Halakhah and the Modern World: How Rabbinic Attitudes Shape the Contentious Orthodox Response to Non-Orthodox Marriage

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Abstract

In the nineteenth century, in the wake of the Jewish Enlightenment, newly formed Orthodox communities faced questions Judaism had never before considered. Should the marriage of two Jews in civil court be recognized as a valid Jewish wedding? Should wedding ceremonies in Reform settings be accepted within Orthodox communities? This thesis focuses on the legal argumentation supporting potential resolutions to these questions in order to explore the nature of decision-making in Jewish law today.

This thesis provides in-depth analyses of the primary writings of Rabbi Moshe Feinstein and Rabbi Eliyahu Henkin on whether civil and Reform wedding ceremonies result in marriage under Jewish law. The thesis concludes that Feinstein's opinion is motivated by an outlook that rejects much of the modern world, granting legitimacy only to Jewish law and those who follow it, while Henkin's opinion is grounded in a worldview that accepts a role for the modern world in matters of Jewish law. Although Feinstein espouses the more right-wing position, he reaches a more lenient conclusion, holding that a woman who marries in a civil or Reform setting does not require a Jewish divorce for dissolution of the marriage. Henkin's more left-wing argument leads to a stricter conclusion, requiring a Jewish divorce in such situations. This divide between argument and outcome may be exploited to gain insight into the nature of contemporary decision-making in Jewish law. Decisors who use Feinstein or Henkin as precedent cannot choose both a right-wing (left-wing) argument and a right-wing (left-wing) outcome, but must choose whether to follow their preferred argument or outcome. From their choices, we can ascertain whether argument or outcome plays a greater role in Jewish legal decision-making today.

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Chapter One: The Genesis of the Problem and Legal Complications

In the late 18th century, countries began to grant citizenship to Jews. For the first time, amid decreasing discrimination and growing social and business contact between Jews and non-Jews, Jews could choose where to solemnize their marriages. Jews could now turn to the state for a civil marriage and forgo *kiddushin*, Jewish marriage, entirely. This new situation alarmed Jewish leaders, for the loss of control over matters of personal status threatened the bonds that held Jews together in a worldwide community. After the Jewish community divided, marriages held under Reform auspices were similarly ambiguous for Orthodox Jews. Orthodox rabbis faced questions they had never before needed to consider: are two Jews who marry in civil court also thereby married under the laws of *kiddushin*, even without a Jewish ceremony?[1] do Reform wedding ceremonies constitute *kiddushin*? The answer to these questions would have far-reaching effects on the eligibility of certain Jews to remarry, and even on who they might legally marry under Jewish law. Violation of these laws would wreak havoc on the Jewish community's self-determination.

The questions were complicated and controversial. If civil and Reform ceremonies were defined as outside the bounds of *kiddushin*, Jews who wed according to state law or with Reform rabbis would not be considered married under Jewish law, even though, practically speaking, the couple would look married. Yet if civil and Reform

[1] While civil marriage for same-gender couples was not a consideration at that time, it is now available to a limited extent. This thesis, however, will not discuss the halakhic implications of these unions. The halakhic intricacies of same gender marriages as *kiddushin* differ from those involved in civil unions between a man and a woman. For these reasons, and because much of the Jewish textual tradition assumes marriage to take place between a man and a woman, although the terminology is inaccurate, the word "marriage" in this thesis will describe a union between a man and a woman.

ceremonies fulfilled the requirements of *kiddushin*, a Jewish writ of divorce would be required to dissolve the marriage. It would be impossible to enforce such a requirement, and the couple could then be civilly divorced, but still married in the eyes of Jewish law. Either situation was problematic.

Halakhah—Jewish law—on the question of whether civil marriage and marriage in a Reform context are to be considered *kiddushin* had not yet been resolved by the mid-twentieth century. At that time, however, in a famous interchange, two leading rabbis outlined positions that became the prominent views on the subject. Their arguments were surprising. One would have expected the more right-wing decisor to reach a stricter conclusion, but such was not the case on this topic. The more right-wing argument led to a lenient solution, that civil marriage is not *kiddushin*, and the less right-wing argument reached a stricter conclusion, requiring a Jewish divorce after civil marriage alone.

Using the dichotomy between argument and outcome expressed by these rabbis, we can gain insight into the establishment of *halakhah* today. Later decisors who use one of these opinions as precedent must choose whether to follow the opinion that matches their preferred argument or the one that matches their preferred outcome.

The purpose of this thesis is twofold. The main part of the thesis will provide a close reading of the two rabbis' primary opinions on the subject of civil marriage as *kiddushin*, and include in the analysis related responsa on both civil marriage and marriage in a Reform context. The aim is to examine how the decisor frames and defines the matter halakhically, and uncover his posture towards *halakhah* within the modern world that influences his choice of texts and their interpretations. An epilogue will outline

research on the nature of halakhic decision-making today using the natural divide between argument and outcome suggested in the writings of these two major rabbis.

In 1790, in the wake of the fervor of the French Revolution, Sephardi Jews in France gained full rights as individual Frenchmen. Ashkenazi Jews in the country were granted equality the following year. For the first time in modern history, Jews stood on a legal platform on par with their compatriots. Even though French Jews did not win full ethnic and religious rights at that time, and Napoleon soon reversed part of the Jews' emancipation, a new political and social reality had been unleashed. Changes stimulated by the European Enlightenment would forever alter the nature of Judaism and the Jewish community.[2]

Even before the emancipation of French Jews, the Jewish Enlightenment, called *Haskalah*, was taking root within the Jewish community. Jewish leaders, drawing on philosophical ideas of the day, called for a changed Judaism and Jewish people worthy of standing within European society. The *maskilim*, proponents of the new viewpoint, urged Jews to move out of their insular communities and adopt European customs. In society at large, access to secular education and to occupations outside of the Jewish sphere increased, as did fraternization between Jews and non-Jews. As Jews gained civil rights and discrimination decreased, they were brought under the law of the state instead of

[2] Challenges faced by the Jewish community in its encounter with modernity are spelled out well by Jacob Katz in the following books: *Tradition and Crisis: Jewish Society at the End of the Middle Ages* (New York: Schocken Books, 1961); *Out of the Ghetto: The Social Background of Jewish Emancipation, 1770-1870* (New York: Syracuse University Press, 1998); *A House Divided: Orthodoxy and Schism in Nineteenth-Century Central European Jewry* (New Hampshire: University Press of New England, 1998). See also David Ellenson, *After Emancipation: Jewish Religious Responses to Modernity* (Cincinnati: Hebrew Union College Press, 2004); Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia: The Jewish Publication Society, 1994), 1576-1588; Michael A. Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (New York: Oxford University Press, 1988).

their own authority. Jewish courts lost the ability to enforce decisions through the *herem*, a form of excommunication, and accordingly, Jews no longer held unrivaled power over their own communities. Entry into a world previously closed to them encouraged Jews to think critically about their community and religion, and in a culture that valued religion as a private affair and championed individual decision-making, with no central body to maintain norms of Jewish practice, Jews began to alter their ritual life. Eventually Judaism split into secular, Reform and Orthodox camps, each striking a different pose towards the new environment in which Judaism now lived.

As Jews began to navigate altered social and legal realities, the newly titled Orthodox communities faced obstacles unique within the larger Jewish community. Orthodox Jews wanted a relationship with Judaism that held much more closely to life as it had been before the *Haskalah* than other Jewish communities. It was initially unclear, however, how Orthodox Jews might keep their Jewish affiliation constant given the quickly-changing world around them. They faced complications both from within Judaism and from the new circumstances when setting a course for their communities. The first challenge was to decide what posture each community should take in relation to the budding modern world. Orthodox rabbis debated the extent to which they should assume a stance of accommodation or resistance to their changed circumstances.[3] Would Judaism be preserved, and more Jews remain observant, if rabbis permitted modifications in laws that could be altered to take into account the new situation? Or should the old rules and traditions be maintained unchanged to the greatest extent possible? The answers

[3] David Ellenson, "Accommodation, Resistance, and the Halakhic Process: A Study of Two Responsa by Rabbi Marcus Horovitz of Frankfurt," in *Jewish Civilization: Essays and Studies in Honor of Mordecai Kaplan's 100th Birthday*, Vol. 2, ed. Ronald Brauner (Philadelphia: Reconstructionist Rabbinical College Press, 1981), 138.

to these questions were both informed by a particular rabbi's view of *halakhah*, and they guided his halakhic choices for the future as well.

Secondly, Orthodox rabbis who deemed it best to adjust practices deliberately faced resistance from within the halakhic process itself. While *halakhah* has characteristics of flexibility and has certainly undergone change through the generations, its stability is also part of its strength.[4] Therefore, the process through which practical *halakhah* emerges has several internal checks that prevent both quick and momentous changes, only some of which will be explored here, as a comprehensive review of these constraints is beyond the scope of this thesis.

Rabbis who answer questions of Jewish law, as leaders facing new challenges in modernity did, are bound by the conventions of the halakhic process. One of the primary forms their writings take is the *teshuvah*, literally "answer." A *teshuvah*, known in English as a responsum, is a rabbi's halakhic analysis and opinion concerning a question of Jewish law posed to him, usually deriving from a practical situation. In composing a *teshuvah*, the *posek*, as a Jewish legal decisor is called, must stay within the halakhic process, "a process possessing its own inherent integrity and governed by particularly *legal* rules."[5] He does not have free reign to choose the principles and ideas on which to make his decision. An example of this constraint is that the halakhist is obliged to take into account texts and opinions traditionally seen as relevant to the posed question, and these precedents and the accompanying standards for how to read them may impose severe limitations on a *posek*'s conclusion. In addition, any conclusion a halakhist

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[4] Robert Gordis, *The Dynamics of Judaism: A Study in Jewish Law* (Bloomington and Indianapolis: Indiana University Press, 1990), 10.

[5] Mark Washofsky, "Responsa and the Art of Writing: Three Examples from the Teshuvot of Rabbi Moshe Feinstein," in *An American Rabbinate: A Festschrift for Walter Jacob*, eds. Peter S. Knobel and Mark N. Staitman (Pittsburgh: Rodef Shalom Press, 2001), 8.

reaches must be within bounds that both his rabbinical peers and the people of his community see as appropriate, or the *teshuvah* will be rejected as invalid.[6] Consequently, existing mores impose restrictions on halakhic change.[7] Change in *halakhah* develops and occurs by means other than through *teshuvot*, but responsa represented one of the most important written methods through which Orthodox rabbis sought to influence Jewish practice during the *Haskalah*.[8] Thus Orthodox rabbis who sought emendations in *halakhah* faced serious hurdles from within Judaism, both from contemporary *halakhah* and from the processes that govern halakhic change through responsa literature.

The new social and legal realities of Jewish communities worldwide also posed challenges for fledgling Orthodox communities as they struggled to renegotiate their relationship with tradition. Modernity brought situations that Jewish communities had never before contemplated. For example, Jews could now resolve business conflicts, even those between Jews, by turning to state courts. Jews could also choose a range of religious practices without incurring Jewish legal sanctions. These circumstances and many others demanded a halakhic response. In this new world, on these new topics, however, Orthodox rabbis had to do more than answer the halakhic question posed to them. They had to define and defend the boundaries of their newly established Orthodox communities, while simultaneously ensuring that their responsa would be perceived as models of halakhic continuity. Thus even as *poskim* argued with each other to determine which texts and previous opinions were relevant to novel questions, they sought to position their decisions as products of the same halakhic process that lived before the Enlightenment. This would encourage communities to accept the rabbis' decisions and

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[6] *Ibid.*, 9.
[7] *Ibid.*, 7.
[8] Meyer, 58.

also imbue the newly Orthodox communities with a sense that their religious life was strong enough to meet the new challenges they faced. In the charged environment of a freshly divided Jewish world, Orthodox rabbis strove to meet the challenge of maintaining continuity while delineating their communities. Thus Orthodox rabbis faced obstacles to continuing Jewish practice both from within and from outside their communities.

Some of the most charged novel questions that occupied Orthodox rabbis concerned matters of personal status. With citizenship, Jews gained the opportunity to establish and dissolve unions between two Jews entirely outside the bounds of Jewish communal life. Instead of turning to Jewish authorities for a Jewish marriage, called *kiddushin*, Jews could now marry each other in civil courts, bypassing any contact with the Jewish community altogether. Rabbis were forced to ask: should the new couple, now married in the eyes of state law, also be considered married according to the Jewish community without any explicitly Jewish ritual? Do civil marriages meet the halakhic requirements of *kiddushin*? A related question arose with the advent of Reform and Orthodox elements of the Jewish community. Orthodox leaders viewed Reform readings of Jewish tradition as unacceptable. Consequently, Orthodox communities were suspicious of the halakhic content of marriages performed in a Reform setting.

