creating such a ceremony and attaching such a ברכה to it, we are implying that every Jew who does not light such a candle on *Yom Hashoah* has been guilty of non-performance of a mitzvah, no matter whatever other means he/she utilizes to observe the day.” (540)

This, though, brings us to one further set of problems. A number of things about the traditional text and practice of saying *birkat erusin* were puzzling to commentators and there is extensive debate about it among the rishonim/classical poskim. One may begin by noting that the Talmudic passage considers whether the blessing is more *like* the one line blessings of gratitude said before consuming food or performing a commanded act (see b. Pes. 105a and Rashi, ד"ה הודאה היא), or more *like* the kiddush said at the beginning of Shabbat or a holiday which encompasses somewhat more extended praise of Shabbat and God for having given us Shabbat; it does not say that the blessing *is* one of these sorts of blessings, including a blessing over a commandment. While some rishonim/poskim – perhaps not surprisingly including the Rambam (see *Hilkhot Ishut* 3:23) – nonetheless do understand it as *birkat hamitzvah*, most do not endorse this position, or do so partially at best.<sup>144</sup> The Rosh (*Tosafot haRosh* to Kid. 7b) in particular gathers in one place a number of arguments that could be made against such an interpretation:

\* A blessing for a mitzvah is typically made prior to the performance of the mitzvah (עובר (לעשיתן)), but there was a common practice throughout the rishonic period to say this blessing *after* the *kiddushin* took place.<sup>145</sup>

\* The text of the blessing is inconsistent with the standard, expected form of *birkat hamitzvah*; in no other case do we bless over a negative commandment and/or what is forbidden (the *arayot*), but rather bless for the positive act we have been commanded to do (i.e., the opening “Who has sanctified us with His commandments and commanded us...” is typically followed by either a. “regarding the doing of act x,” or b. “to do act y”).<sup>146</sup>

\* Why does the blessing mention *huppah*, when *huppah* is not part of the *kiddushin*? That is, *huppah* in this context means the nuptials, centered around the *sheva berakhot*, and is a separate legal act/part of the ceremony; indeed at some points in Jewish history this took place some time significantly after the *kiddushin* was enacted. How can one say *birkat hamitzvah* for a “mitzvah” one is not performing – or, if the mitzvah is understood as marrying, not completing – in the moment?

\* Is there a “mitzvah” to perform *kiddushin*, or *huppah* for that matter, at all? The true mitzvah, he argues, is for a man to procreate (פרו ורבו). While marriage is the most appropriate means to that end, if a man were to father children outside the bounds of marriage (by a *pilegish*, for example) he would nonetheless have fulfilled his obligation. Conversely, *birkat erusin* is said even at a *kiddushin* between a couple who are not expected to be able to procreate (as, for example, if the woman is past the age of menopause or either partner is known to be infertile).

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144. A thorough and clear summary of the views of the rishonim and later halakhic debate on this question can be found in Rabbi Dov Linzer, “May a Woman Recite Birkat Eirusin?": <https://library.yctora.org/lindenbaum/may-a-woman-recite-birkat-eirusin/>.

145. Rambam, consistent with his position, rules that the blessing should be said prior to the *kiddushin*. Others explain that this case is anomalous in that fulfillment of the “mitzvah” – the *kiddushin* – does not rely only on the groom’s intent to perform it, but rather cannot be insured until the bride has accepted, and that a blessing beforehand would become a *brakhah l’vatelah* if she were to refuse and hence should be postponed until after.

146. See also the *Hiddushei haRitba* (Ket. 7b), who addresses this point (and perhaps also the question of whether there is a commandment involved here at all; see below) when he comments: “שמה שאומר וצונו אינו אלא כמו הזהירנו” – perhaps when he says “and has commanded us” it is actually [intended to mean something] like “and has prohibited us/cautioned us [against]...”

Further on, he also notes that the length of the blessing, and the need for both a *petikhah* (an opening of “Blessed are You...”) and a *hatimah* (a closing line again starting with “Blessed are You...”), as became the accepted custom, is atypical of *birkat hamitzvah*, a point also already hinted at in the Talmudic sugya itself (and see also Rashi’s commentary both in this location and to Pes. 105a, ד"ה הודאה היא).



Therefore, *birkat erusin* cannot be marking a mitzvah that is being fulfilled by virtue of the *kiddushin* in and of itself.

\* One additional point raised by several other rishonim though not the Rosh (see *Hiddushei haRitba* and *Hiddushei haRa'ah* to Ket. 7b): if this is *birkat hamitzvah*, how can anyone other than the groom say it? No one else is performing this act, even on his behalf!<sup>147</sup>

In light of these challenges, the more common way to understand this blessing is as *birkat hashevah* – a blessing of praise such as we offer for various events or phenomena which inspire gratitude and/or awe towards God – or a sort of “hybrid” blessing that praises God in place of the *birkat hamitzvah* that a religiously significant act such as this would seem to demand but which is not entirely appropriate here for the reasons just discussed. Much as *kiddush hayom* “frames” and thanks God for the inherent sanctity of Shabbat/Yom Tov that we are commanded to recognize but do not ourselves create, so too this blessing presents what is happening as this couple marries as a moment of personal or even communal happiness and situates it within a framework of Torah, obligation, and the relationship of the Jewish people with God.

What then is that framework? Only once we attempt to answer to this question may we return to Rembaum’s observation regarding liturgical change: when we alter the wording of a blessing or prayer in such a way that the original subject, theme, and structure of the original are maintained, such a change can be acceptable and even theologically preferable. I would suggest that the traditional *birkat erusin* encompasses one over-arching point, in multiple dimensions: not all persons are or should be permitted to each other sexually and romantically. First, certain persons are always forbidden to us by virtue of their relationship to us by blood or marriage to our blood relatives or by their prior commitment to another person. Concomitantly, when we ourselves seek to marry, we must choose an appropriate partner. Further, by marrying, we become committed exclusively to our chosen partner (which we now understand as a mutual commitment, and not just an obligation of a woman in a heterosexual marriage) – and other potential partners become forbidden to us (and us to them). Finally, when two persons come together in marriage, they create a new web of relationships not only with each other but with each other’s extended family, such that persons who were previously unrelated become related and relations with any of those persons would now be not only an adulterous betrayal of our partner, but effectively (and affectively) incestuous. The blessing also frames our observance of these limitations as a Divinely given means to bring holiness into our lives and to be made holy by the Holy One.

None of these assumptions are incompatible with – indeed, they are finally recognized to be fully mutual and binding on both parties equally by – marriage by *hitkadshut* or *B'rit Ahuvim*. As Greenstein writes, “The first phrase – *v'tzivanu 'al ha-'arayot* – should be preserved... The beginning of this blessing, by declaring God has commanded us to respect certain sexual relationships, differentiates between the holy and the profane in this central realm.” As for the continuation of the blessing, he notes that its androcentric wording demands modification, but nonetheless remains conceptually meaningful in that “It sensitizes us [and; sic] makes explicit the significance of the consent and acquiescence given by each partner in the marriage to the other.”<sup>148</sup> An alternative would ideally achieve two ends. First, it must emphasize what it about to take place as a ceremony distinct from traditional *kiddushin*; a blessing too close to the original “runs the risk of blurring the distinction between tradition *qiddushin* and this alternative.” Yet it must also articulate those concepts and commitments around sexuality and marital

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147. Again not surprisingly, the Rambam rules that the one performing the *kiddushin* (the groom or his emissary) is the one to say the blessing. He is, however, decidedly in the minority among his contemporaries in this position.

148. Greenstein, 24, 25. The latter point also speaks to another question Greenstein raises about the blessing (e.g. that it declares sexual relations forbidden in any situation other than after *nissuin*), but one which I do not wish to address directly here: “what can it convey in a culture which allows and even expects couples to live intimately with one another before marriage?”

partnership that are being retained and mutualized: “It would celebrate the moment under the huppah when each partner is called to focus entirely on the other, without a thought given to any other relationship.”<sup>149</sup>

With all these considerations in mind, I offer the following suggested blessing:

בא"ה אמ"ה אשר קדשנו במצותיו והבדילנו על העריות<sup>150</sup> וצונו והתקדשם והייתם קדשים<sup>151</sup> והתיר לנו זה לזו וזו לזה<sup>152</sup> להיות לבשר אחד<sup>153</sup> על ידי חופה [וברית] [והתקדשות] בקדושה וטהרה ונאמנות. בא"ה מקדש ישראל.<sup>154</sup>  
 Blessed are You, Lord, Ruler of the universe, Who has sanctified us with His commandments and separated us from the forbidden relations and commanded us “sanctify yourselves and be holy,” and permitted us this one to that and that one to this, to become one flesh, by means of *huppah* and [covenant] [sanctifying oneself], in sanctity, purity, and faithfulness. Blessed are You, Lord, Who sanctifies Israel.

