**Part I: Introduction (*Kiddushin* and *Get*)**

**A. “A Woman is Acquired”: The Rabbinic Metaphor of Marriage**

**1. Mishnah Kiddushin1:1**

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

By money—the House of Shammai say: by a *dinar*, or by the equivalent of a *dinar*; and the House of Hillel say: by a *p’rutah*, or by the equivalent of a *p’rutah*. And how much is a *p’rutah*? One eighth of an Italian *issar*.

And she acquires herself by a divorce document, or by death of the husband.

The levirate widow is acquired by sexual intercourse. And she acquires herself by *halitzah*, or by death of the levir.

**1a. (optional) selections from Mishnah Kiddushin 1:2-5**

An Israelite slave is acquired (נקנה) by money or by document (1:2)…

A Canaanite slave is acquired (נקנה) by money or by document or by taking possession (1:3)…

A large animal is acquired (נקנית) by delivery, and a small animal by lifting it up (1:4)…

Items that can be mortgaged [i.e., real-estate] are acquired (נקנין) by money or by document or by taking possession, and those that cannot be mortgaged [i.e., moveable objects] are only acquired by drawing them [towards oneself] (1:5)…

**2. Tosefta Kiddushin 1:1-3**

1:1

a) 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 (מקודשת) to me,” [or] “Behold, you are betrothed (*מאורסת*) to me,” [or] “Behold, you are a wife to me” – behold, she is betrothed (מקודשת).

b) But if she gave him money or the equivalent of money, (and) she said to him “Behold, I am betrothed (מקודשת) to you,” [or] “Behold, I am betrothed (*מאורסת*) to you,” [or] “Behold, I am a wife to you” – behold, she is not betrothed (מקודשת).

1:2

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 betrothed (מקודשת).

1:3

And by sexual intercourse? Any act of sexual intercourse that is for the sake of *kiddushin*, she is betrothed (מקודשת)*.*

**3. Babylonian Talmud Kiddushin 5b**

Rav Pappa objects to this (i.e., to a version of the ruling of t. Kidd. 1:1): The reason (why the *kiddushin* is binding in the first clause) is because he (both) gave (the item of value) and he made the statement; this implies that if he gave (the item) but she made the statement, she would not be betrothed.

But note the latter clause: But when she gave to him (and) she said…she is not betrothed. The reason is that she (both) gave and she made the statement; this implies that if he gave (the item) but she made the statement, she would be betrothed…

Rather, this is what it intends to say: if he (both) gave (the item of value) and he made the statement (*natan hu v’amar hu*) – it is obvious that it is (effective) *kiddushin*. (But) if he gave (the item) and she made the statement, it is as if she (both) gave (the item) and she made the statement and (therefore) it is not (effective) *kiddushin*.

Or if you wish, say (as an alternate explanation): if he (both) gave (the item of value) and he made the statement – this is (effective) *kiddushin*. If she (both) gave (the item) and she made the statement – it is not (effective) *kiddushin*. (But) if he gave (the item) and she made the statement – it is an uncertain case, and by rabbinic law we are concerned (that this might be effective *kiddushin*).

Shmu’el said: Regarding betrothal, if he gave her money or the equivalent of money, (*and*) he said to her “Behold, you are betrothed (מקודשת) to me,” [or] “Behold, you are betrothed (*מאורסת*) to me,” [or] “Behold, you are a wife to me” – behold, she is betrothed (מקודשת); [but if he said] “Behold, I am your man,” [or] “Behold, I am your husband,” [or] “Behold, I am your betrothed” – there is no room for doubt here [there is no binding betrothal].

**B: “Permitted to Any Man”: Jewish Divorce**

**1. Mishnah Gittin 9:3**

The essence (*substantive language*) of the [divorce] document: “Behold you are permitted to any man.”

Rabbi Yehudah says: “This should be for you, from me, a writ of divorce, a letter of dismissal, a document of release, to go to marry any man you desire.”

[The essence of the document of manumission: “Behold you are a free woman, behold you belong to yourself.”]