The answer to whether or not civil and Reform marriages would be considered *kiddushin* carried far-reaching implications for Jewish communities worldwide. The repercussions of deciding either way carried such weight that Jewish leaders are still arguing over the resolution today.

The difficulty of the decision lies on several dimensions. If a civil or Reform ceremony meets the legal requirements of *kiddushin*, then dissolution of the Jewish marriage requires that the husband provide his wife with a Jewish bill of divorce, called a *get*. Without a *get*, the woman will be halakhically ineligible for a second Jewish marriage, and she will be termed an *agunah*, literally, a "chained" woman. There are no overarching halakhic solutions for releasing an *agunah* from her obligation to receive a *get*; each case is handled on an individual basis. Thus the plight of the *agunah* is taken very seriously in halakhic literature, with *poskim* often ruling as leniently as possible in order to alleviate the woman's suffering.[9] If a *get* is required but not obtained, Jewish law declares the woman to be committing adultery if she marries again.[10] Any children from this second marriage are considered *mamzerim*, ineligible to marry within the Jewish community.[11] The potential of creating *agunot* and *mamzerim* through civil or Reform marriage as *kiddushin* is a grave possibility.

A link between civil or Reform marriage and *kiddushin* carries additional considerations. Jews whose marriages are solemnized only by the state may not desire a marriage under Jewish law, and the couple would then not choose a Jewish divorce. Alternatively, couples who marry in a civil or Reform ceremony alone may not know about the halakhic requirement for a *get* and therefore not seek one. Either situation might easily to lead to *agunot* or *mamzerim*. Adulterous relationships and *mamzerim* unaware of their status who marry within the Jewish community bring complications about who is considered Jewish. Certain halakhic decisions cannot be rendered in the absence of clear knowledge of a Jew's personal status, and thus halakhic decision-making

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[9] *SA EHE* 17:1ff.
[10] *B. Kiddushin* 7a.
[11] *Ibid.*, 74a.

breaks down. The situation carries the potential to irreparably divide the Jewish community.[12] Some Orthodox leaders worry that a connection between civil marriage and *kiddushin* may demonstrate communal approval of civil marriage and thereby encourage the practice as a route to Jewish marriage.[13] Thus the potential proliferation of *agunot* and *mamzerim* holds the power to destroy the fabric of the entire Jewish community if individual communities seek to insulate themselves from these halakhic difficulties.

The division of civil and Reform marriage from *kiddushin*, however, brings different problems. If a couple marries in either ceremony but has not completed *kiddushin*, they are married in the eyes of state law and generally appear to the public as a married couple. Yet they would not be considered married under Jewish law, creating a strange dichotomy between how they are popularly treated and their halakhic status. The same couple is married yet not married. Opponents argue that the situation abolishes the sanctity of Jewish marriage because Jews live together in relationships not sanctified by Jewish marriage.[14] Furthermore, the situation speaks volumes about the relationship among various parts of the Jewish community. The possibility that a marriage conducted by one group of Jews would not be recognized by other Jews is devastating to *kelal yisrael*, the unity of the Jewish people. Likewise, in cases of civil divorce, if some Jewish communities deem the situation suspect and are unwilling to sanction the woman's second marriage without a *get*, an entire class of Jewish families could end up with a "shadow of illegitimacy."[15] Again *kelal yisrael* is threatened.

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[12] Getsel Ellinson, "Civil Marriage in Israel: Halakhic and Social Implications," *Tradition* 13:2 (1972): 31-32.
[13] Isaac Klein, "The Case of Civil Marriage According to Jewish Law," in *Proceedings of the Rabbinical Assembly* 5 (1933-38): 485.
[14] *Ibid.*, 486.
[15] Isaac Klein, "Civil Marriage (1938)," in *Responsa and Halakhic Studies* (New York: KTAV Publishing House, Inc., 1975), 11.

Thus either answer to whether or not civil and Reform marriages may be considered *kiddushin* leads Judaism down a difficult path. Moreover, each Jewish community cannot reach an autonomous conclusion, one deciding that civil marriage is *kiddushin* and another deciding against. Matters of personal status cross communal and movemental lines and so are best held constant. Thus while many aspects of the question of civil marriage as *kiddushin* are contentious, it is chiefly because either solution carries the power to tear apart the Jewish world that halakhic dialogue on the problem has proceeded slowly.

More than a century after the problem of civil and Reform ceremonies as *kiddushin* first arose, the halakhic community had not yet coalesced around a single solution. In fact, *poskim* had not even settled on the proper halakhic framework through which to view the question. They still debated which precedents should apply and what social considerations might legitimately be taken into account. Although the answer to the question of if a civil or Reform ceremony should be considered *kiddushin* is a simple yes or no, the methods of arriving at the answer are of equal importance to the halakhic community, because these speak to the community's attitude towards the world in which it lives. While the decisor may say he is doing only "what the law demands," he nonetheless chooses the way he frames the matter at hand, even if only unconsciously.[16] The dialogical process of arriving at new practical *halakhah* is as much about arguing over the relative importance of textual precedents as it is about disagreement over this framework. Thus arguments about nontraditional marriage as *kiddushin* served not only

[16] Louis Jacobs, *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (Oxford, New York: Oxford University Press, 1984), 12.

to establish a halakhic resolution to the problem, but to define the identity of Orthodoxy within both the secular world and the larger Jewish community.

Significant progress was made, however, in the late 1950s and early 1960s, when the terms of the debate were set in a famous dispute on the subject between two renowned rabbis. Rabbi Moshe Feinstein and Rabbi Eliyahu Henkin, both born in Eastern Europe but emigrés to the United States, each wrote detailed opinions on civil marriage as *kiddushin*. Henkin's initial analysis of the subject was written before 1925, but it was Feinstein's radically different *teshuvah* in 1959 that sparked a vociferous debate between the two. The writings of Feinstein and Henkin differed from previous *teshuvot* on the topic of nontraditional ceremonies as *kiddushin* in scope and detail. Feinstein and Henkin took into account previous opinions on the subject, generations of discussion on *kiddushin* in general, and responded to each other's ideas as well. These rabbis' analyses of the topic of civil marriage in relation to *halakhah* and their corresponding views on marriage in a Reform setting became the foundation for all subsequent discussions on the subject. Their divergent views on how the question should be framed laid the groundwork not only for future halakhic discussion regarding civil and Reform ceremonies, but for how rabbis might position *halakhah* in the modern world.

Chapters Two and Three will provide an in-depth examination of the halakhic reasoning and framework that underlie both Feinstein's and Henkin's positions. Before beginning this work, it will be useful to outline halakhic requirements of *kiddushin* and consensual sexual relationships, and to raise questions prompted by the application of these rules to nontraditional marriage ceremonies.

While it is true that *poskim* have some latitude in deciding which textual sources and halakhic concepts apply to the problem at hand, centuries of debate have provided guidelines that *poskim* must stay within. *Kiddushin* has three halakhic requirements: *ma'aseh*, an action;[17] *eidim*, witnesses to this action;[18] and *kavannah*, intention on the part of the couple.[19] Although it is customary to have a ceremony to fulfill these conditions, each of the three can be met through several alternatives. These substitute measures carry the same weight as performing the three together in a ceremony, so Jewish marriage can be effected either through a customary ceremony or specified alternatives. It is this possibility that opens the door to civil marriage as *kiddushin*.

The Mishnah suggests that *ma'aseh*—the act that formalizes the marriage—may take place through three means, a gift, a contract, or sexual intercourse.[20] While the ritual is based on modes of taking ownership of property, the *kinyan* (act of acquisition) of *kiddushin* includes an additional component that separates marriage from property transactions. The *kinyan* of marriage includes an element of exclusivity, derived from the idea that just as property dedicated for Temple worship is sanctified and thus exclusive for that purpose (*hekdesh*), so too a man sanctifies his wife.[21] Furthermore, just as the sanctification of property for the Temple effects a change of status for the object, so too the *kinyan* of *kiddushin* changes a woman's status. Thus unlike in property transactions, the 'acquisition' by the man is not an action that transfers ownership, but instead an

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[17] *M. Kiddushin* 1:1.
[18] *SA EHE* 42:2.
[19] *MT Ishut* 3:1ff; *SA EHE* 42:1.
[20] *M. Kiddushin* 1:1.
[21] *B. Kiddushin* 2b. In Jewish marriage, the man is the active party and for the most part, the woman is an object in the proceedings, even though her consent is required (*SA EHE* 42:1). Thus the Jewish textual tradition on marriage speaks of the woman being "acquired" and "brought into his [the man's] household." While such language may offend our modern ears, in order to discuss accurately the halakhic sources, this thesis will retain the traditional formulations.

action that changes a woman's status. Once married, a woman's status is *eishet ish*, a married woman, the chief component of which is her exclusivity to a particular man—she is a wife to him alone.[22]

The first question in considering if a marriage ceremony qualifies as *kiddushin* is whether or not a valid *ma'aseh* took place, be it gift, contract, or sexual intercourse. While the Mishnah lists these three options for the *ma'aseh*, any of which would satisfy the requirement, the man's gift of a ring or another object of value to the woman is by far the most common form of *ma'aseh* today. The act constitutes a legal *ma'aseh* no matter the location of the transaction, including a civil ceremony. A ring exchange, however, may invalidate the *ma'aseh*.[23] The second option for a *ma'aseh*, contract, is not in use today.[24] Nevertheless, *kiddushin* through a contract would be impossible to achieve without intention to do so, and so is unlikely to be fulfilled at a civil ceremony. Signing the state marriage license or registry is not a halakhically valid contract for *kiddushin*. The third option for a *ma'aseh* is marriage through *bi'ah*, sexual intercourse, and the rabbis of the Talmud discouraged Jews from employing this method of *kiddushin*.[25] Nonetheless, *kiddushin* through *bi'ah* (*kiddushei bi'ah*) remained "on the books," as it were, and figures prominently in determining whether a couple's living arrangements subsequent to the civil or Reform ceremonies resulted in *kiddushin*. Even without a proper *ma'aseh* at the ceremony itself, the fact that the couple lives together afterward as husband and wife may qualify as *kiddushei bi'ah*. Whether or not it does depends, in part, on the nature of *eidut*, witnessing, that has taken place.

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[22] *Tosafot*, *B. Kiddushin* 2b, *s.v. di'asar*; *SA EHE* 1:10.
[23] *Resp. Iggerot Moshe EHE* 3:18.
[24] Norman E. Frimer and Dov I. Frimer, "Reform Marriages in Contemporary Halakhic Responsa," *Tradition* 21:3 (1984): 29 n.35.
[25] *B. Yevamot* 52a; *B. Kiddushin* 12b.

Witnesses are an essential part of *kiddushin*. Unlike in monetary transactions, in which witnesses are present only for the purpose of possible future testimony, *eidut* is integral to the Jewish marriage itself. *Kiddushin* does not take place unless witnesses are present.[26] As in any case of *eidut*, witnesses to *kiddushin* must be qualified to serve as valid Jewish witnesses.[27] Acceptable witnesses are halakhically observant, male, adult Jews who are not relatives of the bride or groom, and *halakhah* requires that two of them observe *kiddushin*.[28] The bride and groom must see the witnesses.[29] *Eidut* is fairly straightforward when *ma'aseh* takes place through the giving of a gift or a contract.

When *kiddushin* is accomplished through *bi'ah*, however, *eidut* is more complicated. Under no circumstances did the rabbis want witnesses to be present during the act of intercourse. To respect the privacy of the couple, the sages followed the rule that "*hen hen eidei yihud, hen hen eidei bi'ah.*"[30] Under this principle, witnesses to *kiddushei bi'ah* observe the couple go into seclusion together, and from this fact, understand that *kiddushei bi'ah* has taken place.