*Further distinguishing this marriage from kiddushin:*

As discussed already in Section III and relying on the precedent set by the CJLS procedure for *kiddushin al t'nai*, at the moment of the binding act (the ring exchange of *hitkadshut* or the pooling of resources for *shutafut*) the officiant and the participants must articulate verbally and publicly their affirmative acknowledgement and acceptance that the ceremony is something other than *kiddushin* and is not intended to create *kiddushin*. As Greenstein writes (crediting Adler), “it is of critical importance that there first be an explicit declaration by the parties that the parties’ intent is specifically to create a mutual

149. Greenstein, 25. His proposed blessing is:

ברוך אתה ה'...אשר קידשנו במצותיו וצונו על העריות ואסר לנו את החימוד והתיר לנו את שאהבה נפשינו על ידי חופה וקידושין. ברוך אתה ה' מקדש עמו ישראל על ידי חופה וקידושין

Blessed are You...Who sanctified us with His commandments and commanded us regarding the forbidden relations, Who has forbidden covetousness to us while permitting to us our soul-love by means of huppah and kiddushin. Blessed are You, Lord, Who sanctifies His People Israel by means of huppah and kiddushin.

150. The use of *הבדילנו/separated us* follows Maimonides; see *Hilkhos Ishut* 3:24. I do this so as use *וצונו*/and commanded us in the next phrase. Note also Jacobs’ and Austrian’s adoption of this language, “which we found positive, rather than the traditional form of the blessing”: Jacobs and Austrian, 34.

151. Citing Lev. 20:7, one of the verses that introduces the listing of adulterous and/or incestuous unions that begins in v. 10. Of course, “sanctify yourselves and be holy” is not the sort of commandment over which we typically say a *birkat hamitzvah* (as it does not speak to a specific act), but as established above, this blessing is not (straightforwardly) a *birkat hamitzvah* in any case, but rather a blessing of praise and a framing for the marital commitment about to take place. Moreover, this citation invokes the theme of marriage as an act of holiness and thereby links the body of the blessing to the *hatimah*, while avoiding an implication that the legal act of *kiddushin* might be taking place.

152. The order may be reversed, or for a marriage of same sex partners, simply *לזה לזו* or *זו לזו* is used as appropriate.

153. Gen. 2:24.

154. As noted above, the Vatican 130 manuscript does not include the words *על ידי חופה וקידושין*/by means of *huppah* and *kiddushin* in the *hatimah* of the blessing (although it also does not include *shem u' malkhut*, mention of God’s name and sovereignty). The version used here is well-known to (and favored by many of) the Rishonim, who in turn attribute it to Hai Gaon (and the Rif; see, for example *Hiddushei haRamban*, *Hiddushei haRashba*, *Hiddushei haRitba*, *Hiddushei haRan*, Meiri, and *Hiddushei haRa'a*), on the grounds that “the sanctity of Israel does not depend [only] on this [i.e., *huppah* and *kiddushin*].” This is also the version codified by Maimonides, *Hilkhos Ishut* 3:24. Thus, there is no concern about creating a new blessing if this form is used. Obviously, the full traditional version would not be appropriate here, and indeed might create a problematic misapprehension that *kiddushin* is taking place when it is not. See also Jacobs and Austrian, 34.

relationship that is not to be confused with the unilateral *qinyan* of old.”<sup>155</sup> When Adler’s son and daughter-in-law, Rabbis Amitai and Julie (Pelc) Adler, were married by *brit ahuvim*, they included in their ceremony that each of the participants would be asked directly by the officiant, just prior to the creation of the *shutafut*:

את/ה רוצה לקבל על עצמך כל החובות וכל התנאים האמורים בשטר זה, ולהתאחד עם אשה/זה/זו, ולקיים עמו/ה בית בישראל; ולאשרר שאין ברית זו קידושין ואין באתכם יהיה לשם קידושין?  
 “[Name] is it your wish to take upon yourself all of the terms and conditions<sup>156</sup> mentioned in this contract, and to unite with this man/woman, and make with him/her a household amongst Israel? And do you likewise affirm that this covenant<sup>157</sup> is not a kiddushin, and your marital relations will not be for the purpose of establishing a kiddushin?<sup>158</sup>

A formula of this sort would fully fulfill the requirement just set out. Similarly, the CJLS formula used for *kiddushin al t'nai* may be appropriately adapted:

Under the חופה, immediately before the binding act of marriage, the rabbi should ask the couple together, “Do you enter this marriage [according to the laws of Moses and the people of Israel and] [*if the couple have set conditions on the marriage*: and according to the conditions you have undertaken and] according to the understanding that this act of self-betrothal/partnership is not for the purpose of *kiddushin*, now or during the duration of your marriage?” Both parties should answer: “Yes.” The ceremony should then proceed as outlined in Section V above.<sup>159</sup>

#### Documents:

\* As noted in Section IV, documentation is an essential element to the binding legal nature of these ceremonies. Acceptable models for this document are:

Adler’s אהובים ברית/B’rit Ahuvim Lovers’ Covenant.

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155. Greenstein, 25–26. Greenstein includes the following “Words of welcome and explanation” in his ceremony at the end of the article (34; I, however find the emphasis on the “non-halakhic” nature of the ceremony problematic, despite Greenstein’s own modification of that claim elsewhere in his discussion, as discussed above):

“This new Jewish wedding ceremony expresses our understanding that marriage is a sacred relationship of mutuality. Based on this understanding, we have fashioned a ceremony that explicitly distances itself from any attempt to follow the laws and understanding of halakhic marriage. There is no acquisition – *qinyan* – effected by the groom upon the bride. This ceremony does not, in any way, mean to be taken as a halakhically valid marriage. Nevertheless, it affirms the validity and sanctity of our bond in Jewish terms of commitment and holiness.”

Adler suggests that the officiant speak to the couple at the opening of the ceremony, and moreover should “take this opportunity to explain what a *b’rit ahuvim* is and to distinguish it from *kiddushin*.” Adler, *Engendering Judaism*, 197.

Information about the nature of the ceremony can also be included in a wedding program/pamphlet if the couple chooses to create and distribute one.

156. If the couple have made conditions, this element of the question suffices to affirm their commitment to those conditions for the duration of the marriage.

157. For *hitkadshut*, one would substitute: “this act of self-betrothal” or “self-sanctification.”

158. For their description and discussion of their ceremony, see <http://therabbisadler.blogspot.com/2012/07/brit-ahuvim-20-new-standard-halachic.html>.

159. Adapted from the language in *Moreh Derekh*, C-36.

The “Covenant of Loving Partners” created by Rabbis Dorff, Nevins, and Reisner (with the addition suggested just below and properly adapted for the genders of the couple) may be used also for a differing-sex couple marrying by means other than *kiddushin*.<sup>160</sup>

Examples of each of these appear in Appendix II below.

\* The document should include an explicit statement that the ceremony is not meant to enact *kiddushin*. The Rabbis Amitai and Julie (Pelc) Adler included the following in their *B'rit Ahuvim* document:

אין ברית אהובים זו קידושין, ואין ביאת חתן והכלה לשם קידושין, ולא לשם זנות: אלא אך ורק לשם הבעת אהבה.  
This covenant is not a *kiddushin* marriage, and the marital relations of the groom and the bride are not intended to bring about *kiddushin* marriage,<sup>161</sup> and not with the intent of licentiousness, but only and solely with the intent of the expression of love.

\* The specific guidelines for the mechanism by which the marriage will be dissolved if this were to become necessary should be documented. Adler’s sample documents for the *B'rit Ahuvim* do not include a provision for the contingency of ending the partnership and how that is to be effected. However, again from the Rabbis Adler (my translation, but adopting some of the language of their Hebrew/English):

במקרה, חו"ש, וירצו או יצטרכו החתן והכלה לבטל שותפות זו, היא תיבטל על-ידי הסכמה בין שניהם בשטר ובחתימת ידיהם וידי שני עדים כשרים, בפני בית דין צדק; או, על ידי הצהרת רצונו של אחד מהם, בשטר ובחתימת ידו/ידה וידי שני עדים כשרים, בפני בית דין צדק...ובהכל ללא צריך גט כריתות

Should it happen, God forbid, that the groom or the bride might wish or require to cancel this partnership, it will be cancelled by consent between the two of them, by a document and by their signatures and those of two valid witnesses, before a just rabbinic court; or, by the declaration of intent of one of them, by a document and by his/her signature and those of two valid witnesses, before a just rabbinic court...And all of this is without the need for a *get* of divorce.

Alternately, this can also be accomplished by a separate document: in the rites for same-sex couples suggested by Dorff, Nevins, and Reisner, the couple signs a pre-nuptial “*Thai Biverit*,” which states, “Should we choose to part at some future time, just as this covenant has been concluded openly before the Jewish people, so do I commit to severing this bond through a dissolution [*hafarah*] in the fashion ordained by a Jewish court [*Bet Din*].”<sup>162</sup> It is also possible to incorporate this language into the rest of the “Covenant of Loving Partners” already drafted by Rabbis Dorff, Nevins, and Reisner.