**2a. Mishnah Yevamot 14:1**

The man who divorces is not like the woman who is divorced; the woman goes out (*of the marriage*) whether she desires it or not, but the man sends out (*his wife*) only if he desires it.

**2b. Tosefta Bava Batra 11:5**

One writes a divorce document for a man without the knowledge/consent of the wife, but one only writes (*it*) with the knowledge/consent of the man.

[(One writes a document of manumission) for the master without the knowledge/consent of the slave, but one only writes (*it*) with the knowledge/consent of the master.]

**C. Modern sources on gender and *kiddushin***

**1. Rabbi Isaac Klein, *A Guide to Jewish Religious Practice*, 396**

“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*.” (emphasis added)

**2a. Rabbis Elliot N. Dorff, Daniel S. Nevins, and Avram I. Reisner, “Rituals and Documents of Marriage and Divorce for Same-Sex Couples,” 4-5**

“Our hesitations about calling for same-sex ‘*kiddushin*’ are threefold: First, the ancient model of *kiddushin*, which may be translated either as *sanctification* or *designation*, is an inherently non-egalitarian model of marriage. The original concept from antiquity, when polygamy was permitted, was for a man to designate a woman for himself in a one-way exclusive arrangement. *She was exclusively his, but he was not exclusively hers*…

A second source of hesitation simply to apply the *kiddushin* model to same-sex couples flows from the previous one. According to Jewish law, a woman who has been designated as a wife by a Jewish man requires a Jewish writ of divorce (*get*) from him in order to terminate the marriage and marry again. Although this practice is mandated by a specific passage in the Torah (Deut. 24:1-2), it has been the source of great suffering in many Jewish communities, because a woman whose husband refuses her a Jewish divorce even after a civil divorce remains *agunah*, ‘chained’ to him and unable to remarry…

Finally, the very language of the traditional Jewish wedding liturgy and its documents, and likewise with the traditional Jewish divorce ceremony and its documents, is gender specific. Neither fits same-sex couples.” (emphasis in the original)

**2b. Rabbi Dr. Rachel Adler, *Engendering Judaism: An Inclusive Theology and Ethics*, 191**

“From an ethical perspective, the double-ring ceremony is a dubious amelioration. 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.”

**Part II: Are We Limited to *Kiddushin*? (Part I) (*Kiddushin* and *Z’nut*)**

**A. The Dichotomy**

**1. Sifra Kodashim perek 7:1**

“Do not degrade your daughter and make her a harlot” (Lev. 19:29)... 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 marriage.

2. **Dr. Michael L. Satlow, *Tasting the Dish: Rabbinic Rhetorics of Sexuality*, 140**

“*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...”

3. **Rabbi David Novak, “The Status of Jews Married Under Non-Jewish Auspices,” *Jewish Law Association Studies* 1 (1985), 63**

“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.”

**B. Implications for the Status of a Civil Marriage in the United States (and other Western countries?)**

This teshuvah (pp. 18-19) summarizes several points made by **Rabbi Isaac Klein** regarding the status of civil marriage (in ***Responsa and Halakhic Studies*, 9-11**). Slightly abridged, these are:

a. A civil marriage establishes the relationship between the couple as well-known publicly, and this public knowledge functions in the place of witnesses.

b. Although the civil ceremony is not a halakhically valid act, it certainly indicates an intention to be married, and therefore “would lead us to believe that the parties concerned desire to become husband and wife…” (9)

c. 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*.” (10)

d. Although the intent of the couple is not explicit we have a general presumption that “a person will, wherever possible, do the right thing and will rather act in a way that will be licit and legitimate.” To be indisputably licit (in Klein’s view), 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.