In the case of a couple that does not set out deliberately to fulfill *kiddushin* through *bi'ah*, as with a couple who has a civil or Reform ceremony, no witnesses are specifically designated as *eidim* for the couple's *ma'aseh* of *bi'ah*. Proper *eidut* may nonetheless be achieved through the halakhic principle of *anan sahadei*, in which the community's general knowledge that the couple lives together as husband and wife may qualify as *eidut* for the *ma'aseh*. The same requirements apply for *eidim* whether they are

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[26] *B. Kiddushin* 65a-b.
[27] *B. Sanhedrin* 26b; *SA EHE* 42:5.
[28] *SA EHE* 42:2.
[29] *SA EHE* 42:3.
[30] "Witnesses to [a couple's] seclusion are equal to witnesses to [their] sexual intercourse." See *BT* Gittin 81b.

specifically designated as witnesses for the ceremony or they are *eidim* through *anan sahadei*. Thus if it is certain or even unclear that no kosher witnesses attended the civil ceremony and the general Jewish public is to serve as *eidim* through *anan sahadei*, it must include the requisite halakhically-observant witnesses. Feinstein and Henkin strongly disagree about the requirements of *anan sahadei*, the terms under which a couple's living arrangements lead to *kiddushei bi'ah*. They disagree about the conditions under which we can presume that valid witnesses know about the couple's living arrangements, and also about when in the couple's new life together these witnesses must know about the newlyweds.

Valid *kiddushin* requires not only that witnesses observe a particular act, but that they do something much more difficult: ascertain the couple's intention. At a Jewish ceremony, this is accomplished by hearing the groom's recitation of the traditional marriage formula[31] and by observing the bride's willing receipt of the groom's gift.[32] At this type of service, it is clear that both parties desire not only marriage, but Jewish marriage; they are willing participants in the act of *kiddushin*. The question of intention becomes more complicated if the couple is to achieve *kiddushin* outside of the customary Jewish marriage ceremony, especially if the method is *kiddushei bi'ah*. How can witnesses be sure the couple has the needed intention at the proper time?

Once again, the sages step in and offer a presumption that can govern such circumstances. The rabbis teach that "*ein adam oseh be'ilato be'ilat zenut*," literally, that "a man does not make his sexual intercourse an act of licentiousness."[33] That is, if given a choice, a man desires his sexual relations to be legitimate rather than illegitimate. This

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[31] *MT Ishut* 3:1.
[32] *SA EHE* 42:1.
[33] *MT Gerushin* 10:19; *SA EHE* 149:5.

rabbinic presumption, known as a *hazakah*, lets us conclude that if we know a man had sexual relations with an unmarried woman, he must have had the proper intention—i.e., for marriage. The *hazakah* appears for the first time in two Talmudic passages. In the first,[34] a divorced couple stays together at an inn, and the rabbis now wonder if she needs a *get*. The *hazakah* is introduced during the discussion in order to explain a difference of opinion between *Beit Shammai*, who thinks no *get* is needed, and *Beit Hillel*, who requires a *get*. If there are witnesses to the act, so that the requirements of *ma'aseh* and *eidim* are met, then *Beit Hillel*, who holds that *kavannah* is met through the *hazakah*, calls for a *get*. *Beit Shammai*, who does not believe in the *hazakah*—a man is perfectly willing to have sex outside of legal boundaries—thinks that the situation does not establish a marriage. The condition of *kavannah* was not met. The Talmudic passage does not state whether or not the *hazakah* reflects people's true intentions, and if and when it should be employed. The second Talmudic passage, too, does not deal with the *hazakah* directly, but refers to the presumption only to explain the sage Rav's position.[35]

The fact that early sources of Jewish law did little to explain the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" left the door wide open for its interpretation in later years. One of the major questions halakhists faced was if they should apply the *hazakah* only in the two situations described in the Talmud, or if the *hazakah* should enjoy wide usage. Perhaps an underlying principle that links the two cases should be the basis for use of the *hazakah*, such as if the couple had a sanctioned relationship prior to the situation in question. Leading Jewish thinkers throughout the centuries held differing opinions, complicating the task of modern-day *poskim*.

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[34] *B. Gittin* 81a.
[35] *B. Ketubot* 72b.

The *Geonim*, Jewish sages of the early medieval period, for instance, applied the *hazakah*, but disagreed among themselves whether or not its use should be limited only to the unusual situation they confronted.[36] Their situation was as follows: Bustenai, the Exilarch (head of the community's secular affairs), was sent a Persian princess. Not wanting to offend his powerful Islamic neighbors, he married her and they had a number of sons. These children were treated as family members alongside the Exilarch's other sons. After Bustenai's death, his sons from his marriage with a Jewish woman claimed that the sons of the princess held the status of unfreed slaves, since their mother's status may have been as slave. Later, however, a grandchild of one of the sons of the princess married a Jewish woman, and another was appointed Exilarch. The community, apparently, considered the line kosher. Using the *hazakah*, *geonim* agreed that Bustenai must have freed the princess before he had children with her, thereby ensuring that her children would be Jews. *Geonim*, discussing the case of Bustenai, agree that the *hazakah* should be applied to him, since he was such a great man and surely would not have had illicit sexual relations. In later years, Bustenai's case was seen as a precedent for applying the *hazakah* to a broader range of situations than only the two discussed in the Talmud, even though some *geonim* argued that it was unclear if the *hazakah* should ever be used again. In addition, the case of Bustenai dispelled the argument that the *hazakah* should apply only when the couple has had a prior relationship, because Bustenai clearly had no *kiddushin*-type relationship with the princess before their marriage. Geonic opinions, while not in complete agreement, nonetheless indisputably cleared the way for a more expansive application of the *hazakah*.

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[36] Geonic responsa may be found in Avraham Grossman, *Reishot Hagolah Bibavel Bitekufat HaGeonim* (Jerusalem:
Hahevra Hahistorit Hayisraelit), 1984.

Maimonides, a 12th century Jewish philosopher and codifier of *halakhah* known as Rambam, disagreed with the geonic conclusion. Rambam favored limited use of the *hazakah*. It is unclear whether he intended for the *hazakah* to be effective only in the two cases specifically listed in the Talmud, or if he preferred it be applied when the couple had a preceding relationship, in which case Rambam thought it reasonable to presume that the couple intended any subsequent sexual liaison to be for marriage.[37] Rambam put forward another requirement for application of the *hazakah*: it may only be used with people who follow Jewish law and lead morally upright lives.[38] This ruling is a severe limitation on use of the *hazakah* today. Orthodox authorities, basing their opinions on Maimonides, may *prima facie* exclude significant parts of the Jewish community from application of the *hazakah*.

The *Geonim* and Rambam represent two of the most common opinions governing use of the *hazakah*. As already explained, the question of when to apply the *hazakah* is critical to the subject of civil marriage as *kiddushin*, because the *hazakah* is the key to establishing intention in *kiddushei bi'ah* if intention has not been explicitly stated. In cases of marriages in civil and Reform settings, Feinstein and Henkin disagree, not surprisingly, about application of the *hazakah*. They argue, for example, about when the required intention for *kiddushei bi'ah* must be present, whether explicitly at the first *bi'ah* or at another point. More importantly, the rabbis disagree about something more fundamental: the type of intention is needed to effect *kiddushin*. Henkin argues that *kiddushin* takes hold even without the couple's explicit intention to fulfill the Jewish *mitzvah* (commandment) of *kiddushin*, because he interprets the sources to say that the

[37] *MT Gerushin* 10:19.
[38] *Ibid.*, 7:23.

couple's desire to be married fulfills the halakhic requirement of *kavannah* in *kiddushin*. Feinstein reads the texts to say that the couple must intend to fulfill the requirements of *kiddushin*. While the sources reasonably support either position, the rabbis' argument is also over an idea not contained in the texts: the question of whether or not a couple that has a civil marriage *wants* to be married under Jewish law.

Each of the debates on *ma'aseh*, *eidut*, and *kavannah* represents a serious difference of opinion between the two *poskim*. Yet questions surrounding requirements for the three elements of *kiddushin* are only one dimension on which Feinstein and Henkin disagree when considering nontraditional ceremonies as *kiddushin*. A second significant area of contention is the relevance of a 14th century *teshuvah* by Rabbi Isaac ben Sheshet, known as Rivash.[39] In the responsum, Rivash is asked about the status of a woman who, because of persecution, married in a church. The *posek*'s conclusion is that the woman does not need a *get*; she never had *kiddushin*. The couple never had intention for *kiddushin* because they chose to be married in a church, Rivash says. Furthermore, he continues, we cannot apply the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" because the people involved do not follow *halakhah*, a fact known because no kosher *mikvah* was available due to persecution.

While Rivash's *teshuvah* leaves open many questions, such as how he intends for the Jewish people to continue if they cannot establish *kiddushin* when no kosher *mikvah* is available, Feinstein finds the *teshuvah* compelling. For Feinstein, Rivash's *teshuvah* is a precedent that eliminates the possibility that civil marriage could ever be counted as *kiddushin*.[40] Rivash, one of the foremost rabbis of his generation, did not consider the

[39] *Resp. Rivash, Siman* 6.
[40] *Resp. Iggerot Moshe, EHE* 1:74.

marriage of a Jewish couple under non-Jewish auspices as *kiddushin*. Henkin, who holds that civil marriage qualifies as *kiddushin*, has a tougher challenge in dealing with Rivash's *teshuvah*. Yet, just as strongly as Feinstein insists that Rivash's precedent negates civil marriage as *kiddushin*, Henkin rejects the idea that Rivash's *teshuvah* has any bearing on *kiddushin* through nontraditional ceremonies.[41] Henkin reads the *teshuvah* as a case in which the requirement of *eidut* was not met. No kosher witnesses were present at the ceremony or in the community because so many had been forced to convert, or did so willingly. In addition, the couple did not really intend marriage during their ceremony in the church because they did not desire a permanent relationship at the time; their thought was to leave as soon as feasible and have a *kiddushin* ceremony outside the country. Because the couple does not intend marriage by their act, they fail to meet Henkin's standards for *kiddushin*, and Rivash's *teshuvah* cannot be used as a precedent for any link between civil or Reform marriage and *kiddushin*.

A third critical area of disagreement between Feinstein and Henkin is over the relevance to the question of *pilagshut*, a legal category governing nonmarital consensual sexual relationships. A *pilegesh*, often called a concubine, holds the status of *eved ivri*, a Jewish slave, but since Jewish servitude was abolished after the destruction of the Second Temple, most *poskim* agree that the category of *pilagshut* is no longer active today. While Feinstein quickly dismisses the question of *pilegesh* as a distraction, Henkin puts great effort into explaining why a civil or Reform ceremony could not result in a *pilegesh* relationship even if the category were in force today. He does so for two reasons. First, because Henkin holds that civil and Reform ceremonies in conjunction with subsequent living arrangements result in a relationship sanctified by *kiddushin*, he has a stake in

[41] *Perushei Ibra* 1:4.

proving that civil marriage does not result in the woman holding a status less than full *ishut*, the outcome of a typical *kiddushin* ceremony. Secondly, the discussion allows him to look halakhic issues similar to those found in nontraditional Jewish marriage ceremonies: *kiddushin* outside of the usual ceremony, without a *ketubah* (Jewish prenuptial contract), and possibly without kosher *eidim*. Thus in order to show that a woman married in a civil or Reform ceremony is married under Jewish law with the status of *ishut*, wife, Henkin deals extensively with the question of *pilagshut*.

Finally, one additional consideration may be of relevance to an analysis of Feinstein's and Henkin's positions. Feinstein composed his major opinion on civil marriage as *kiddushin* in the form of a *teshuvah*, while Henkin wrote his piece as *pesak*, a theoretical examination. Since the form in which they present their opinions is not identical, one might wonder whether their chosen form influences their outcomes. Feinstein is dealing with a real case, with a woman stuck in her marriage standing before him. Perhaps he is influenced by compassion to free her, or to study the issue more soundly because he knows of real people who depend on his answer. Or perhaps Henkin has produced a more careful reading of the problem because in the absence of the time constraints of an actual case, he could consider all theoretical possibilities.

Although each rabbi's choice of form may play a role in his writing, on the subject of civil and Reform ceremonies as *kiddushin*, however, it appears to make little difference. Firstly, Feinstein's argument is not based solely on his desire to free the *agunah* standing before him. While Feinstein prefers leniency in situations of *agunah*, he also thinks it necessary to present a theoretical reading of relevant issues, which he does. Feinstein's argument is not framed as an exercise to free an *agunah*. Secondly, while

Henkin's *pesak* is purely theoretical, he defends his opinion in an open letter to Feinstein that makes clear Henkin maintains his position in actual cases. Thus even though the form in which each *posek* composes his opinion differs, their positions may be compared because both men understand their arguments to be applicable equally in theoretical and actual cases.

Having set forth the genesis of the halakhic problem of nontraditional Jewish marriages, influences and limitations on the writing of *teshuvot*, social and halakhic implications of civil and Reform ceremonies as *kiddushin*, and halakhic ambiguities that arise when considering nontraditional Jewish marriage ceremonies, the thesis will now turn to detailed analyses of Feinstein's and Henkin's primary opinions on the subject.