*Divorce:*

\* As described just above, a marriage enacted by one the two means described above may be ended by mutual consent or by the request of either party. This process is to be overseen by a reliable *beit din* (such as the Movement’s Joint *Beit Din*).

160. Dorff, Nevins, and Reisner, 15–17.

161. To here, following the translation of the Adlers in their Hebrew-English document; they do not translate the rest there, so I have done so myself.

162. Dorff, Nevins, and Reisner, 15.

\* Neither Adler nor Greenstein suggest a specific language for the document prepared by the *beit din*, though this might be because each couple will have distinct arrangements and no standard language is possible or desirable. Within the Conservative/Masorti context, the documentary language and attendant ritual procedure developed by Rabbis Dorff, Nevins, and Reisner for same-sex couples should be adapted for this purpose as well.<sup>163</sup> A copy of this document appears as part of Appendix II.

*Conditions:*

Just as *kiddushin* can be made conditional (על תנאי), so too other forms of marriage. Even though both of the non-*kiddushin* ceremonies that have been considered here are intended to allow for unilateral divorce, a condition can be added to further protect the partners in case of separation or abandonment. Dorff, Nevins, and Reisner include such a condition in their rites for same-sex couples that may be used for differing-sex couples as well:

...should we be separated for more than six months with the intent of either party to terminate the union, this covenant shall be null and void.<sup>164</sup>

If this condition is set, it should be (re)affirmed during the ceremony just before the time of the binding marriage act, along with the couple's affirmation also that this ceremony is not intended as *kiddushin*. See the formulas in the ceremony in Appendix I for language the officiant may use for this purpose.<sup>165</sup>

*Standards of Rabbinic Practice:*

Finally, the Rabbinical Assembly maintains several "Standards of Rabbinic Practice," halakhic stances on matters of particular importance, which are binding on all Conservative/Masorti rabbis and not subject to the discretion of the individual acting as *mara d'atra* (the local rabbinic/halakhic authority). In 1975, the R.A. adopted the following as such a Standard: "A rabbi may not officiate at the marriage of a divorced man or woman if a *get* or *hafka*' at *kiddushin* was not obtained."<sup>166</sup> Thus, just before presenting

163. Dorff, Nevins, and Reisner, 18–20.

164. Dorff, Nevins, and Reisner, 15

165. The Adlers also drafted a condition nullifying their partnership/*shutafut* altogether if a *beit din* were to ever rule that a *get* should be required:

לכך, שותפות זו קיימת על מנת שאין בית דין בישראל שבמקרה וירצו או יצטרכו החתן והכלה לבטל שותפות זו, ויקראו ב"ד את ברית אהובים זו קידושין לספק, ודנים שצריכים החתן והכלה גט כריתות מקידושין. ועם יהיה קיום על תנאי זו, יהיה שותפות זו מעוקר למפריע.

Therefore, this partnership is effective on the condition that no rabbinical court among the People Israel call this covenant a *kiddushin* marriage (whether intentional or accidental), and pass a judgement which states that if, God forbid, there comes a reason to dissolve this partnership, that the bridegroom and bride require a *get* divorce; and if this condition is fulfilled, and a court does judge so, then this partnership and covenant will be deemed nullified and it shall have been void *ab initio*.

While I appreciate the underlying intention of this condition and the quite real risk it means to address, I have decided not to include it in my proposal for at least two reasons. First, it problematically re-invokes the possibility of this relationship being deemed *kiddushin* at precisely the moment we are attempting to be clear that there is *no* intention of *kiddushin* being created. Moreover, unlike the condition that is made in *kiddushin al t'nai* – in which the implementation of the condition is contingent solely on the husband's choice whether to give a *get* within the set period of time – the possible activation of this condition could be entirely out of the hands of the couple themselves, and could even theoretically come into application against both of their desires.

166. *CJLS Summary Index: Marriage and Divorce*, "Standards of Rabbinic Practice" (item 1), 9:13.

their actual recommended ceremonies for Jewish, halakhic same-sex marriages, Dorff, Nevins, and Reisner add a highly significant provision to their teshuvah:

The Rabbinical Assembly maintains standards of rabbinic practice regarding marriage, and we shall apply the same standards to same-sex couples. Conservative/Masorti rabbis and cantors (bound by parallel policies of the Cantors Assembly) may perform weddings only...where neither is currently married by either Jewish or civil law to another person.”

They further specify in a note, “If either has been previously married, whether to a man or to a woman who is Jewish and is still alive, then they must provide or secure a Jewish divorce, nullification (*hafka’ah*), or dissolution (*hafarah*) before a Conservative rabbi will be allowed to officiate at the new marriage.”<sup>167</sup> To rule in this way is one final statement that these same-sex marriages indeed have legal and halakhic standing in our Movement and our understanding of halakhah, just as marriages between differing-sex partners through *kiddushin* do. If we hold that the non-*kiddushin* ceremonies we have been considering here bind the partners who enter into them under halakhah, then we can rule no differently here than did Dorff, Nevins, and Reisner. Any Jewish person who had once been married to a Jewish partner by one of these means and subsequently divorced must have that relationship dissolved under Jewish as well as civil law before s/he may be married again, by *kiddushin* or otherwise. Conservative/Masorti rabbis are bound by this Standard of Rabbinic Practice in these cases, and any rabbi who officiates at a remarriage of any kind without having seen or obtained valid documentation that a prior marriage was properly dissolved should be deemed to have violated the Standard.

Dorff, Nevins, and Reisner additionally make clear that the other Standards of Rabbinic Practice which:

- a) define Jewish identity (through matrilineal descent or conversion according to halakhah), and
- b) prohibit rabbinic participation in intermarriage

apply to same-sex marriages just as they do to *kiddushin* for the purposes of a Conservative/Masorti being able to officiate. So too in the case of differing sex couples married by a halakhic means other than *kiddushin*: in order for a Conservative/Masorti rabbi to officiate (or participate) in any way, both partners must be Jewish according to the halakhic criteria as established by the CJLS.

## VII. Conclusion/*P’sak*

\* Any ceremony in which a Jewish man gives a Jewish woman (presuming they are eligible to be married to each other) a ring or other item of value or a document and makes a statement to the effect that she should thereby become his wife or life partner – even if she then does the same in return – carries with it the possibility that at least doubtful *kiddushin* has been effected, and must therefore be dissolved by a *get*.<sup>168</sup> Moreover, this teshuvah does not overturn at this time the established position and practice of the Conservative/Masorti Movement that a *get m’safek* (or *hafka’ah*) may be and typically is required for to halakhically end the marriage of a Jewish differing-sex couple who have been married civilly and/or by other rites, *with the exception of the ceremonies outlined herein when executed as described herein*.

\* That is, the most important conclusion/*p’sak* of this teshuvah is that it is possible and permissible within halakhah to create a binding Jewish marriage between differing-sex partners (and indeed any two Jewish partners of any genders) by means other than *kiddushin*.

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<sup>167</sup> Dorff, Nevins, and Reisner, 6; the note is 17.

<sup>168</sup> As noted already in the Introduction, this would include a differing sex couple using, without modification, one of the ceremonies that Rabbis Dorff, Nevins, and Reisner created for same-sex couples.

At this time, the CJLS endorses the two (and only these two) specific means presented above: *hitkadshut* or *brit ahuvim*.

A marriage performed in accordance with either of these options – following the template for the ceremony in Appendix I, accompanied by a document from Appendix II – and in compliance with the guidelines in Sections V, is neither to be considered *z'nut* (and hence prohibited), nor to be deemed *kiddushin* after the fact, even out of doubt. Therefore no *get* will be required should it become necessary or desirable for the couple to dissolve their relationship.

\* A marriage constituted through *hitkadshut* or *brit ahuvim* must be dissolved by Jewish means, ideally at the time of the (civil) divorce and certainly before either party enters into a new marriage with another Jewish partner. This is accomplished under the supervision of a reliable beit din. The beit din should then provide documentation to each of the parties – following the language drafted by Dorff, Nevins, and Reisner and appearing in Appendix II – of the dissolution of the marriage and the freedom of the parties to remarry, as well as any other decisions and actions (such as those regarding division of property or child-care arrangements) taken by the beit din, as discussed in Section V above.<sup>169</sup>

\* If a condition (תנאי) was attached to the marriage, the beit din should investigate and confirm whether the condition has been activated or not. If the condition has in fact been activated, the marriage is retroactively null and void; the beit din should then provide documentation to each of the parties of its findings and (where pertinent) of the nullification.<sup>170</sup>

\* Just as Rabbis Dorff, Nevins, and Reisner ruled (and the CJLS concurred) that the Standards of Rabbinic Practice applies to same-sex marriages, so too for all differing-sex marriages conducted in accordance with this teshuvah:

- a) If either party to such a marriage wishes to enter a new marriage – either by means of *kiddushin* or by means other than *kiddushin* – supervised by a Conservative/Masorti rabbi, s/he must provide valid documentation of and/or testimony to the dissolution of the previous relationship. Similarly, proof of civil divorce for any prior marriage must be provided before entering a new Jewish marriage under the auspices of a Conservative/Masorti rabbi.
- b) The Standards of Rabbinic Practice that prohibit a Conservative/Masorti rabbi from officiating at (or participating in) an intermarriage and that define halakhic Jewishness through either matrilineal descent or conversion according to halakhah (as understood through CJLS rulings) apply equally to a differing-sex marriage by a halakhic means other than *kiddushin*, as they do to *kiddushin* and same-sex marriage.