Klein therefore rules that “According to the law, then, our decision is that in the case of civil marriage a *get* is necessary.” (11)

**Part III: Are We Limited to *Kiddushin*? (Part 2) (Breaking the *Kiddushin/Z’nut* Binary*)***

**A. “Publicly Known” – Israeli “Common Law” Marriage**

**Rabbi Pesach Schindler,** “Extramarital Relationships” – selections from the English Summary, *Responsa of the Va’ad Halakhah*, Vol. 4 (<https://responsafortoday.com/en/extramarital-relationships/>)

**Question**:
Is it permissible for a single man and a single woman to establish a long-term sexual relationship outside of the framework of betrothal and marriage (erussin and kiddushin) as defined by Jewish law?

**Responsum**:
In the State of Israel, extramarital sexual relationships (henceforth: EMR) are often justified by the consenting couple as…

3. An act of opposition to the religious ceremony imposed on secular Jews by the religious establishment of the State.

A thorough investigation of the halakhic sources leads us to the following conclusions:

1. Jewish law prohibits all forms of EMR outside of the framework of betrothal and marriage.

2. A Jewish bill of divorce (get) is not required to dissolve such a relationship since it has no halakhic validity from its inception.

…

EMR lack three of the essential conditions of Jewish marriage:

a) EMR lack proper kiddushin…which include the betrothal by a ring, with the understanding and consent of both partners, in the presence of two valid witnesses.

b) EMR lack the essential element of a ceremony conducted for the express purpose of marriage…

c) Lastly, the Jewish marriage ceremony includes the groom’s commitment and obligation to the bride as expressed in the ketubah.

Since EMR do not meet these three essential requirements, there is no reason to assume that kiddushin have taken place.

…

On the contrary, kiddushin as defined by halakhah is clearly denied by the couple…

**B. Concubinage (*Pilagshut*)**

**1. Biblical examples**

a. Gen. 25:6 – “but to Abraham’s sons by concubines, Abraham gave gifts while he was still living…”

b. Gen. 35:22 – “…Reuben went and lay with Bilhah, his father’s concubine…”

c. Judges 8:32 – “A son was also born to him (Gideon) by his concubine in Shechem…”

d. Judges 19:1 – “In those days, when there was no king in Israel, a Levite…took to himself a concubine from Bethlehem in Judea.”

e. II Sam. 3:7 – “Now Saul had a concubine named Rizpah, daughter of Aiah…”

f. II Sam. 5:13 – “After he left Hebron, David took more concubines and wives in Jerusalem…”

g. I Kings 11:3 – “He (Solomon) had seven hundred royal wives and three hundred concubines…”

**2. Babylonian TalmudSanhedrin 21a**

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 without *kiddushin*.

**3. Maimonides, Laws of Kings, 4:4**

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.

**4. Nachmanides (in response of the Rashba, 284)**

I do not know why one should be in doubt about this, as she is certainly permitted when she is exclusive to him… But when she enters his home, and is exclusive to him, and known as his, her children are called by his name, and she is permitted…And there is no mention in Scripture or the Talmud of a distinction between a king and an ordinary person.

…

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

**5. Adler, *Engendering Judaism*, 204, 205**

“Another strain in classical Jewish law, however, offers halakhic precedent for a class of intimate relationships that are neither *kiddushin* nor *zenut*. Its classic example of such a relationship is concubinage, *pilagshut*. Into this category, earlier halakhists tossed a wildly ahistorical muddle of relationships…These examples, in turn, served for some authorities as models for civil marriage and other nonhalakhic long-term relationships. For the progressive Jew, however, these anaologies are fundamentally flawed: none of the examples describe an egalitarian relationship. For the traditionalist, however, what all these long-term relationships have in common is their claim to be other than *kiddushin*…

Although *concubinage may be valuable as a placeholder for relationships differentiated from kiddushin*, such relationships need not be identified as *kiddushin*. They could instead be identified as other non-*kiddushin* relationships for which concubinage is the first precedent in Jewish history.” (emphasis added)

**C. A Conservative approach to extra-marital sex and “promiscuity”**

**Rabbi Elliot Dorff, “*This Is My Beloved, This Is My Friend:” A Rabbinic Letter on Intimate Relations***

Judaism posits marriage as the appropriate context for sexual intercourse. We recognize, though, that many Jews are engaging in sexual relations outside the marital bond… We also condemn casual and promiscuous sexual encounters since they involve little or no love or commitment.