Chapter Two: Feinstein on Non-Orthodox Wedding Ceremonies

The debate between R. Moshe Feinstein and R. Eliyahu Henkin marked a turning point in halakhic discussions on civil marriage and marriage in a Reform setting. Each *posek* set forth a detailed reading of relevant sources that was taken seriously in the Orthodox world, and even though the *poskim* addressed the same halakhic questions and read the same textual tradition, they reached polar opposite conclusions. Feinstein ruled that a woman who has only a civil or Reform ceremony does not require a *get*, while Henkin ruled that the woman is also considered married under the laws of *kiddushin* and therefore requires a *get*. What accounts for their different halakhic conclusions? Chapters Two and Three will study the halakhic argumentation of each rabbi's opinion and suggest that the halakhic framework within which they answer the question of whether or not nontraditional marriages are *kiddushin* is strongly influenced by the rabbi's view of *halakhah* within the modern world.

Chapters Two and Three will each begin with a close reading of the two rabbis' primary *teshuvot* on nontraditional marriages. The halakhic arguments of both *poskim* have merit; that is, neither can be proven "wrong," and the purpose of this thesis is not to decide which reading of the sources is "better"—who makes a stronger argument or whose interpretations have more validity. Neither is this thesis designed to perform a sociological analysis of the *teshuvot*, laying out reasons for each man's interpretation. Rather, this thesis focuses on the source material each *posek* views as relevant and how he interprets it. The goal of the close reading is to explain the rabbi's halakhic argument and to expose underlying assumptions revealed through choices of text and interpretation.

As discussed in Chapter One, a *posek*'s halakhic argument is influenced by many factors. The close reading will pay attention to particularly creative aspects of the decisor's arguments and fault lines in his logic. It will also note the rabbi's assumptions about the interaction of *halakhah* with the modern world, his assumptions about Jewish practice today, and comments he makes in *teshuvot* on other subjects. From these, it will be possible to construct a picture of the framework within which he writes his halakhic opinion, and thus how his argumentation has been influenced by this framework.

This chapter will focus on R. Moshe Feinstein's *teshuvot* on civil marriage and marriage in a Reform setting.

In *Iggerot Moshe*, Responsum #74, written in 1959,[1] Feinstein addresses the question of whether or not a couple that married and divorced in Hungary under Soviet rule needs a Jewish divorce. The woman claims that they had no *kiddushin* ceremony, but did only what was necessary to register their marriage with the state. The couple's choice of a civil ceremony was not a declaration that they desired nothing to do with Judaism, unlike in the preceding responsum, in which the husband explicitly shunned Judaism. The woman in Responsum #74 moved to Canada and wanted to remarry, but rabbis in her new city were not sure if she was eligible for Jewish marriage or if she was an *agunah*. Her husband could not be found in order to give her a *get*. Feinstein is asked to give his opinion.

Feinstein opens his argument by immediately dismissing the possibility that a *ma'aseh kiddushin* took place at the civil ceremony, even without examining what might have occurred during the ceremony. He does not explain his assumption, but proceeds

[1] *Resp. Iggerot Moshe, EHE* 1:74.

with his argument, stating that even if kosher witnesses saw the couple register their marriage with the government, no *kiddushin* resulted, because there was no *ma'aseh* for the witnesses to see. The possibility remains, however, that the couple lived near kosher witnesses, in which case the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" would indicate that the man desires his sexual relations to be legitimate and the couple would be married under the terms of *kiddushei bi'ah*. Observant Jews in the neighborhood would serve as witnesses, intention would be established through the *hazakah*, and the *ma'aseh* would be *bi'ah*. To explore this possibility, the first part of Feinstein's *teshuvah* seeks to establish if the couple had the needed intention to effect *kiddushin* by determining whether or not the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" should be applied to the man in question. This section also provides insight into Feinstein's theoretical position on use of the *hazakah*.

Feinstein begins by reviewing the halakhic debate among *rishonim*, rabbis who lived from the 11th to the 15th centuries, on when to apply the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*." The majority of *poskim* agree that the presumption only applies to *kisherim*, to people who follow *halakhah*.[2] Feinstein finds no reason in this case not to abide by the weight of precedent, so his next step is to determine if the man in question is *kasher*, one who keeps *halakhah*, or a *parutz liz'nut*, one who habitually violates *halakhah* on sexual matters.

Feinstein reasons that the man must be a *parutz*, because if the woman had gone to the *mikvah* before her wedding as was halakhically mandated, kosher witnesses would

[2] *Radbaz* in *Mishneh LeMelekh, Gerushin* 10:18; *Resp. Rivash, Siman* 6; *Rif Gittin* 73b; *SA EHE* 149:6; *Rama EHE* 26:1; *Be'ur HaGra* 26:9.

have known of their marriage plans[3] and ensured that the couple did a proper *kiddushin*. Since no traditional Jewish wedding ceremony took place, the woman must not have gone to the *mikvah*. Sexual relations without the accompanying *mikvah* rituals are forbidden,[4] so the man is *bo'el niddah*, one who has sexual relations with a ritually impure woman. Rivash, in his famous *teshuvah*,[5] declares that even if a man is *bo'el niddah* because a kosher *mikvah* is unavailable, the *hazakah* may not be applied to him. Thus Feinstein concludes that the man in question before him is not *kasher* and the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" cannot be used. For this reason, *kiddushei bi'ah* did not take place. The couple did not complete the requirements for *kiddushin*.

Feinstein expands Rivash's precedent in a novel manner. Rivash's precedent was for a situation in which a kosher *mikvah* was unavailable, but Feinstein does not differentiate between failure to visit the *mikvah* because a kosher one is unavailable and failure because of willful nonobservance. He simply cites Rivash's ruling as precedent and declares that based upon it, the *hazakah* does not apply to the couple in the question before him. While on its own Feinstein's expansion of Rivash's ruling may seem unremarkable, the underlying reasoning is typical of the type exhibited again and again from this *posek*. By linking *mikvah* with *parutz*, Feinstein conflates ritual and ethical matters. *Niddah* is a purely ritualistic affair, while *zenut*—sexual relations with an unmarried woman—is a matter of ethics (even though observance of *niddah* and avoidance of *zenut* are both *mitzvot*). The expansion of Rivash's ruling allows Feinstein to say that ignoring *halakhah* on ritual sexual matters is the equivalent of disregarding

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[3] The only time a single woman visits the *mikvah* is before her wedding.
[4] Lev. 19:19.
[5] *Resp. Rivash, Siman* 6.

halakhah not only on sexual ethics, but on all matters. In Rivash's case, because a kosher *mikvah* was unavailable, the couple did not choose to violate ritual *halakhah*.

Feinstein's conflation of the ritual and ethical follows precedent. As part of his review of the halakhic debate on when to apply the *hazakah*, Feinstein cites Radbaz,[6] Rabbi David ben Solomon ibn Zimra, from the 15th-16th century, who argued that one who does not care about violating *niddah* certainly does not care about violating *zenut*, which carries a lighter penalty. No, Radbaz reasons, a person who willfully violates one *halakhah* with regard to sexual relations has shown his stance towards *halakhah* on all sexual matters. He is as likely to violate one as to violate all, and Radbaz views such a person as a sinner in all respects. It is possible to argue that a person who violates a halakhic ritual matter may not be willing to violate ethical matters, but Feinstein does not see the world in these terms. While such thinking may have suited the pre-modern world of Radbaz, Feinstein writes in a time in which many make distinctions between the religious and the secular. Feinstein, however, does not. For Feinstein, ethics are bound to religion, specifically, to *halakhah*. The halakhic world is all that is of consequence, and Feinstein does not acknowledge that ethically-conscious Jews may not keep *halakhah*. In essence, Feinstein believes that *halakhah* contains all that is ethically correct.

Feinstein's argument thus far hinges on the idea that if a man violates one *halakhah* on sexual matters, he is willing to violate any of them. Since the man in question has been shown to be *bo'el niddah*, he may be willing to be *bo'el penuyah*, to have intercourse with an unmarried woman. He would thereby be a *parutz liz'nut*, and because of this possibility, a witness to the couple's *yihud* cannot assume that the man

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[6] *Radbaz* in *Mishneh LeMelekh, Gerushin* 10:18.

intended for his intercourse to establish *kiddushin*. Therefore, the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" cannot be applied to him.

Not all *poskim* agree with the principle that a person who violates one *halakhah* on sexual matters would be willing to violate any of them. A comment by R. Moshe ben Yitzhak Yehuda Lima,[7] author of *Chelkat Mikhokek*, a 17th century commentary on *Even HaEzer* of the *Shulkhan Arukh*, seems to challenge Feinstein's reliance on this principle.

Chelkat Mikhokek, writing centuries before Feinstein, is discussing *kiddushin* among *anusim*, Jews forced to convert to Christianity but who continue practicing Judaism to the extent they can. *Chelkat Mikhokek* says, "If it is known that they [the *anusim*] keep *mitzvot* in secret, and they marry each other, even in a church, there is reason to think...that *kiddushin* took place, and this is especially so if they were careful in *niddah* and *mikvah*." Feinstein interprets the word "especially" to mean that *Chelkat Mikhokek* believes that even if the couple was not careful with *niddah* and *mikvah*, the church ceremony may nonetheless have resulted in *kiddushin*.[8] Thus in Feinstein's reading of *Chelkat Mikhokek*, the commentator holds that just because a couple violates one *halakhah* on sexual matters, it is not required that they be suspected of violating that which is easy for them to fulfill. Even if they had difficulty keeping *mikvah* due to circumstances beyond their control, they still might have had intention for *kiddushin* at their first sexual encounter because it is easy to do so. Feinstein's concern is that *Chelkat Mikhokek*'s comment would be a precedent for applying the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" to Jews who habitually violate *halakhah* on sexual matters. Since Feinstein's argument against applying the *hazakah* in the case before him rests on the

[7] *Chelkat Mikhokek* 26:3.
[8] *Resp. Iggerot Moshe, EHE* 1:74.

premise that the *hazakah* is inappropriate for those who violate even a single *halakhah* on sexual matters, Feinstein must address *Chelkat Mikhokek*'s challenge.

Before we examine the content of Feinstein's resolution to *Chelkat Mikhokek*'s challenge, let us step back and look at what Feinstein is doing. Feinstein's keen reading of *Chelkat Mikhokek* jumpstarts an entire discussion hinging on a single word, "especially." It is a clever move on Feinstein's part, because the discussion allows him to conceal a radical conclusion regarding requirements for *eidut* under *anan sahadei* and the conditions under which the *hazakah* "*ein adam*" should be applied in the guise of answering a specific challenge. It is also an opportunity for Feinstein to include a great deal of theoretical information in his answer to the specific case before him.

Feinstein's answer to *Chelkat Mikhokek*'s challenge may be divided into four parts. In the first part, Feinstein limits the terms of *Chelkat Mikhokek*'s case. In the second part, Feinstein examines why the *hazakah* cannot be applied if the man in question is *parutz liz'nut*, which allows Feinstein to discuss his understanding of *anan sahadei* and its relevance to his interpretation of Rivash's famous *teshuvah*. Next Feinstein asks if the *hazakah* is appropriate if the man isn't *parutz liz'nut*, but still violates *niddah*. Finally, Feinstein resolves *Chelkat Mikhokek*'s challenge by explaining that when *Chelkat Mikhokek* says the couple may have *kiddushin*, he is referring only to non-*perutzim*, and therefore the *hazakah* can be applied.

As noted, Feinstein's first move is to narrow *Chelkat Mikhokek*'s case to *anusim* acting out of weakness or expediency (*l'tei'avon*), not on principle (*l'hakh'is*). For Feinstein, who does not allow for the possibility that a Jew may be nonobservant yet ethical, a person who disdains the *halakhah* cannot be trusted to have honorable

intentions. The *hazakah* is inappropriate for unethical people—i.e., non-Torah-observant Jews—because it supposes that two unmarried people who have sexual relations desire what for Feinstein is the ethically-upright relationship. Thus the question of whether or not the *hazakah* should apply to Jews who convert to Christianity to spurn Judaism is a nonstarter for Feinstein. The only *anusim* for whom we might consider application of the *hazakah* are those who convert for convenience, not because of contempt for Judaism. This is the situation in *Chelkat Mikhokek*'s case, in which *anusim* who were known secretly to keep *mitzvot* nonetheless marry in a church.