In Hosea 2:21-22, God reveals through the prophet God's desire to be mutually bound to the People of Israel "with righteousness and with justice, and with goodness and with mercy and...with faithfulness." So too may Jewish men and women have the opportunity to commit to each other in their best understandings of how to achieve those essential values of relationship. However a couple choose to affirm those commitments ritually and legally, may all Jewish life partners be blessed to build בית נאמן בישראל/a house of faithfulness in Israel.

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169. Moreover, if the couple were civilly married, they should be instructed to also seek a civil divorce if they have not already done so or are not in the process of doing so.

170. Note that the role of the beit din is to investigate, verify, and document, but not to *effect* the nullification, which occurs in any case by virtue of the condition.

## Appendix I – Outline of the wedding ceremony

Anything appearing in this font is common to both methods and should be included in the ceremony. In order to distinguish the two forms of marriage bonds where elements of each differ, each will appear in different fonts: *hitkadshut*, *brit ahuvim*. Follow all instructions for the chosen method.

### A) Welcoming

\* The wedding is performed under a *huppah*, and the couple is greeted with the traditional welcome from the officiant.<sup>1</sup>

### B) Hitkadshut/Brit Ahuvim – Binding the Couple in Marriage

\* For a wedding by *hitkadshut*, the legal act of binding to each other is preceded by a blessing over a glass of wine, and then a blessing for the act itself.

Such a blessing is not required for Brit Ahuvim, but may be said in praise of God and to frame the act of commitment undertaken by the couple, if they and the officiant so choose.

The officiant says one of options a, b, or c:

Option a:

<p>Blessed are You, Lord, Ruler of the universe, Who has sanctified us with His commandments and separated us from the forbidden relations and commanded us “sanctify yourselves and be holy,” and permitted us this one to that and that one to this, to become one flesh, by means of huppah and [covenant] [sanctifying oneself], in sanctity, purity, and faithfulness. Blesses are You, Lord, Who sanctifies Israel.</p>	<p>בא"ה אמ"ה אשר קדשנו במצותיו והבדילנו על העריות וצונו והתקדשם והייתם קדשים והתיר לנו זה לזו וזו לזה<sup>2</sup> להיות לבשר אחד על ידי חופה [וברית] [והתקדשות] בקדושה וטהרה ונאמנות. בא"ה מקדש ישראל.</p>
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<sup>1</sup> As in *Moreh Derekh* C-43–45.

Circling – one partner circling the other (traditionally the bride circling the groom), or each circling the other – is a matter of custom rather than halakhah and may be performed or omitted as the couple decides.

<sup>2</sup> The order may be reversed, or for a marriage of same sex partners, simply זה לזה or זו לזו is used as appropriate.



## Option b:

Our God and God of our Patriarchs and Matriarchs, look down from Your holy abode, from heaven, and bless these loving companions who are together creating a Covenant of Lovers. Praised are You, Adonai, who is good and does good.	אלהינו ואלהי אבותינו ואמותינו השקיפה ממעון קדשך מן-השמים וברך את-הרעים האהובים הכרתים ביניהם ברית אהובים. ברוך אתה יי הטוב והמטיב.
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## Option c:

Our God and God of our Patriarchs and Matriarchs, look down from Your holy abode, from heaven, and bless these loving companions who are together participating in a Covenant of life-long partnership. May they dwell before You in love, harmony, peace, and companionship. Praised are You, Adonai, who is good and does good.	אלהינו ואלהי אבותינו ואמותינו השקיפה ממעון קדשך מן-השמים וברך את-הרעים האהובים המשתתפים יחד היום בשותפות חיים, ונכם שישבו לפניך באהבה ובאהבה בשלום וברעות. ברוך אתה יי הטוב והמטיב.
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The officiant, and the bride and groom each drink a sip of the wine.

\* Following the blessing, the act of self-betrothal each to the other or the creation of the partnership is performed.

As in a traditional *kiddushin* ceremony, there should be valid עדים/witnesses (as defined by the CJLS), designated for this transaction.

The officiant begins with the declaration and acknowledgement of each member of the couple affirmatively stating their awareness and acceptance that the act they are about to undertake is *not* intended to create *kiddushin* (option a or b):

Option a:<sup>3</sup>

“[Name] is it your wish to take upon yourself all of the terms and conditions <sup>4</sup> mentioned in this contract, and to unite with this man/woman, and make with him/her a household amongst Israel? And do you likewise affirm that this act of (for <i>hitkadshut</i> ;) self-betrothal <sup>5</sup> /(for <i>brit ahuvim</i> ;) covenant is not a <i>kiddushin</i> , and your marital relations will not be for the purpose of establishing a <i>kiddushin</i> ?”	את/ה רוצה לקבל על עצמך כל החובות וכל התנאים האמורים בשטר זה, ולהתאחד עם אש/ה זה/זו, ולקיים עמו/ה בית בישראל; ולאשרר שאין התקדשות/ברית זו קידושין ואין באתכם יהיה לשם קידושין?
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<sup>3</sup> As formulated by Amitai and Julie Pelc Adler for their *Brit Ahuvim* ceremony.

<sup>4</sup> If the couple has made the marriage conditional, this element of the question suffices to affirm their commitment to that condition for the duration of the marriage.

<sup>5</sup> Or “self-sanctification.”

Option b:<sup>6</sup>

Under the חופה, immediately before the binding act of marriage, the rabbi should ask the couple together, “Do you enter this marriage [according to the laws of Moses and the people of Israel and] [*if the couple have set conditions on the marriage*: and according to the conditions you have undertaken and] according to the understanding that this act of (for *hitkadshut*;) self-betrothal<sup>7</sup>/(for *brit ahuvim*;) covenant is not for the purpose of *kiddushin*, now or during the duration of your marriage?”

Both parties should answer: “Yes.”

\* The binding act:

For *hitkadshut*, the partners in turn (in whatever order they choose) each recite the formula and then place the ring on the other’s finger:

A man says:

“הרי אני מתקדש לך<sup>8</sup> בטבעת זו כדת משה וישראל”

A woman says:

“הרי אני מתקדשת לך<sup>9</sup> בטבעת זו כדת משה וישראל”

“Behold, with this ring I am betrothed/set aside/sanctify myself to you, according to the laws of Moses and Israel.”

For *b’rit ahuvim*, Adler does not provide or require any specific formula for the members of the couple to say; the act itself is the binding element. The partnership document should be read and signed by the couple (and witnesses) before the symbolic pooling of resources. Adler suggests that “If the partners have put in distinctive personal objects and intend to talk about their significance for the partnership, they should do so before lifting the bag.”<sup>10</sup> The couple each place a personal item of value – or the rings that they will subsequently wear – into a bag, and lift the bag together. They may say the traditional blessing over a rainbow as they do so:

בְּרוּךְ אַתָּה ה' אֱלֹהֵינוּ מֶלֶךְ הָעוֹלָם זֹכֵר הַבְּרִית וְנֹאֲמָן בְּבְרִיתוֹ וְקִנִּים בְּמִצְוָתוֹ

Blessed are You, Lord our God, Sovereign of the universe, who remembers the covenant, and is faithful to the covenant, and keeps promises.

<sup>6</sup> Adapted from the language in *Moreh Derekh*, C-36 for *kiddushin al t’nai*.

<sup>7</sup> Or “self-sanctification.”

<sup>8</sup> *Lakh* or *l’kha* as appropriate to the gender of the partner.

<sup>9</sup> *Lakh* or *l’kha* as appropriate to the gender of the partner.

<sup>10</sup> Adler, *Engendering Judaism*, 197. She also noted in personal conversation (May 11, 2018) that this is often the most personal and emotionally moving part of the ceremony for both the couple and the others present.

\* In either ceremony, the marriage document may be read after the binding act.

### **C) Nissuin**

\* The officiant or a guest may offer a reading or a charge to the couple.

\* The traditional nuptial blessings, the *שבע ברכות*, are read by the officiant or by (Jewish<sup>11</sup>) persons the couple wish to honor and have participate in their wedding.

\*The breaking of a glass by one or both partners.

\* *Yihud*/Private time alone for the couple.

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<sup>11</sup>Because this is a legal, halakhic act to complete the marriage, it should be performed by those bound by the halakhic system. It is left to the individual officiating rabbi, or to whomever the couple turn to as their guiding halakhic authority, to determine the appropriateness of a non-Jewish relative or friend participating in another manner, such as by reading the translation of one of the blessings after the Hebrew has been recited, or by presenting a reading of a biblical passage, a poem, a personal charge to the couple, etc.