The non-marital relations which this section addresses, then, are not adulterous, incestuous, forced, *or promiscuous*; they are rather sexual relations between two unmarried adults which take place in the context of an ongoing, loving relationship. (p. 30, emphasis added)

Jewish norms in sexual matters, like Jewish norms in other arenas, are not an "all or nothing" thing. Certainly, failing to abide by Judaism's command that we restrict sexual relations to marriage does not excuse one from trying to live by the concepts and values Judaism would have us use in all of our relationships, including intimate ones. (p. 31)

…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. (p. 35, emphasis added)

**Part IV: Options for Jewish Marriage Without *Kiddushin***

**A. A *kiddushin*-like model (*hitkadshut*)**

**1.Why retain a form similar to *kiddushin*?**

**Rabbi David Greenstein, “Equality and Sanctity: Rethinking Jewish Marriage in Theory and in Ceremony,” *G’vanim* 5, no. 1 (2009), 18, 19-20**

 “...*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.” (emphasis in the original)

“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...”

**2. Halakhic roots**

**Maimonides, Laws of Marriage 3:2 and 6**

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)

**3. *Hitkadshut***

 **Greenstein, “Equality and Sanctity,” 27**

“The preferable formula need not be created out of nothing. It has been given to us by the halakhic authorities! In a marriage between a woman and a man, as each person gives a ring to their beloved, the bride should say – *harei ani mitqadeshet l’kha...* And the groom should say – *harei ani mitqadesh lakh...* – I hereby sanctify myself to you with this ring according to the religious tradition of Moses and Israel.

...the gift of the ring is declared by this formula to exemplify a gift of self…each is creating a change of status to themself and dedicating that changed status to the other…”

**4. What makes it binding?**

**Dorff, Nevins, and Reisner, “Rituals and Documents…,” 2 (n. 5), 3**

“As rabbinic interpreters of halakhah, we believe that our ruling is an authentic expression of דת משה וישראל, the laws of Moses and Israel…

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.”

“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.”

**B. Beyond Kiddushin/Brit Ahuvim**

**1. Covenant**

**Adler, *Engendering Judaism*, 192, 193-94**

 “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.”

“…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.”

**2. Halakhic roots**

**Maimonides, Laws of Agents and Partners, 4:1 and 3**

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)

**3. Partnership (*shutafut*)**

**Adler, *Engendering Judaism*, 192, 1936**

“…partnership law, *hilkhot shutafut*, forms the legal basis for the contractual aspects of the *b’rit ahuvim*…

…A partnership is formed by mutual agreement, and each party has the power to terminate it… the partnership is regarded as a kind of property in which the partners have invested. Consequently, each partner acquires legal obligations for maintaining the partnership and its projects.”

“There is, however…, a form of *kinyan* that was used in ancient times exclusively for partnership acquisition: symbolically pooling resources in a bag and lifting it together. This gesture could not possibly be mistaken for an acquisition of *kiddushin*… each partner places an object of some value in a bag provided for this purpose, perhaps specially designed or decorated. These may be objects that are especially eloquent of their owners’ personalities… Along with these chosen objects, or instead of them, each partner may put the other’s wedding ring into the bag. In this way, the rings are acquired specifically as tokens of partnership.”

**3. How are these marriages undone (divorce)**

a. **Adler, *Engendering Judaism*, 199**

 “Like the business partnerships that provide its contractual structure, the *b’rit ahuvim* may be dissolved at the intiative of either partner. This procedure should be conducted by a court of three learned Jews… the court should draw up a document in Hebrew, also translated into the vernacular, attesting to the termination of the *b’rit ahuvim*, the distribution of its assets, and arrangements for any continuing obligations. The document should be signed by two witnesses.” (199)

**b. Dorff, Nevins, and Reisner,** **“Rituals and Documents…,” 19**

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.