Feinstein's narrowing of the issue to *anusim* acting *l'tei'avon* raises a problem for Feinstein, because the Talmud teaches that we give people acting out of expediency the benefit of the doubt with regard to "easy" *mitzvot*—those considered easy to fulfill.[9] Feinstein's problem is that if this principle applies, then even though a man violates some *mitzvot* pertaining to sexual matters, we would not conclude that he will necessarily violate that which is easy for him to do. For example, even if a couple does not fulfill *niddah* because it is difficult for them, they might still do what is easier, like intending *kiddushin* at the first *bi'ah* in order to avoid *issur penuyah*, sexual relations with an unmarried woman.

Feinstein, however, determines that the *hazakah* "*la shevik*" does not apply to *kiddushin* because the *hazakah* relates only to ritual matters.[10] Therefore the principle must be applied whether the person in question is *parutz* or *kasher*. A principle that does not take into account a person's ethical nature should not be used to decide ethical

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[9] See *B. Hullin* 4a: "a person will not abandon what is permitted and eat what is forbidden ('*la shevik heteira vi'achil issura*')."
[10] *Resp. Iggerot Moshe, EHE* 1:74.

matters like whether or not a man would be willing to have intercourse with an unmarried woman, and consequently "*la shevik*" cannot be used to effect *kiddushin.*

Thus although the *hazakah* "*la shevik*" may appear to be similar to the *hazakah* "*ein adam,*" it is not, Feinstein argues. Both *hazakot* seem to indicate that if people are able to act licitly, they will, but only "*ein adam*" applies to ethical behavior.[11] While Feinstein's rationale is logical, it is not a necessary conclusion—one could acceptably argue that "*la shevik*" applies also to ethical matters. In *Gittin* 37b, for example, the *hazakah* is cited in matters of monetary law. Yet instead of agreeing that "*la shevik*" is a principle that can establish *kiddushin*, Feinstein instead develops a rationale behind the *hazakah* and uses the rationale to argue against application of "*la shevik*" to ethical questions. Given Feinstein's predilection for blurring the boundaries between ritual and ethical matters, his conclusion with regard to "*la shevik*" is surprising. To be consistent with Feinstein's general position, he ought to have applied "*la shevik*" to *kiddushin.* Feinstein's larger argument, however, requires that "*la shevik*" not be a precedent that establishes *kiddushin.* Feinstein is engaging in his own expedient argument.

Having dealt with an immediate problem related to narrowing *Chelkat Mikhokek*'s challenge to a case of a person acting out of expediency, Feinstein now turns more directly to the *hazakah* "*ein adam,*" clarifying why it cannot be applied to a *parutz liz'nut.* Feinstein deals with two related issues regarding witnesses.

Feinstein explains that in order to meet the requirement of *eidut*, witnesses must be sure of what they are witnessing. *Eidim* must be sure they are seeing that which constitutes *kiddushin*: either that a couple has entered *yihud* for the purpose of establishing *kiddushin*, or that they are living together monogamously in a long-term

[11] *Ibid.*

relationship that looks like marriage. If a person is a *parutz liz'nut*, however, it is not clear to witnesses that a particular sexual act is for the purpose of *kiddushin*. The witnesses have no reason to think that one time is different than any of the other times he acted licentiously, Feinstein argues, and since *eidut* cannot be established, the requirements of *kiddushin* have not been met. Feinstein continues: even if the witnesses are *talmidei chachamim*, knowledgeable about Jewish law, and judge that the *hazakah* "*la shevik*" should apply to the situation, still no *eidut* can be established with a *parutz liz'nut*. This is because the man himself would not be aware that the witnesses to his intercourse are *talmidei chachamim* who are able to make the necessary presumptions to effect *kiddushin*. The man involved would think that the witnesses viewed his sexual act as *zenut*, not *kiddushin*. No, Feinstein says, the man must be aware that witnesses exist to his act of *kiddushin*.[12] In other words, Feinstein's argument is that witnesses must be sure the *yihud* they see is for the purpose of establishing *kiddushin*, and the couple needs to know that there are witnesses to their act of *kiddushin*. The logic excludes *anan sahadei* as a potential avenue for establishing *eidut* with *perutzim liz'nut*: the *hazakah* "*ein adam*" cannot be applied because the public cannot be sure what it is witnessing. Again, without *eidut*, there is no *kiddushin*.

Feinstein uses the same criteria to explain Rivash's famous ruling that *anusim* who married in a church did not have *kiddushin*. Rivash argues that no *eidut* could be established through *anan sahadei* because the *hazakah* "*ein adam*" could not be applied.[13] Feinstein's interpretation of this conclusion is that there was so much *peritzut* at the time that the people forgot that certain sexual unions were forbidden. As a result,

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[12] *Ibid.*
[13] *Resp. Rivash, Siman* 6.

witnesses could never be sure that a particular sexual act was for the purpose of establishing *kiddushin*, and the newly married *anusim* would never think that *eidim* considered their *yihud* as *kiddushei bi'ah*.[14]

Feinstein is making some remarkable claims here as he defines the requirements of *eidut* for applying "*ein adam*." First, Feinstein asserts that witnesses must be absolutely certain that they are witnessing an act intended to establish *kiddushin*, and since it is impossible to do so with people who regularly act licentiously, *eidut* for *kiddushin* cannot be established with them through the *hazakah*. Secondly, Feinstein requires that the couple know that witnesses are present during their act of *kiddushei bi'ah* for the purposes of establishing *eidut*. These are high standards to meet in order to apply the *hazakah*, in effect, requirements that nearly rule out *eidut* without any explicit statement of intent from the couple. With Feinstein's stringencies, *anan sahadei* becomes an almost useless concept for practical purposes.

One more note about Feinstein's argument. By explaining that *talmidei chachamim* may apply "*la shevik*" to *kiddushin*, Feinstein concedes that his understanding of "*la shevik*" is arbitrary. Feinstein concluded that "*la shevik*" was not a precedent for ethical matters, but in order to bolster his argument that the conditions under which the *hazakah* "*ein adam*" can be applied are severely limited, Feinstein reveals that the potential exists to resolve the question of "*la shevik*" in the other direction.

Feinstein continues now with the third part of his answer to *Chelkat Mikhokek*, demonstrating why the commentator's statement does not require Feinstein to give those who violate some *mitzvot* the benefit of the doubt with regard to easy *mitzvot*. Feinstein

[14] *Resp. Iggerot Moshe, EHE* 1:74.

has already considered the outcome if a person is a *parutz liz'nut*. He next considers whether the *hazakah* "*ein adam*" should be applied if the person is not a *parutz liz'nut*, but nonetheless violates *niddah*. Not surprisingly, Feinstein concludes that the *hazakah* does not apply.

In this section, Feinstein argues that it is impossible to know what the man in question thinks is strict, and thus what he would take greater pains to avoid. *Issur penuyah*—sexual relations with an unmarried woman—is strict for many, even if the man does not treat it as such, Feinstein says. The man may not be suspected of violating anything other than *niddah*, but nonetheless, not everyone would apply the *hazakah* to him since the man in question is nonobservant in some respects. Since it is not clear that everyone would apply the *hazakah*, the man never assumes that the *eidim* know his intent. With this as the husband's expectation, according to Feinstein as explained above, no *anan sahadei* can exist. Consequently, Feinstein argues that the *hazakah* should not be applied to a person who is not a *parutz liz'nut*, but nonetheless violates *niddah*.[15]

Chelkat Mikhokek's comment raises an obvious objection to Feinstein's argument: a person who is not suspected of *issur penuyah* should be accorded the *hazakah*—we should believe he had intent for *kiddushin* at the proper time because it is so easy to act in a permitted way. He ought not automatically be suspected of violating other *halakhot* on sexual matters, even if he violates *niddah*. As long as a man is not known as a *parutz liz'nut*, then he is presumed *kasher* for the purpose of applying the *hazakah* "*ein adam*." The argument is similar to the one Rashba, a 13th century commentator, makes in favor of use of the *hazakah* with those who violate a *halakhah* on

[15] *Ibid.*

sexual matters; the person may very well follow all other *halakhot*, and we can believe he wants his intercourse to be legal.[16]

Feinstein's response to *Chelkat Mikhokek* and Rashba is that even though we may presume that the man is *kasher*, a presumption is not of the same standard as *eidut*. Even *Chelkat Mikhokek* would say so, Feinstein asserts.[17] Accordingly, Feinstein holds that in order to apply the *hazakah* "*ein adam*," we must have in place the high standards of *eidut berurah*—clear, unambiguous evidence that the man in question is not a *parutz liz'nut*. It is insufficient to argue that we can presume someone to be innocent of *zenut* if no evidence to the contrary exists, Feinstein believes. Once again, Feinstein is setting the bar exceedingly high for application of the *hazakah*: its use requires the standards of *eidut berurah*. In addition, Feinstein is making a slightly ridiculous request by requiring evidence that a person is *kasher* if he is generally known in the community to be such. Demonstrating that a person is not a *parutz liz'nut* is a much more difficult task than presuming he is *kasher*. The fact that Feinstein requires this step demonstrates the extent to which he is unwilling to consider the possibility that any unobservant person might be a morally upright individual.

In the final part of Feinstein's answer to *Chelkat Mikhokek*'s challenge, he considers the application of the *hazakah* to non-*perutzim*. Feinstein concludes that when *Chelkat Mikhokek* writes that there is reason to think that *kiddushin* took place—that the *hazakah* was applied in order to achieve *anan sahadei*—he is referring only to *anusim* of that time who are not *perutzim*. On this point, in part, Feinstein agrees with *Chelkat Mikhokek*: if we know the standard of observance of a non-*parutz*, then we may have

[16] *Rashba* in *Beit Yosef, EHE* 17.
[17] *Resp. Iggerot Moshe, EHE* 1:74.

anan sahadei.[18] If we are not sure about the standard of observance of a non-*parutz*, Feinstein would not apply the *hazakah* because he presumes that if a person violates one *halakhah*, he is liable to violate more. Even if in theory Feinstein was willing to presume that people do not violate what they can easily do in a permitted fashion, a witness to the couple's *yihud* or ongoing monogamous relationship is nonetheless not entirely sure what to think. Feinstein, as already explained, holds that *eidim* must be clear on what they are witnessing. In addition, Feinstein adds, even if God knows that the couple's intention is for *kiddushin*, this is not sufficient. Again, *kiddushin* requires witnesses. Feinstein concludes that in a case of *anusim* acting out of expediency, we simply do not know enough about them to say that they observe what *mitzvot* they can. Feinstein believes that even in this type of case, *Chelkat Mikhokek* would agree that marriage in a church would not result in *kiddushin*.[19] Yet it is Feinstein who has defined *Chelkat Mikhokek*'s case as one of *anusim* acting out of expediency when they marry in a church. Now Feinstein has the audacity to state that in such a case, even *Chelkat Mikhokek* would agree that their marriage is not *kiddushin*!

Feinstein is arguing brilliantly here. At the beginning of this point, he accepts that if we know the standard of observance of a non-*parutz*, we may have *anan sahadei*. By the end of his argument, however, Feinstein has shut down entirely the opportunity for use of the *hazakah* and *anan sahadei*. He argues that if we are unsure of a person's standard of observance, we cannot be witnesses through *anan sahadei*. Feinstein then quite smoothly introduces the idea that it is nearly impossible to know people's standard of observance if they violate even a single *mitzvah*, because Feinstein dismisses the idea

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[18] *Ibid.*
[19] *Ibid.*

that we can presume that people follow what *mitzvot* they can. With Feinstein, a person is either a Torah-observant Jew or not. There is no in-between, no recognition that in the modern world it is commonplace for Jews to keep only some of the *mitzvot*. Thus the *hazakah* cannot be applied except in cases of absolute certainty of a person's halakhic observance. In other words, there is almost no circumstance today that would justify use of the *hazakah*.

It hardly comes as a surprise when Feinstein next concludes that the case before him is very similar to the one from *Chelkat Mikhokek*—the couples in both cases are acting out of expediency. The one difference, Feinstein asserts, is that the character of the couple in the case before him is known. Feinstein reasons as follows: we know that the couple did not know any rabbis or observant Jews in Hungary, even though such people were available, "many in every city," Feinstein says.[20] The couple's lack of contact with observant Jews makes them *risha'im*, literally, "wicked," and Feinstein's term for nonobservant Jews. In an uncharacteristic comment, Feinstein notes that at the time, although some Jews were afraid to associate with observant Jews, the persecution was not severe.[21] Feinstein, as we have seen, does not usually take into account the world outside of halakhic Judaism, so his remark here is conspicuous. He is drawing attention to the idea that the couple, of their own accord, chose to have nothing to do with Jewish observance. Nobody forced them to be nonobservant. As Feinstein argued through his rebuttal of *Chelkat Mikhokek*'s challenge, we can not trust that these types of people would fulfill easy *mitzvot*, and so we cannot definitively establish that their intention at

[20] *Ibid.*
[21] *Resp. Iggerot Moshe, EHE* 1:74.

bi'ah was for *kiddushin*.[22] We cannot, therefore, apply the *hazakah* "*ein adam*" and become witnesses through *anan sahadei*. Without witnesses, the couple does not have *kiddushin*. Feinstein's final comment is that we also cannot apply "*la shevik*" to the couple. He provides no explanation at this point, relying on his earlier argument, which, as we have seen, was an arbitrary decision he made in his favor.