## Appendix II - Documentation of Non-Kiddushin Marriage of a Differing Sex Couple

The documents that follow are:

- A) A *brit ahuvim* document.<sup>1</sup>
- B) A document based on the “Covenant of Loving Partners” drafted by Rabbis Elliot Dorff, Daniel Nevins, and Avram Reisner for same-sex couples, to be used for *hitkadshut*.<sup>2</sup>
- C) A document making the marriage conditional if the couple chooses not to incorporate this into the marriage document.
- D) A divorce document (and procedures) based on that drafted by Dorff, Nevins, and Reisner for same-sex couples, and to be used for the dissolution of either *brit ahuvim* or *hitkadshut*.

Witnesses to any of these documents must be valid עדים according to the standards of the CJLS.

### A) Brit Ahuvim

1. All Brit Ahuvim documents begin with the following Introduction:

<p>On the ____ day of the week, the ____ day of the month of _____, in the year ____ of the World – corresponding to [day/month/year] – in this community to which we are adjoined in [place], in [country]; before truthful and sober witnesses, and before this holy congregation: come these, the bride, _____, and the bridegroom, _____, to unite and bond together, joining one to the other in a Covenant of Lovers, to make thus a household amongst the People Israel.</p>	<p>ב _____ בשבת, ב _____ ימים לחדש _____, בשנת _____ לבריאת העולם, למנין שאנו מונין כאן _____, במדינת _____: בפני עדים נאמנים וישרים, ובפני הקהל הקדוש הזה: באו הכלה _____ המכונה _____, והחתן _____ המכונה _____ להתאחד ולידבק זה בזו וזו בזה בברית אהובים, ומתוך כך לקיים בית נאמן בישראל.</p>
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<sup>1</sup> The *brit ahuvim* document I offer is adapted from three sources:

- Adler’s original Hebrew and English texts as found in Adler, *Engendering Judaism*, 214–17 (see also Adler’s discussion of how the document may be adapted to the specific needs and commitments of the couple, 193–94).
- The *brit ahuvim* document signed by Amitai and Julie Adler; versions of their documents may be viewed at <https://app.box.com/s/2a22fe5b069705b9bffd> and <https://app.box.com/s/41f3773caeea3d33e3c7>.
- A document I prepared for the wedding of a family member, based on the previous two (note also that in the document I prepared, the couple added personalized provisions for her commitment to his children from a previous marriage, and a commitment of each towards the care of the other’s parents if such should become necessary; these appear in the Appendix as examples of optional and personalized commitments that might be included in such a marriage document).

<sup>2</sup> While I believe the language of the *brit ahuvim* document could be adapted for marriage by *hitkadshut*, this document is fully sufficient and hence recommended.

2. After the Introduction, one of the following two Preamble options may be used:

Preamble Option #1 (Rachel Adler, as used by Amitai and Julie Pelc Adler)

<p>This partnership which the bride, _____, and the bridegroom, _____, will effect, is a sacred covenant, like those ancient covenants that our forefathers and foremothers set in olden days; like the great covenants that the Blessed Creator set with us, and thus were changed the fates of the world.</p> <p>This is a covenant of faith and hope, like the covenant that the Blessed Creator swore to Noah and his descendants, as it is said: "And it shall be, when the bow appears in the clouds, and I see it, it shall remind me of the eternal covenant between God and all living beings, all those of earthly flesh. And God said to Noah, this is the sign of the covenant I have effected between me and all those of earthly flesh." (Gen. 9:16-17)</p>	<p>שותפות זו שיקיימו הכלה _____, והחתן _____, ברית קדושה היא, כבריתות שכרתו אבותנו ואמותנו בימי קדם, וכבריתות הגדולות שכרת הבורא יתברך עם ישראל, ונשתנו בהן גורלי העולם.</p> <p>ברית אמונה ותקוה הברית הזאת, שכרת הבורא יתברך עם נח וצאצאיו, שנאמר: וְהִיתָה תִּקְוַת בְּעֵינֶיךָ וְרֵאִיתִיהָ לְזִכֹּר בְּרִית עוֹלָם בֵּין אֱלֹהִים וּבֵין כָּל-נֶפֶשׁ חַיָּה בְּכָל-בֶּשֶׂר אֲשֶׁר עַל-הָאָרֶץ: וַיֹּאמֶר אֱלֹהִים אֶל-נֹחַ זֶאת אוֹת-הַבְּרִית אֲשֶׁר תִּקְמוֹתִי בֵּינִי וּבֵין כָּל-בֶּשֶׂר אֲשֶׁר עַל-הָאָרֶץ: (בראשית ט:טז-יז)</p>
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This is a covenant of respect, and recognition of mutual responsibilities, like the covenant of Avraham our forefather with Avimelech, at Be'er Sheva, as it is said: "Now swear to me by God in this place: if you are false to me or to my kin and successors...! Rather, with the lovingkindness I have treated you with, you shall treat me in return, and do so likewise for the land on which you dwell!" And Avraham said, 'I so swear.'" (Gen. 21:23-24)

This is a covenant of cherishing, like the covenant the Blessed Creator made in the wilderness with the People Israel, as it is said: "And I shall take you to me as my people, and I shall be yours-- your God." (Ex. 6:7)

This is a covenant of cleaving together, to bind up the hearts of the loving companions, like the covenant of David and Yonatan, as it is said: "And the soul of Yonatan was bound up with the soul of David, and Yonatan loved him even as his own self...and Yonatan and David forged a covenant, based upon each loving the other as he loved himself." (1 Sam. 18:1-3)

This is a covenant of lovingkindness and contentment, compassion and mutual support, like the covenant of marriage between the Blessed Creator and Tziyon, as it is said: "I shall espouse you forever; I shall espouse you in righteousness and justice, in lovingkindness and compassion; I shall espouse you in faith, and you will know that I am YHVH." (Hos. 2:21-22)

ברית כבוד והכרת חובות הדדיות הברית הזאת, כברית שכרת אברהם אבינו עם אבימלך בבאר שבע, כמה שאמר: ועתה השבעה לי באלהים חנה אם הנשקור לי ולניני ולנכדי כחסד אשר עשיתי עמך תעשה עמדי ועם הארץ אשר גרתה בה: ויאמר אברהם אנכי אשבע: (בראשית כא:כג-כד)

ברית בחירה הברית הזאת כברית שעשה הבורא יתברך עם עם ישראל במדבר, כמה שאמר: ולקחתי אתכם לי לעם והייתי לכם לאלהים. (שמות ו:ז)

ברית דבקות הברית הזאת, לקשור לבבות רעים אהובים, כבריתם של דוד ויהונתן, שנאמר: ונפש יהונתן נקשרה בנפש דוד ויאהבהו יהונתן כנפשו...ויכרת יהונתן ודוד ברית באהבתו אתו כנפשו: (שמואל א' יח:ג)

ברית חסד ואושר, רחמים ותמיכה הדדית היא הברית הזאת, כברית נשואין של הבורא יתברך וציון, כמה שאמר: וארשתיד לי לעולם וארשתיד לי בצדק ובמשפט ובחסד וברחמים: וארשתיד לי באמונה ונדעת את ה': (חושע ב:כא-כב)

## Preamble Option #2 (Gail Labovitz)

<p>This partnership that the bride, _____, and the bridegroom, _____, will effect is a sacred covenant, like the great covenants that the Blessed Creator set with the People of Israel and like those ancient covenants that our forefathers and foremothers set in olden days. As it is said: "And I shall take you to me as my people, and I shall be yours -- your God." (Ex. 6:7) And as it is said: "I shall espouse you forever; I shall espouse you in righteousness and justice, in lovingkindness and compassion; I shall espouse you in faith, and you will know that I am YHVH." (Hos. 2:21-22) And as it is said: "And the soul of Yonatan was bound up with the soul of David, and Yonatan loved him even as his own self...and Yonatan and David forged a covenant, based upon each loving the other as he loved himself." (1 Sam. 18:1-3)</p>	<p>שותפות זו שיקיימו הכלה _____, והחתן _____, ברית קדושה היא, כבריתות הגדולות שכרת הבורא יתברך עם ישראל, וכבריתות שכרתו אבותנו ואמותנו בימי קדם. כמו שנשמר: ולקחתי אתכם לי לעם והייתי לכם לאלהים (שמות ו:ז). וכמו שנאמר: וארשתיך לי לעולם וארשתיך לי בצדק ובמשפט ובחסד וברחמים וארשתיך לי באמונה וידעת את ה' (הושע ב:כא-כב). וכמו שנשמר: ונפש יהונתן נקשרה בנפש דוד ויאהבו ויאהבהו יהונתן כנפשו...ויכרת יהונתן ודוד ברית באהבתו אתו כנפשו (שמואל א יח:א, ג).</p>
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## 3. The body of the Brit Ahuvim – required for all versions

(Amitai and Julie Pelc Adler, adapted from the original by Rachel Adler):