Feinstein's answer to *Chelkat Mikhokek*'s challenge allowed him to put forth his position on use of the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*." By disclosing his opinion piecemeal under the guise of a response to *Chelkat Mikhokek*, Feinstein was able to conceal the radical nature of his view. A complete picture of Feinstein's attitude towards the *hazakah*, however, reveals that he has such strict requirements for its application that the *hazakah* can never be used. First, Feinstein requires that the man involved must be *kasher*, not a *parutz liz'nut*. Many *poskim* also hold this position, so Feinstein's demand here is unexceptional. Feinstein's interpretation of this principle, however, is extreme. It is only if the man is a non-*parutz* whose level of halakhic observance is well-known that the *hazakah* may be applied. In addition, he cannot be only presumed *kasher*, but we must have clear, unambiguous evidence that the man in question is not a *parutz liz'nut*. Yet this is precisely the type of person for whom the *hazakah* is rarely needed; someone with a high level of halakhic observance would choose from the start to perform *kiddushin* in the customary manner. Thus Feinstein holds that anyone who does not fully observe the *mitzvot* that pertain to him or her is not eligible for the *hazakah*. It is not even sufficient that a person keep what *mitzvot* he or she can; anyone, for any reason, who does not observe applicable *mitzvot* cannot be trusted to fulfill even easy *mitzvot*, like those requiring only intention, not action. Feinstein, we see

[22] *Ibid.*

again, believes that a person cannot be an ethical person unless he or she completely adheres to halakhic Judaism. He has placed the burden of proof on those who must show that the person has the needed intent for marriage, not on those who would show that the person does not have the proper intent. Feinstein's opinion begins with the premise that almost no one has the proper intent, particularly those with any type of nonobservance.

Although it is already clear that Feinstein would almost never apply the *hazakah* "*ein adam*," we can nonetheless draw out further requirements that limit its use. Feinstein holds that both sides—the couple and the witnesses—must be aware of each other's presence and understand each other's intentions. The couple must know that witnesses exist to their act of *kiddushin*, and the witnesses must be entirely sure that the couple intends *kiddushin* through their *bi'ah*. A man who is *parutz liz'nut* never has witnesses to a potential *kiddushei bi'ah* because those who observe his *yihud* never think that a particular act is for the purpose of establishing *kiddushin*, and because even if he intends *kiddushin*, he never thinks that the witnesses believe that he has the proper intention. Even if a person is not *parutz liz'nut*, but nonetheless violates some *mitzvot*, he cannot be trusted, so witnesses can never be sure what they are seeing.

Given that this is Feinstein's position, it is clear that much of his answer to *Chelkat Mikhokek* is unnecessary. The *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" can almost never be applied, at least not in the contemporary context, where we simply cannot "know" the intentions of Jews who are not observant. The entire nonobservant segment of the Jewish community therefore falls outside of the boundaries of this benefit-of-the-doubt presumption, making it nearly impossible for them to establish *kiddushin* without a halakhically valid *kiddushin* ceremony. Without the *hazakah*, the concept of

anan sahadei is nearly useless, because the public cannot be witness to a couple's intention for *kiddushin* unless the couple's intent can be determined through different means. Feinstein deals directly with these alternatives later in the *teshuvah*, but it is already clear that without the *hazakah*, a couple that marries in a civil ceremony alone cannot establish *kiddushin* without specific intent to do so. Since it is rare for a couple who has only a civil ceremony to express such an intent, Feinstein has nearly completed the argument supporting his conclusion that the couple in question is not married under Jewish law.

Feinstein now challenges Rabbi Eliyahu Henkin's interpretation of civil marriage as *kiddushin*. Feinstein first briefly lays out Henkin's position. It is an accurate portrayal of Henkin's opinion. As outlined in Chapter One, Henkin holds that the couple need not intend to establish *kiddushin*, but only intend *ishut*, marriage. Even if there is no act of *kinyan* at the time of marriage, subsequent *bi'ah* establishes the *kinyan* because the man made clear his intent to be married by registering civilly. Since his intent for marriage is known, his former marital status or status as *parutz liz'nut* is of no consequence. Henkin's theory that intent for marriage is the *kavannah* necessary for *kiddushin* conflicts with Rivash's conclusion in his famous responsum, Feinstein claims; the couple in Rivash's *teshuvah* appears to have shown intent for a long-term, monogamous relationship by holding a marriage ceremony, albeit in a church. Henkin's explanation for Rivash's ruling is that the couple could not establish a proper monogamous intent because they were *mumarim*, apostates. *Mumarim* do not intend monogamy, but only *hefkerut*, licentiousness.

Feinstein's response to Henkin focuses on Henkin's reading of Rivash *Siman* 6. Feinstein begins by pointing out the ways in which he thinks Henkin misunderstands Rivash's *teshuvah*. First, Feinstein says, Rivash is not discussing *mumarim*. It is inaccurate for Henkin to describe the Jews in Rivash's responsum as *mumarim* because some *anusim* kept *mitzvot* in secret, meaning, not all Jews at the time were *mumarim*. Feinstein's position, he reminds his readers, is that it was only because so many *anusim* were *perutzim liz'nut* that the *hazakah* "*ein adam*" cannot be applied; it was impossible to be sure that any individual held the proper intention.[23]

Furthermore, Feinstein argues, Henkin has no basis for thinking the *anusim* intend only *hefkerut*, and not monogamous relationships. Feinstein's first reason is based on a fine distinction between *peritzut* and *mafkir ishto*: a licentious person is not in the same category of depravity as one who does not believe in marriage. Feinstein explains that even if a person is not a *parutz liz'nut* but violates *niddah* when a kosher *mikvah* is available, this person is still not suspected of violating *hefkerut*. How much more so, then, is a non-*parutz* who violates *niddah* when no kosher *mikvah* is available not suspected of violating *mafkir ishto*. Such is the situation in Rivash's case. Even an *anus* who engages in idolatry is not suspected of violating *mafkir ishto*.

Coming from Feinstein, this distinction is odd; Feinstein has repeatedly maintained that a person who violates one *halakhah* on sexual matters is suspected of violating any of them. The fact that he places *mafkir ishto* into an entirely different class of *halakhot* demonstrates how severely he views violation of this one prohibition, but does not accord with his general view that a person who is willing to violate *halakhah* on sexual matters is willing to violate any ritual or ethical prohibition.

[23] *Ibid.*

Feinstein's second reason that the *anusim* in Rivash's responsum could not intend only *hefkerut* is based on the fact that Rivash wrote in Spain, a Catholic country. Catholicism does not permit divorce, so the husband must have intended his marriage to be as long as they lived, Feinstein explains. So it is not possible to posit that the people in Rivash's *teshuvah* were *mafkir ishto*, as Henkin did in *Siman heh*, letter *tet*, where he wrote that maybe it was the custom not to have a *get* or to care if a wife had sex with men other than her husband. Such behavior was not condoned, Feinstein asserts, not by the state and not by the *anus*.[24]

Feinstein raises a third problem regarding Henkin's reading of Rivash's famous *teshuvah*. Henkin claims that one of the reasons that Rivash ruled that the couple did not have *kiddushin* was because there were no kosher *eidim* available—they were all *mumarim*. First of all, Feinstein says, Rivash did not mention this idea. Secondly, without *eidim* there is no *kiddushin*, and therefore no reason for Rivash to make any other arguments. Rivash, Feinstein concludes, must be discussing a case in which kosher *eidim* were available.[25] As Feinstein argued during his answer to *Chelkat Mikhokek*, Rivash did not consider the wedding to be *kiddushin* for two reasons: because so many Jews at the time were *perutzim*, and thus the public could not be certain of anyone's intention; and because without a kosher *mikvah*, everyone was *bo 'el niddah*, and so because they were willing to violate one *halakhah*, they were suspected of being willing to violate any *halakhah*.

Feinstein adds another feature to his understanding of Rivash's *teshuvah* in order to make Henkin's reading of the responsum inapplicable. Feinstein writes that Rivash's

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[24] *Ibid.*
[25] *Ibid.*

case is one in which it is possible that the couple wants to be married only according to the state. The couple may have good reasons for not wanting *kiddushin*, so why, Feinstein asks, should the couple be married under Jewish law only by virtue of application of the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*?"[26] The need for a *get* complicates their lives. Feinstein reminds his readers that the circumstances of the case result in a situation of no *anan sahadei*, and without witnesses, no *kiddushin* took place.[27] As a result, Rivash's case, Feinstein declares, hinges on the smallest of details: the application of a rabbinic presumption. Feinstein intimates that it is best not to rely on the *hazakah* to effect *kiddushin*; *kiddushin* should be achieved more directly so that the couple's desire for *kiddushin* is absolutely clear. Feinstein's conclusion here builds on his earlier minimization of the *hazakah* through its status as presumption, not fact. He adds that because making the presumption may accord a couple an unwanted status, it should not be used at all. Feinstein's final understanding of the *hazakah*, then, is that its use should be avoided entirely.

Feinstein's rhetoric here reveals another dimension of his view of *halakhah* within the modern world. By surmising that the couple may desire civil marriage but not *kiddushin*, Feinstein has made clear that he views civil and Jewish marriages as two entirely separate entities. Thus in Feinstein's opinion, intent for marriage cannot be the same as intent for *kiddushin*, as Henkin would have it. We once again see Feinstein's strict division between the world of halakhic Judaism and everything outside of it. As

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[26] *Ibid.*

[27] To review, the case before Rivash deals with a man who is *parutz liz'nut* and *bo'el niddah* (even if only because a kosher *mikvah* is unavailable), so that even if kosher *eidim* knew about their marriage and the couple intended for their bond to be lifelong, still the *hazakah* cannot be applied. Without it, the kosher *eidim* do not become witnesses to any alleged act of *kiddushin* through *anan sahadei*, and *kiddushin* does not take place because there are no *eidim*.

discussed in Chapter One, Feinstein's view that civil marriage does not result in *kiddushin* means that it is possible to be married under state law but not under Jewish law—a couple living together monogamously after a ceremony to solemnize their relationship, appearing to all intents and purposes to be married, does not hold the status of a married couple within the Jewish community. In addition, Feinstein's requirements with regard to *kiddushin* mean that a Jew can only be part of the Jewish community by deliberately choosing to do so; Feinstein's preference is a couple either do *kiddushin* in the customary ceremony, or they must have such strong halakhic observance that no question exists as to the level of their observance.

As a final point to prove that Henkin's reading of Rivash's *teshuvah* is untenable, Feinstein amasses precedents for his position. According to Feinstein, both the *Shulkhan Arukh*[28] (R. Yosef Caro, 16th c.) and Rama[29] (R. Moshe Isserles, 16th c.) agree with Rivash that no reason exists to apply the *hazakah*, so without *anan sahadei*, the couple in Rivash's *teshuvah* did not have *kiddushin*. Caro writes about a couple who converted because of persecution and married in an idolatrous ceremony. Even if the Jewish community saw them live together daily, Caro holds nonetheless that the couple does not have *kiddushin*. Feinstein interprets Caro's ruling as a case in which the *hazakah* cannot be applied, even in countries in which marriage is for life. As Feinstein reads the ruling, it directly contradicts Henkin's understanding of the *kavannah* needed to effect *kiddushin*, because Caro's case is one in which a couple intends a lifelong marriage but their union does not result in *kiddushin*. Rama writes that *mumarim* who marry each other and later return to Judaism do not need a *get*. Feinstein interprets Rama to include *mumarim* who

[28] *SA EHE* 149:6.
[29] *Rama EHE* 26:1.

converted due to persecution whose marriage was known to kosher witnesses. He can do so because Rama did not specify a type of *mumar*. Rama's ruling, too, contradicts Henkin's reading of Rivash. To conclude this section of his *teshuvah*, Feinstein summarizes the rulings of the earlier *poskim*: all agree that *perutzim liz'nut* cannot achieve *kiddushin* through the *hazakah*; for those who violate *niddah* and *sotah*, Rashba disagrees with Rivash and Radbaz, but Caro and Rama rule with Rivash. In Feinstein's interpretation of the rulings, such people do not have *kiddushin* because the *hazakah* is not applied, so there are no witnesses to their *kiddushin*.

By this point in his *teshuvah*, Feinstein's position and his underlying halakhic reasoning are clear. Nonetheless, Feinstein includes a discussion of *anan sahadei* both in order to round out his theory on the *hazakah* and to bolster his argument that the couple in question does not have *kiddushin*. Feinstein has strict requirements for *anan sahadei* beyond those he has already expressed. The couple must live in a neighborhood with observant Jews, the neighbors must know each other, and the couple must move in immediately after their civil ceremony. If the couple violates any of these three requirements, then Feinstein classifies the couple as *perutzim liz'nut*. His reasoning is that the couple could have taken measures to establish *anan sahadei* but they did not care enough about *kiddushin* to do so. Thus the couple is living together but not married—the very definition of *perutzim liz'nut*. Even if the couple keeps *niddah* and all of the other *mitzvot*, nonetheless, Feinstein asserts, if they do not establish *anan sahadei* properly, then they are *perutzim*.[30] The *hazakah* does not apply to *perutzim*.

Once again, Feinstein demonstrates that it is nearly impossible for the public to be *anan sahadei* without a specific intention on the part of the couple to establish *eidut*.

[30] *Resp. Iggerot Moshe, EHE* 1:74.

Almost no situations outside of the customary ceremony can demonstrate the presence of *kavannah* because living arrangements do not communicate whether or not the couple had the necessary intention and a presumption they had *kavannah* is insufficient. The couple must be knowledgeable enough about Jewish law on *kiddushin* to set up their lives in such a way to fulfill *anan sahadei* or must publicly demonstrate intention for *kiddushin* through the customary ceremony, Feinstein rules. Once again, we encounter Feinstein's deep division between halakhic Judaism and everything outside of it. Without a stated intention for *kiddushin*, a couple is not married under Jewish law, and thus Feinstein terms them *perutzim*. Even though they live in a long-term, monogamous relationship solemnized in a ceremony, Feinstein nonetheless views these Jews as immoral. For Feinstein, moral behavior does not extend beyond the boundaries of Torah Judaism.

Feinstein moves now to tying up loose ends. He has only three points left in his *teshuvah*, but before he begins them, he entirely reverses his position for a moment. In a brief statement, he suggests that we should be strict if possible and obtain a *get*.[31] He immediately continues, however, with the thought that if it is not possible to obtain a *get*, there are grounds for ruling that the woman in the case before him can remarry. In the midst of his long discourse on why the couple does not need a *get*, Feinstein's statement of preference for a *get* seems like a pro forma concession to those who think obtaining a *get* is the preferred position.

The first of Feinstein's three final points is the weakest in the entire responsum. Here, Feinstein argues that civil marriage is not true marriage at all. He says that since divorce is permitted in Hungary, we have no way of knowing that the couple wants to be

[31] *Ibid.*

bound to each other forever.[32] In essence, Feinstein is arguing that because civil divorce is available, marriage in Hungary is temporary. Obviously, Judaism also provides for divorce, but Feinstein considers divorce in Hungary to be much easier to obtain: "at any time they [the couple] want."[33] The purpose of Feinstein's argument here is to close off every possibility of establishing Henkin's standard of *kavannah* instead of Feinstein's. Feinstein's assertion that civil divorce is completely different from Jewish divorce once again implies that *kiddushin* is distinct from civil marriage. Again Feinstein demonstrates that his conception of the world divides Jewish matters from all else.

Feinstein next explores whether the woman is telling the truth that she did not have *kiddushin*. He does so in order to emphasize that even though he offers an answer that takes into account the facts presented, additional information may affect the appropriate decision in this particular case. Feinstein looks to the situation in Hungary at the time the woman married in order to assess her claim, and he finds equal evidence to support and reject the idea that *kiddushin* took place. He writes that the government in Hungary had not been in power long enough to eliminate completely Jewish marriage; Jews would register civilly and later do *huppah*. Even with governments in power "for over forty years," those who wanted a Jewish marriage knew how to accomplish it.[34] Yet if the woman or her husband registered as a Communist, even if they did not believe in the movement, then they certainly would not have performed *kiddushin*, Feinstein reasons. Regardless of what may or may not have taken place in Hungary, however, a Talmudic principle prevails in the woman's situation. Known as "*ha-peh she'asar*," the dictum teaches that if it would have been to a person's advantage to hide a fact, yet he or

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[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

she reveals it anyway, the person is believed.[35] Thus because it would have been to the woman's advantage to say that she had never married, and yet she revealed that she married civilly without *kiddushin*, she is believed. Nevertheless, if people in the woman's new city of residence are aware of her previous marriage, then "*ha-peh she'asar*" may not apply if the woman was not the one who revealed the information about her marriage. Feinstein advises that in this case, the question of whether or not she had *kiddushin* in Hungary should be investigated thoroughly.[36]

Feinstein's final point addresses the relevance of *pilagshut*, nonmarital consensual sexual relationships. Henkin writes extensively on the question of whether or not the legal category of *pilagshut* is relevant to the subject of civil marriage as *kiddushin*, but Feinstein dispenses quickly with the subject. Feinstein reviews the sources and concludes that a *pilegesh* without *kiddushin* does not require a *get*. Thus even if the woman in the question before him could qualify as a *pilegesh*,[37] she does not need a *get*.[38]

In conclusion, Feinstein holds in responsum #74 that the woman in the case before him does not need a *get* because her civil marriage did not result in *kiddushin*, and he also demonstrates theoretically that civil marriage can never effect *kiddushin*. Although the question before Feinstein mentions that if the woman has had *kiddushin* she will now be an *agunah*, nowhere in his *teshuvah* does Feinstein openly use this fact as part of his argumentation. Instead, Feinstein centers his argument on the question of when the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" should be applied. Feinstein's reading of the sources results in an understanding that the *hazakah* cannot be used unless

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[35] See *B. Ketubot* 23a: "*hapeh she-asar hu hapeh shehitir*," literally, "the mouth that forbade is the mouth that permitted."
[36] *Resp. Iggerot Moshe, EHE* 1:74.
[37] As discussed in Chapter One, most *poskim* hold that the category of *pilegesh* is no longer lawful.
[38] *Resp. Iggerot Moshe, EHE* 1:74.

the man has been proven to be halakhically observant. Feinstein thereby opens an exceedingly narrow window in which the *hazakah* will be used, because observant Jews will choose to do *kiddushin* in the customary manner anyway and have little need for the *hazakah*. Feinstein's true conclusion is that he will never rely upon the *hazakah*; instead, he requires a couple to state explicitly its intention for *kiddushin* because presumption of *kavannah* is not the same as proof.

A similar reading of the sources also underlies Feinstein's decisions in Responsa #76 and #77 that marriage in a Reform setting is not *kiddushin*. These responsa provide additional insight into Feinstein's halakhic thinking on *kiddushin* and reinforce the picture of Feinstein's attitude towards *halakhah* in the modern world found in Responsum #74. Again and again in Responsa #76 and #77 Feinstein demonstrates his exclusion of non-Orthodox Jews from the Jewish community by assuming that Reform Jews and Reform Jewish practice are entirely nonhalakhic. The exclusion is part of Feinstein's outlook on *halakhah* in the modern world, in which everything and everyone outside of *halakhah* has no standing.

In these two responsa on marriage in a Reform setting, Feinstein considers two primary questions. He asks whether there is any halakhic validity to Reform marriage, and whether the fact that the couple lives together after the Reform ceremony subsequently establishes *kiddushin*.

On the first question, Feinstein answers firmly in the negative. No *kiddushin* takes place with Reform rabbis. First, no valid *ma'aseh* takes place in a Reform ceremony, Feinstein asserts. As Feinstein scorns, "Every Reform rabbi does some *ma'aseh* that he

invented and says that it is *kiddushin*."[39] Even if a valid *ma'aseh* does take place, Feinstein continues, no kosher *eidim* are present to witness it. A ruling by Chatam Sofer[40] (R. Moshe Sofer, 19th c.) challenges the necessity that kosher witnesses must actually attend the ceremony; he held that if two valid *eidim* are standing far away from the ceremony and are unable to witness the *ma'aseh*, *kiddushin* is nonetheless valid. Feinstein argues, however, that Chatam Sofer's challenge is irrelevant to the question of whether marriage in a Reform setting is *kiddushin*. In Chatam Sofer's case, *anan sahadei* applies because it is understood that the act of *kiddushin* was carried out according to *halakhah*, but with Reform marriage, the same presumption cannot be made.[41] Feinstein's argument here is based on the twin assumptions that Reform ceremonies never include a valid *ma'aseh* or *eidim*. It is possible that Feinstein intends to express that Reform ceremonies are situations of double doubt: doubt exists as to whether a valid *ma'aseh* took place inside the synagogue, and doubt exists as to whether two kosher witnesses were present. In such cases, the halakhic rule is to decide leniently: no *kiddushin* takes place, so a woman married in a Reform setting does not require a *get*. Feinstein thus concludes that Reform wedding ceremonies have no halakhic validity, but his decision is based entirely on his own assumptions about what takes place at the ceremonies.

In Feinstein's second question, he asks if public knowledge that the couple lives together after the Reform ceremony establishes *kiddushin*. Feinstein's answer to this query mirrors his discussion of *anan sahadei* in responsum #74. Feinstein argues that the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" does not apply to those who completely violate *halakhah*, i.e., Reform Jews. In addition, Feinstein argues that whenever a man

[39] *Resp. Iggerot Moshe, EHE* 1:76.
[40] *Chatam Sofer, EHE* 100.
[41] *Resp. Iggerot Moshe, EHE* 1:76.

believes that his initial *ma'aseh* is valid, then he does not again intend to establish *kiddushin* through any other act. For example, if a man has a ceremony to establish *kiddushin* but does not realize that the ceremony is invalid in some way, he would not then choose to have the needed intention for *kiddushin* at his first *bi'ah*. Surely we cannot apply the *hazakah* under such circumstances, Feinstein claims. Since people who marry in a Reform setting believe their marriage is legal under Jewish law, they do not later intend *kiddushin*, Feinstein presumes.[42] Witnesses who see the couple living together therefore do not think that the couple had the needed intention, so *anan sahadei* does not apply to marriage in a Reform setting.

Responsa #77 deals more extensively with Feinstein's position on *anan sahadei*. In one argument, Feinstein analyzes whether the fact that the public thinks the couple is married has any bearing on their marital status under Jewish law. Feinstein places the public's presumption in the category of rumor, and concludes for two reasons that this rumor should not be taken seriously. First, Feinstein argues, the rumor is based on an act of doubtful halakhic validity, so even though Rama writes that we take such rumors seriously and investigate their truthfulness,[43] the rumor itself declares the fact the marriage may not be valid.[44] That is, since the rumor says that the couple is married because they had a ceremony in a Reform Temple, the content of the rumor indicates that their marriage is potentially invalid, and so the public cannot be witnesses through *anan sahadei*. Secondly, on the other side of the issue, the majority of commentators in the *Shulkhan Arukh* hold that such a rumor should be ignored, and the only reason to take the rumor seriously is based on a rabbinic stringency. When a problem with rabbinic law

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[42] *Ibid.*
[43] *Rama EHE* 46:4.
[44] *Resp. Iggerot Moshe, EHE* 1:77.

arises, it is customary to decide leniently. Thus a second reason not to consider the public's thoughts on the matter is that since we are not sure whether or not the rabbinic law applies, we do not apply it. The fact that the public believes the couple to be married is of no consequence.[45]

Note what Feinstein has done here. The public decided that a couple was married because they lived together following a marriage ceremony, but Feinstein argues that such a conclusion is misguided. Instead, he places the public's understanding of the situation in the category of rumor and demonstrates halakhically that it is not necessary to pay attention to the rumor. In this way, Feinstein dismisses the idea that common knowledge of a marriage has any halakhic validity. The public can think whatever it wants, but whether the three requirements of *kiddushin* have been met is not influenced by public perception. Again, in Feinstein's view, the presumption that a man intended *kiddushin* is not the same as proof that he did so, especially when dealing with a person who does not follow *halakhah*. Feinstein divorces halakhic truth from what appears in reality. This argument, as above, is also based on the presumption that Reform *misadrei kiddushin* never conduct a ceremony that includes a proper *ma'aseh*, or that kosher *eidim* never attend a Reform wedding ceremony.