<p>Therefore, this Covenant of Lovers shall be effected and begin at the moment the bride, _____, and the bridegroom, _____, agree before the court and witnesses to the terms and conditions of this partnership, and signify it by means of combining their pledges of property in a lifted bag, and then signing this deed of partnership.</p> <p>These are the terms by which the parties to this Covenant of Lovers-- the bride, _____, and the bridegroom, _____ -- shall be bound:</p> <p>The bride and bridegroom set themselves apart, each for the other only, and shall not take any others to themselves.</p> <p>The bride and bridegroom agree that they together shall make a household amongst the People Israel, and a whole family. That is, they shall each guard over the other, in matters physical and in matters spiritual; they shall each</p>	<p>ובכן ברית אהובים זו תחל כשהכלה _____, והחתן _____, יסכימו בפני עדים לחיובי ותנאי השותפות הזאת, ויסמלו את הסכמתם על-ידי הטלת ערבנותיהם לתוך כיס אחד, ויחתמו על שטר השותפות הזה:</p> <p>ואלא החיובים בהם יתחייבו הכלה _____, והחתן _____, בעלי ברית אהובים זו:</p> <p>החתן והכלה מקדישים את עצמם זה לזו וזו לזו, ולא יקחו עוד אחר על פני הזולת.</p> <p>החתן והכלה מקבלים על עצמם לשתף פעולה בקיום בית נאמן בישראל ומשפחה שלמה: כלומר, לשמור אחד על השני, בין על בריאות הגוף בין על בריאות הנשמה; לדאג כל אחד מידי</p>
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<p>concern themselves with the happiness of the other, each and every day; they shall each provide aid and compassionate assistance to the other in all circumstances of life; and they shall each provide for the other, should it for some reason not be possible for them to both provide; and they shall both remember what a blessing and a gift is theirs in the miracle of their love.</p>	<p>יום ביומו לשמחת השני; לעזור אחד לשני ולרחם עליו בכל נסיבות החיים; ולפרנס אחד את השני במקרה ואי אפשר להתפרנס ביחד; ולזכור שניהם תמיד איזו מתנה ואיזו ברכה יש להם בנס אהבתם.</p>
<p>The bride and bridegroom agree that they shall dwell together according to the ways of the People Israel: they shall serve YHVH our God, and do what is right in God's eyes; they shall make their home a place of lovingkindness and justice, peace and joy, love and fellowship, and most of all, of learning and teaching, that they may fulfill the words of our Sages: "Let your home be a meeting place for the wise...Let your home be open wide, and let the needy be members of your household." (Pirkei Avot 1:4,5)</p>	<p>החתן והכלה מקבלים על עצמם להיות ביחד כדרך עם ישראל: לעבוד את ה' אלהינו, ולעשות הישר בעיניו: להיות ביתם מקום חסד וצדקה, שלום ושמחה, אהבה ורעות, ועל כולם ללמוד וללמד בו; ויקיימו בבתיים דברי חכמנו, ז"ל: יהי ביתך בית ועד לחכמים...יהי ביתך פתוח לרוחה ויהיו עניים בני ביתך (אבות א:ד, ה).</p>

4. Individualized Commitments – at this point the couple may add various commitments/agreements that are individualized to the circumstances of their own relationship. The following are examples of such commitments, and do not by any means represent the full possibility of options. Couples may draft language for their own commitments with the assistance of a rabbi, scholar, and/or the officiant at their ceremony. A couple may include as many or as few commitments of this sort as they desire.

For a couple hoping/ intending to have a family together (Rachel Adler):

<p>The bride and bridegroom agree that should they have children, they shall raise them with love and safety and respect, in the ways of Torah and Halachah, and in the traditions of Avraham, Yitzchak, and Yaakov, Sarah, Rivkah, Rahel and Leah, to be in awe of Heaven, pursuers of peace, and lovers of justice and lovingkindness, so that they shall fulfill what is written: "Be among the students of Aharon: love peace and pursue peace, love all living creatures, and draw close to the Torah." (Avot 1:12)</p>	<p>והחתן והכלה מקבלים על עצמם שאם יהיו להם ילדים, יגדלו אותם באהבה ובביטחון ובכבוד, בדרכי תורה והלכה על פי מסורת אברהם, יצחק, ויעקב, שרה, רבקה, רחל, ולאה, שיהיו יראי שמים, רודפי שלום, ואוהבי צדק וחסד, ויקיימו בהם דברי חכמנו ז"ל: הָיוּ מִתְלַמְּדֵי שֵׁל אַהֲרֹן, אוֹהֲבֵי שְׁלוֹם וְרוֹדְפֵי שְׁלוֹם, אוֹהֲבֵי אֶת הַבְּרִיּוֹת וּמִקְרָבָן לַתּוֹרָה. (אבות איב)</p>
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For a when one or both partners have children from a previous relationship (Gail Labovitz):

<p>The [bride/groom/each partner] agrees that [she/he/they] shall protect, support, and care for the children of [the bride/the groom/each other], as did Bityah, the daughter of Pharaoh, for Moshe, that [she/he/they] may fulfill the words of our Sages: “Anyone who raises the child of his fellow, Scripture attributes it to him as if he had birthed him.” (Midrash Sekhel Tov) And they both agree that they will raise them with love and safety and respect, in the ways of Torah and Halachah, and in the traditions of Avraham, Yitzchak, and Yaakov, Sarah, Rivkah, Rachel and Leah, to be in awe of Heaven, pursuers of peace, and lovers of justice and lovingkindness, so that they shall fulfill what is written: “Be among the students of Aharon: love peace and pursue peace, love all living creatures, and draw them close to the Torah.” (Avot 1:12)</p>	<p>[והכלה/החתן/שני השותפים] מקבל/ת/ים על עצמו/הם לשמור על, לפרנס את, ולטפל בבני [הכלה/החתן]/היא בבניו והוא בבניה, כמו שעשתה בתיה למשה, ויקיימו בו/ה/הם דברי חכמנו, ז"ל: כל המגדל בן חבירו בתוך ביתו, מעלה עליו הכתוב כאילו ילדו (מדרש שכל טוב). ושניהם מקבלים על עצמם שיגדלו אותם באהבה וביטחון ובכבוד, ובדרכי תורה והלכה על פי מסורת אברהם, יצחק, ויעקב, שרה, רבקה, רחל, ולאה, שיהו יראי שמים, רודפי שלום, ואוהבי צדק וחסד, ויקיימו בהם דברי חכמנו, ז"ל: הוי מתלמידיו של אהרן אוהב שלום ורודף שלום אוהב את הבריות ומקרבן לתורה (אבות א:יב):</p>
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For a couple with aging parents (Gail Labovitz):

<p>The bride and the bridegroom agree that they shall protect, and if necessary support, and be an advocate, each for the parents of the other, with love and safety and respect, as Ruth did for Naomi, as it is said: “But Ruth replied, ‘Do not urge me to leave you, to turn back and not follow you. For wherever you go, I will go; where you lodge, I will lodge; your people shall be my people, and your God my God.’” (Ruth 1:16)</p>	<p>החתן והכלה מקבלים על עצמם כל אחד לשמור על, ואם יצריכו לפרנס את, ולהיות מליץ או מליצת יושר לאב ואם של השני, באהבה וביטחון ובכבוד, כמו שעשתה רות לנעמי, כמו שנאמר: ותאמר רות אל תפגעי בי לעזבך לשוב מאחריך כי אל אשר תלכי אלך ובאשר תליני אליו עמך עמי ואלהיך אלהי (רות פרק א:טז):</p>
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(see also Adler, *Engendering Judaism*, 214 and 216 for a pledge of mutual support at the end of life)

5. Required Statement – this marriage is not intended as *kiddushin*.

<p>The bride, _____, and the bridegroom, _____, also attest: This Covenant of Lovers is not a <i>kiddushin</i> marriage, and the marital relations of the bridegroom and bride are not intended to bring about <i>kiddushin</i> marriage.</p>	<p>הכלה _____, והחתן _____, מצהירים: אין ברית אהובים זה קידושין, ואין ביאת החתן והכלה לשם קידושין, ולא לשם זנות: אלא אך ורק לשם הבעת אהבה.</p>
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The couple may also include the specification that the marriage does not require a *get* to be dissolved.

<p>Should it happen that, God forbid, the bride or bridegroom might wish or require the termination of this partnership and Covenant, it shall be nullified and ended upon the mutual declaration in writing of the parties and their signatures before a just rabbinical court; or, by the written declaration of either party to the Covenant signed by that party and two witnesses, before a just rabbinical court. And additionally, the parties to this partnership must accompany its dissolution with a civil divorce according to the laws of [country], or whatever secular government they happen to be living under at that time. But at no time ought a <i>get</i> divorcement be necessary.</p>	<p>במקרה, חו"ש, וירצו או יצטרכו החתן והכלה לבטל שותפות זו, היא תיבטל על-ידי הסכמה בין שניהם בשטר ובחתימת ידיהם וידי שני עדים כשרים, בפני בית דין צדק; או, על ידי הצהרת רצונו של אחד מהם, בשטר ובחתימת ידו/ידיה וידי שני עדים כשרים, בפני בית דין צדק. ובכל מקרה, אין בטול שותפות זו בבלי שטר התנתקות באורכות המדינה; ובהכל ללא צריך גט כריתות.</p>
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6. The following condition may be included in the Brit Ahuvim document, or written up as a separate document (see Document C below):

<p>Should we choose to part at some future time, just as this covenant has been concluded openly before the Jewish people, so does each partner commit to severing this bond through dissolution [<i>hafarah</i>] in the fashion ordained by a Jewish court [<i>Bet Din</i>]. Notwithstanding, should we be separated for more than six months with the intent by either party to terminate the union, this covenant shall be null and void.</p> <p>(Elliot Dorff, Daniel Nevins, Avram Reisner)</p>	<p>(Note: Rabbis Dorff, Nevins, and Reisner did not create a Hebrew text for this condition.)</p>
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## 7. Conclusion/Signatures

<p>To attest and affirm all these rights and conditions and responsibilities set forth above, the bride, _____, and the bridegroom, _____, and the witnesses to the document, come that they may sign. May it be the will of the Blessed Creator that the parties to this Covenant of Lovers shall fulfill therein what is written: "Set me as a seal upon your heart, like the seal upon your arm; for love is strong as death...Many waters cannot drown love, nor can rivers quench it..." (Song of Songs, 8:6-7)</p>	<p>ולראיה על כל הנ"ל, באו הכלה _____, והחתן _____, ועדי שטר זה, על החתום. ויהי רצון מלפני הבורא יתברך, שיקוים בבעלי ברית אהובים זו מה שנאמר: שימני כחותם על לבך כחותם על זרועך כי עזה כמות אהבה...מים רבים לא יוכלו לכבות את האהבה ונהרות לא ישטפוה (שיר השירים ח:ו-ז):</p> <p>החתן:</p> <p>_____</p>
<p>Bridegroom:</p> <p>_____</p>	<p>הכלה:</p> <p>_____</p>
<p>Bride:</p> <p>_____</p>	<p>עדים:</p> <p>_____</p>
<p>Witnesses:</p> <p>_____</p>	<p>_____</p>
<p>_____</p>	<p>_____</p>

## B) Document adapted from the "Covenant of Loving Partners"

*In the presence of the couple, two valid witnesses and other guests, the officiating rabbi reads the Covenant and asks each party to signify acceptance of its terms through the mechanism of קנין, the lifting of a symbolic object such as a pen or kerchief. The witnesses then attest to the mutual commitment by signing the Covenant in Hebrew (and English, if using). This may take place just prior to the wedding ceremony or during the ceremony itself in the place indicated.*

1. Introduction and
2. Body of the Document

<p>On the __ (1) __ day of the week, the __ (2) __ day of the month of __ (3) __ in the year five thousand seven hundred __ (4) __, corresponding to the secular date of __ (4a) __, here in __ (5) __ in the country of __ (6) __ we, __ (7) __ the daughter/son of __ (7) __, and __ (7) __ the daughter/son of __ (8) __, before the people and the congregation make this holy declaration:</p> <p>"Let it be known that our souls are bound one to the other with bonds of love and mutual devotion, and that it is our intention, with God's help, to be exclusively faithful to each other all the days of our lives upon this earth. As our Sages taught: A person should find a partner with whom to eat, drink, read, study, sleep, and share every secret, secrets of Torah and secrets of life. We shall share from this day a complete partnership, joyfully and wholeheartedly establishing a household in common with moral and financial responsibilities for one another. We shall be loving partners for each other and will cherish, respect, sustain and assist one another in righteousness and faithfulness. With God's help may our dwelling be filled with love and harmony, peace and companionship, and may we be privileged to nurture together our Jewish heritage, our love for our fellow Jews and the dignity of every creature."</p>	<p>בְּ יוֹם לַחֲדָשׁ (3) , שְׁנַת חֲמִשָּׁת אֲלָפִים וּשְׁבַע מֵאוֹת וְ (4) לְמִנְיַן שָׁנֵינוּ מוֹנִים כֵּאֵן בְּ (5) בְּמִדְיַנַּת (6) אָמְרוּ (א7) בְּ יוֹם (8) וְ בַּת (7) (8) בְּפָנַי עִם וְעֵדָה בְּהִצְהָרָה קְדוּשָׁה: יְהֵא יְדוּעַ בְּזֵה שְׁנִקְשָׁרוּ נַפְשׁוֹתֵינוּ זֶה בְּזֶה בְּקִשְׁרֵי אֶהְבָּה וּמְסִירוֹת הַדְּדִית, וּבְכִנּוּנָנוּ בְּעֵזְרַת יי לֵהִיֹּת נְאֻמִּים זֶה לְזֶה בְּאוֹפֶן בְּלִעָדֵי כָּל- יְמֵי חַיֵּינוּ עָלֵי אֲדָמוֹת כְּמוֹ שְׁשֵׁנוּ רַבּוֹתֵינוּ יִקְנֶה אֲדָם חֶבֶר לְעַצְמוֹ שְׂיֵאכֹל עִמּוֹ וְיִשְׁתֶּה עִמּוֹ וְיִקְרָא עִמּוֹ וְיִשְׁנֶה עִמּוֹ וְיִישֵׁן עִמּוֹ וְיִגְלֶה לוֹ כָּל סִתְרָיו, סִתְרֵי תוֹרָה וְסִתְרֵי דָרֶךְ אֲרִץ. אֲנַחְנוּ נִשְׁתַּמֵּךְ מִן-הַיּוֹם הַזֶּה וְהֵלָא בְּשִׂתּוֹף גָּמוּר כְּרֵאוּי בְּאוֹשֶׁר וּבְלֵב שְׁלֵם וְנִקְיָם מְשֻׁק בֵּית מִשְׁתֶּךָ. נִהְיֶה זֶה לְזֶה רְעִים אֶהְוִיבִים וְנוֹקִיר וְנִכְבֵּד וְנִפְרָגִס וְנִסְעֵד זֶה אֶת-זֶה בְּיוֹשֶׁר וּבְאֵמוּנָה. בְּעֵזְרַת יי בְּמַעֲוָנָנוּ יִשְׁרוּ אֶהְבָּה וְאֶחָה שְׁלוֹם וְרַעוּת וְנִנְזָכָה לְטַפְּחַ יַחַד אֶת מוֹרֶשֶׁת הַיְהוּדוּת, אֶהְבֵּת יִשְׂרָאֵל וְכָבוֹד הַבְּרִיּוֹת.</p>
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(1) day of week; (2) day of month; (3) Hebrew month; (4) Hebrew year; (4a) date on secular calendar; (5) city name; (6) country/continent; (7א) name of the groom; (7ב) name of the bride; (8) names of parents.

Note: the name of the bride and groom can appear in either order.

3. Required Statement – this marriage is not intended as *kiddushin*.

<p>The bride, _____, and the bridegroom, _____, also attest: This marriage is not a <i>kiddushin</i> marriage, and the marital relations of the bridegroom and bride are not intended to bring about <i>kiddushin</i> marriage.</p>	<p>הכלה _____, והחתן _____ מצהירים: אין התקדשות זה קידושין, ואין ביאת החתן והכלה לשם קידושין, ולא לשם זנות: אלא אך ורק לשם הבעת אהבה.</p>
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The couple may also include the specification that the marriage does not require a *get* to be dissolved.

<p>Should it happen that, God forbid, the bride or bridegroom might wish or require the termination of this partnership, it shall be nullified and ended upon the mutual declaration in writing of the parties and their signatures before a just rabbinical court; or, by the written declaration of either party signed by that party and two witnesses, before a just rabbinical court. And additionally, the parties to this partnership must accompany its dissolution with a civil divorce according to the laws of [country], or whatever secular government they happen to be living under at that time. But at no time ought a <i>get</i> divorcement be necessary.</p>	<p>במקרה, חו"ש, וירצו או יצטרכו החתן והכלה לבטל שותפות זו, היא תיבטל על-ידי הסכמה בין שניהם בשטר ובחתימת ידיהם וידי שני עדים כשרים, בפני בית דין צדק; או, על ידי הצהרת רצונו של אחד מהם, בשטר ובחתימת ידו/ידיה וידי שני עדים כשרים, בפני בית דין צדק. ובכל מקרה, אין בטול שותפות זו בבלי שטר התנתקות באורכות המדינה; ובהכל ללא צריך גט כריתות.</p>
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At this point, couples may, if they so desire, include one or more Individualized Commitments, as in point 4 of the Brit Ahuvim document above.

4. The following condition may be included in the commitment document, or written up as a separate document (see Document C, below):

<p>Should we choose to part at some future time, just as this covenant has been concluded openly before the Jewish people, so does each partner commit to severing this bond through dissolution [<i>hafarah</i>] in the fashion ordained by a Jewish court [<i>Bet Din</i>]. Notwithstanding, should we be separated for more than six months with the intent by either party to terminate the union, this covenant shall be null and void.</p> <p>(Elliot Dorff, Daniel Nevins, Avram Reisner)</p>	<p>(Note: Rabbis Dorff, Nevins, and Reisner did not create a Hebrew text for this condition. One can/will be added here should the teshuvah be adopted)</p>
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## 5. Conclusion/Signatures

<p>We, the witnesses, attest that everything that is written and specified above has been done in our presence and is valid and effective.</p>	<p>כָּל מָה שֶׁכָּתוּב וּמְפָרָשׁ לְעֵיל גָּאָמַר וְנַעֲשֶׂה לְפָנֵינוּ, וְהַפֵּל שְׂרִיר וְקִיָּם.</p>
<p>(Signature) _____, witness</p>	<p>_____ עד/ה</p>
<p>(Signature) _____, witness</p>	<p>_____ עד/ה</p>

C) Conditions (adapted from the condition drafted by Elliot Dorff, Daniel Nevins, Avram Reisner)

The couple may place this condition on the *Hitkadshut/Brit Ahuvim* in a separate document rather than in the binding marital document.

*This document is to be completed and signed by the couple and their witnesses prior to the wedding ceremony. A copy shall be kept by the officiating rabbi, with the original returned to the couple together with their other marriage documents.*

This is to certify that on the [Hebrew date] day of the [Hebrew month] in the year [Hebrew year], corresponding to the [secular date] of [secular month], [secular year] in [name of jurisdiction], \_\_\_\_\_ and \_\_\_\_\_, of their own free will and accord, stipulated the following with respect to the Covenant of Loving Partners/marriage by *hitkadshut* that they enter today:

Should we choose to part at some future time, just as this covenant has been concluded openly before the Jewish people, so does each partner commit to severing this bond through dissolution [*hafarah*] in the fashion ordained by a Jewish court [*Bet Din*].

Notwithstanding, should we be separated for more than six months with the intent by either party to terminate the union, this covenant shall be null and void.

1. Signatures/Witnesses

Bride _____	החתן:
Groom _____	_____
Witness _____	הכלה:
Witness _____	_____
	עדים:
	_____
	_____

D) Document (and Procedures) of Divorce/Hafarah (adapted from Dorff, Nevins, and Reisner)<sup>3</sup>

There is no need to replicate the procedures involving a scribe which the rabbis required for a get. Thus, the following documents may be filled in, printed, and signed. The signature (hatimah) is by the partner presenting the document; as indicated below. When both agree to participate in this proceeding, each should fill out the document and present it to the other. However, in cases where this is not the case, one partner may complete the dissolution document unilaterally. Witnesses to the signature of the principal are required, following the general requirements of witnesses under Jewish law. Three copies of each dissolution document should be signed with one original returned to each party, and one forwarded to the Rabbinical Assembly, as described below.

**נוסח הַפְּרָה מֵאִשָּׁה לְאִישׁ**

בְּ \_\_\_\_\_ בְּשַׁבָּת, \_\_\_\_\_ לְחֹדֶשׁ \_\_\_\_\_, שְׁנַת חֲמִשָּׁת אֲלָפִים וְשִׁבְעַ מֵאוֹת וְ \_\_\_\_\_ לְמִנְיָן שָׂאֲנוּ מוֹנִים כָּאֵן בְּ \_\_\_\_\_ בְּמִדְיַת \_\_\_\_\_ אֲנִי \_\_\_\_\_, הַמְּכַוֵּנָה \_\_\_\_\_, עֲמֻדְתִּי בְּרִצּוֹן חֲפְזִי, בְּלֹא אוֹנֶס וּבְלֹא דוֹחַק, וּפְטָרְתִּידָהּ, \_\_\_\_\_ הַמְּכַוֵּנָה \_\_\_\_\_, שְׁהֵייתִי רְעִי עַד עֲתָה, מִן הַבְּרִית שְׁהֵתְקַיְמָה בֵּינֵינוּ. הָרִי רְשׁוֹת בְּגֻדְךָ לְכָרוֹת בְּרִית אֲהוּבִים אֶתְּךָ פְּרִצּוֹנְךָ. וְזֶה יִהְיֶה לְךָ לְאוֹת הַפְּרַת הַבְּרִית שְׁהֵתְקַיְמָה בֵּינֵינוּ לְשִׁעְבֵּר בְּעֵינֶיךָ וּבְעֵינֵי אֱלֹהִים וְאָדָם.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

עד/ה

עד/ה

חתימה

**נוסח הַפְּרָה מֵאִישׁ לְאִשָּׁה**

בְּ \_\_\_\_\_ בְּשַׁבָּת, \_\_\_\_\_ לְחֹדֶשׁ \_\_\_\_\_, שְׁנַת חֲמִשָּׁת אֲלָפִים וְשִׁבְעַ מֵאוֹת וְ \_\_\_\_\_ לְמִנְיָן שָׂאֲנוּ מוֹנִים כָּאֵן בְּ \_\_\_\_\_ בְּמִדְיַת \_\_\_\_\_ אֲנִי \_\_\_\_\_, הַמְּכַוֵּנָה \_\_\_\_\_, עֲמֻדְתִּי בְּרִצּוֹן חֲפְזִי, בְּלֹא אוֹנֶס וּבְלֹא דוֹחַק, וּפְטָרְתִּידָהּ, \_\_\_\_\_ הַמְּכַוֵּנָה \_\_\_\_\_, שְׁהֵייתִי רְעִי עַד עֲתָה, מִן הַבְּרִית שְׁהֵתְקַיְמָה בֵּינֵינוּ. הָרִי רְשׁוֹת בְּגֻדְךָ לְכָרוֹת בְּרִית אֲהוּבִים אֶתְּךָ פְּרִצּוֹנְךָ. וְזֶה יִהְיֶה לְךָ לְאוֹת הַפְּרַת הַבְּרִית שְׁהֵתְקַיְמָה בֵּינֵינוּ לְשִׁעְבֵּר בְּעֵינֶיךָ וּבְעֵינֵי אֱלֹהִים וְאָדָם.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

עד/ה

עד/ה

חתימה

**Dissolution of the Covenant of Loving Partners**

On the \_\_\_\_\_ day of the week, the \_\_\_\_\_ day of the month of \_\_\_\_\_ in the year five thousand seven hundred \_\_\_\_\_, corresponding to the secular date of \_\_\_\_\_, here in \_\_\_\_\_ in the country of \_\_\_\_\_, I, \_\_\_\_\_ the daughter/son of \_\_\_\_\_, arose of my own free will, without coercion or pressure, and have released you \_\_\_\_\_ the daughter/son of \_\_\_\_\_, who had been my loving partner until now, from the covenant that had been between us. You are hereby permitted to establish any other such covenant that you desire. This shall be the formal dissolution of the covenant that had existed between us in your eyes, and in the eyes of God and all people.

<sup>3</sup> <http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf>, 18-20.



### Procedure for Delivery

*Ideally, where the separation is mutually agreed, each member of the partnership will fill out a dissolution form and deliver it personally to his or her partner. Where the partners exchange dissolution documents mutually, each should say (in Hebrew or English or any other language that is common to them):*

לשון זכר:

הַתְּקַבֵּל הַפְּרָה זֶה. וְזֶה יְהִיָּה לְאוֹת הַפְּרַת הַבְּרִית שֶׁהִתְקַיְּמָה בֵּינֵינוּ לְשַׁעֲבֵר בְּעֵינֶיךָ וּבְעֵינֵי אֱלֹהִים וְאָדָם.

לשון נקבה:

הַתְּקַבְּלִי הַפְּרָה זֶה. וְזֶה יְהִיָּה לְאוֹת הַפְּרַת הַבְּרִית שֶׁהִתְקַיְּמָה בֵּינֵינוּ לְשַׁעֲבֵר בְּעֵינֶיךָ וּבְעֵינֵי אֱלֹהִים וְאָדָם.

“Here is the document of dissolution. This shall be the formal dissolution of the covenant that had existed between us in your eyes, and in the eyes of God and all people.”

*The person giving the document shall then place it in the hands of his/her partner. Where mutual hafarot are contemplated, each should present the hafarah they have prepared to the other. Where no exchange is contemplated, a copy should be sent to the absent partner. While no rabbinic presence is necessary to effectuate this dissolution, the separating partners may wish to do so before their rabbi. In that case, the rabbi might serve as one of the witnesses to the hafarah and issue each of them, as well, a letter attesting to the performance of the ritual in his or her presence. In all cases the second copy should be sent to the Registry of Dissolutions of the Rabbinical Assembly, 3080 Broadway, NY, NY 10027, along with a copy of the Brit Ahuvim/Ahuvot if it is available or a statement of the date and place in which the Brit Ahuvim/Ahuvot was entered into, and the officiant thereof. Because of the significance of these documents, all mail (paper or electronic) should be registered, return receipt requested. The third copy should be retained by the principal.*