Feinstein's next point concerning Reform marriage and *anan sahadei* clarifies an argument Feinstein made in Responsum #76. There, he argued that since those who marry in a Reform setting believe they are married under Jewish law, they do not later intend *kiddushin* at their first post-marriage *bi'ah*. In Responsum #77, Feinstein asks whether it is possible that a man who marries at a Reform temple might know that his *kiddushin* is invalid. No, Feinstein claims, most Americans are unaware of this fact, so

[45] *Ibid.*

that even if a Reform Jew does know that he has not completed *kiddushin* at his Reform ceremony, witnesses cannot presume that he knows, and thus the *hazakah* "*ein adam*" cannot be applied.[46] This argument is analogous to the one Feinstein made in Responsum #74 about what witnesses can presume about a *parutz liz'nut* who has a civil marriage. Even if the *parutz liz'nut* does intend *kiddushin* during intercourse, because of his character and past history, witnesses to his *yihud* do not assume he had the needed intention. Similarly, witnesses to the *yihud* of a Reform Jew cannot presume that he knows his ceremony was invalid and therefore decided to intend *kiddushin* through his sexual act.

The particular circumstances of Responsum #77 allow Feinstein to present yet another detail of his understanding of *anan sahadei*. In #77, although the woman contends that the couple never consummated their marriage, a question nonetheless exists as to whether the woman is *safek mikudeshet*, in limbo between marriage and divorce,[47] because they had *bi'ah shelo kidarka*, sexual activity in an unusual manner. In a very narrow interpretation, Feinstein asserts that *anan sahadei* only takes hold with *bi'ah kidarka*—sex in the "regular" manner—even if the couple had time for other types of sexual activity.[48] The interpretation is consistent with Feinstein's other strict legal constructionist readings that do not match the living reality of a situation. Here, Feinstein insists that witnesses through *anan sahadei* expect that *bi'ah kidarka* took place with a man and woman who live together, and so any other sexual activity does not establish the public as witnesses to *kiddushin*.

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[46] *Ibid.*
[47] The woman is forbidden to every man including her 'husband' until she either completes *kiddushin* with him or receives a *get*.
[48] *Resp. Iggerot Moshe, EHE* 1:77.

In Responsum #77, Feinstein also adds a detail to his *anan sahadei* requirement that the couple live in a neighborhood with observant Jews. The couple in question lived in a non-Jewish neighborhood and it is unlikely that they were seen living together by two valid witnesses. Feinstein's new addition is to teach that we do not raise the possibility that perhaps kosher *eidim* saw them, as long as we do not know of any witnesses who were there.[49] Feinstein's argument is unusual for him in that thus far he has preferred absolute proof, not supposition. As a result, we can see that by saying that we ought not investigate if the couple was actually seen living together by kosher *eidim*, Feinstein has chosen a convenient argument.

Responsum #77 also contains a section in which Feinstein strongly promotes the idea that the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" cannot be applied to Reform Jews. Feinstein reviews the statements of several *rishonim* who agree that the *hazakah* is inappropriate for those widely known to violate Torah. Feinstein reasons, "How much more so should the *hazakah* not be applied today, when people completely deny God and His Torah."[50] Feinstein claims that widespread religious nonobservance among Reform Jews indicates that there is no reason to suspect that a Reform Jew would have the needed intent for *kiddushei bi'ah*. Over and over in Responsa #76 and #77 on marriage in a Reform setting, Feinstein bases his rejection of Reform ceremonies as *kiddushin* on his presumption that all Reform Jews are not familiar with and do not observe *halakhah*. While it is impossible to determine if Feinstein's decisions are motivated by his attitude towards Reform Judaism or if his argumentation simply reflects his beliefs, a strong condemnation of Reform Judaism comes through in Feinstein's writings.

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[49] *Ibid.*
[50] *Ibid.*

As with Responsum #74 on civil marriage as *kiddushin*, the cases before Feinstein about marriage in a Reform setting are also situations of potential *igun*. Unlike in #74, in which Feinstein never mentions *agunah* as a motivation, he invokes the need to be lenient in situations of *igun* in Responsum #77. He does so on a minor point,[51] but the statement does reveal that the potential to place the woman before him in the status of *agunah* is influencing Feinstein's interpretation of the sources. Feinstein has demonstrated clearly that he is writing from a viewpoint that strictly divides *halakhah* from the modern world. The outcome of this right-wing argumentation is Feinstein's lenient conclusion that the women who appeal to him in these *teshuvot* were never married, and thus do not require a *get* and are not *agunot*. Since this is the only statement regarding *igun* that Feinstein makes in the five responsa surveyed in this thesis, a more detailed survey of Feinstein's *teshuvot* would be necessary in order to assess whether it is Feinstein's right-wing outlook or his desire to avoid *igun* that serves as a more general motivation for his halakhic decisions.

Although Feinstein reaches a lenient conclusion in determining that the women do not require *gittin*, his argument is quite troubling socially. Reform Jews who perform a Reform ceremony have completed a Jewish marriage ceremony, yet Feinstein nonetheless holds that these couples are not a married according to Jewish law. Even worse, these Jews are *perutzim*, immoral. Feinstein's lenient conclusion follows from an argument that labels an entire segment of the Jewish community immoral—a heavy price to pay for releasing *agunot*. In addition, his conclusion sharply separates Reform Judaism

[51] In determining whether or not kosher *eidim* were present at the Reform ceremony, Feinstein explores the possibility that testimony might need to be taken in the presence of those who were at the wedding in order to assess their validity as witnesses. Feinstein concludes that it is preferable to do so, but since it is not possible, one should be lenient in the situation of *igun* and not take the testimony in their presence.

from the world of halakhic Judaism, in essence dividing all non-Orthodox Jews from the rest of the Jewish community.

Responsa #73-77 reveal Feinstein's worldview that *halakhah* and the modern world are entirely separate. In addition, the world outside of *halakhic* Judaism has no validity that must be taken into account during halakhic decision-making. These twin assumptions regarding the role of *halakhah* in the modern world underlie Feinstein's textual interpretation and choice of precedent in the case before him. They lead to the idea that state law on personal status has no bearing on Jewish law: a couple married in civil court can be unmarried according to Jewish law. These assumptions also lead to Feinstein's exclusion of non-Orthodox Jews from any significant position in his worldview and to his characterization of them as unethical. Ethics are contained only within *halakhah*, so Jews who do not keep *halakhah* cannot be ethical individuals. From these right-wing assumptions, Feinstein builds the idea that it is nearly impossible to achieve *kiddushin* outside of a typical *kiddushin* ceremony, except when one is proven to be halakhically knowledgeable and observant. The caveat is meaningless, however, because in all likelihood, a person who keeps *halakhah* would have a *kiddushin* ceremony in order to marry. Thus it is by virtue of Feinstein's right-wing outlook that he reaches a lenient conclusion—a woman married in a nontraditional setting does not require a *get*.

Chapter Three: Henkin on Non-Orthodox Wedding Ceremonies

In Chapter Two, analysis of R. Moshe Feinstein's *teshuvot* on nontraditional marriage revealed that his interpretation of textual sources was influenced strongly by his outlook on the world outside of halakhic Judaism as inconsequential. The opinions of R. Eliyahu Henkin, too, emerge from a particular view of *halakhah* within the modern world. Henkin, unlike Feinstein, accepts that contemporary Judaism is multivalent, even though he might prefer a different reality. This chapter will examine Henkin's primary article on civil marriage as *kiddushin* to expose the assumptions that underlie his halakhic argumentation.

In *Perushei Ibra, Siman Dalet*,[1] Henkin presents his theory of how a Jewish couple who has only a civil ceremony becomes married under Jewish law in the absence of a *kiddushin* ceremony. As noted in Chapter One, Henkin's opinion is written from a theoretical perspective, as *pesak*. It is a lengthy piece, presented in 23 sections, offering a significantly more detailed study of the subject than Feinstein's *teshuvah*. Henkin's essay begins with a brief précis of the problem and the main issues he will address. He writes that a woman married in a civil ceremony, and the couple became Jewishly married through the act of living together as husband and wife for a long time. The woman, therefore, needs a *get* to dissolve the union. Henkin explains that he will address different opinions on the law of *pilagshut*, and especially Maimonides' opinion, because Maimonides claims that a *pilegesh* does not have *kiddushin* but nonetheless is considered a wife and needs a *get* to leave the relationship.

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[1] *Perushei Ibra* 1:4.

Following this brief overview, Henkin begins his discussion with a definition of marriage, *ishut*. In order to ascertain the meaning of the term, Henkin looks at the exact nature of the *kinyan* that takes place between husband and wife. As discussed in Chapter One, the *kinyan* of a wife differs from other *kinyanim* in two ways. Firstly, a husband does not bodily acquire the object of the *kinyan* as a possession, in this case, a wife. Secondly, in *kiddushin*, a woman is forbidden to all men,[2] just as *hekdesh*, property dedicated for Temple worship, can be used only for that purpose. The *kinyan* of marriage makes the woman permitted to her husband alone. Thus Henkin interprets the property right that a husband acquires through *kinyan* as his wife's sexual relationship with him.[3] The ideas of *kinyan* and *issur*—marriage and sexual exclusivity—therefore are inextricably intertwined. It is impossible to have one without the other, Henkin asserts, because they are both tied together in the definition of *kiddushin*. No stipulations that a man might make during his marriage ceremony can break the connection between marriage and sexual exclusivity and still result in *kiddushin*. Thus the definition of *ishut*, marriage, is a relationship in which the woman is sexually exclusive to a single man. The fact that the ritual prohibition of the woman to all men, including her husband, takes place at a different time than when she becomes sexually permitted to her husband does not indicate a break between the ideas of marriage and sexual exclusivity. Henkin explains that this is so because the woman is legally bound to marry the man at the appointed time. In this way, Henkin defines *ishut*, marriage, as a relationship whose primary characteristic is sexual exclusivity.

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[2] *SA EHE* 55:1.
[3] *Perushei Ibra* 1:4, sec. 1.

Next, Henkin proves that people desire that their intentions be acted upon. Henkin needs this idea in order to establish that even if a man does not set out to fulfill the requirements of *kiddushin*, his desire to be married, for *ishut*, should govern all halakhic decisions surrounding his marriage. Henkin derives this principle through several halakhic examples, and a single case will suffice to explain his point. If a man says to a woman, I will marry you now, but afterwards I will send you away without a *get*, his stipulation violates a Toraitic law[4] and so his marriage is entirely valid as if he had not made the stipulation. But if the public knows that he would not have wanted to marry the woman without the stipulation, then the couple is not bound by *kiddushin*.[5] In this example, *kiddushin* takes hold when the man cares more that his action should stand and less that his stipulation matter. The principle that Henkin is driving at is that people want their intentions to be acted upon. The idea is critical to Henkin's understanding of civil marriage as *kiddushin*. It allows Henkin, unlike Feinstein, to posit a correspondence between civil and Jewish marriage: a man who wants to be married wants this relationship under all relevant legal systems.

Henkin will now need to prove that the desire to be married carries halakhic implications. He starts by explaining that *kinyan* and *hekdesh* are linked in marriage even when a man does not explicitly state they should be. If the groom does not say to his bride, "You are forbidden to everyone like *hekdesh*," she is nonetheless automatically sexually forbidden to all other men until divorce. Henkin asserts that this principle is "*din Torah*," a law from the Torah, but he does not supply a source.[6] The logic is obvious,

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[4] Deuteronomy 24:1 specifies that the woman must be handed a writ of divorce in order for the separation to take effect.
[5] *Tosafot, B. Kiddushin* 49b, *s.v. divarim.*
[6] *Perushei Ibra* 1:4, sec. 3.

however; if a man desires marriage, whose defining characteristic is sexual exclusivity, then there is no need for a statement regarding monogamy. Non-Jews, too, intend sexual exclusivity as part of their marriage ceremony, even though they do not explicitly include this clause in their ceremonies. Henkin admits that some difference of opinion exists about whether sexual exclusivity is characteristic of civil ceremonies, but Henkin proceeds as if it is. This allows him to conclude that if a Jewish couple marries in a civil ceremony, they thereby express an intention for sexual exclusivity, meaning, for the very essence of *ishut*. Thus a Jewish couple who has a civil ceremony demonstrates intention to be married according to the fundamental aspect of Jewish marriage, even without an explicit statement to that effect. The couple not only desires to be married, but intends to be married in the type of marriage that is the heart of *kiddushin*. The institution of marriage means the same thing, Henkin is saying, whether the ceremony originates under Orthodox rabbinical auspices or not.

Henkin's conclusion regarding the institution of marriage might easily be misinterpreted, with opponents charging that Henkin is equating *kiddushin* with non-Jewish marriage and thereby ignoring halakhic requirements of *kiddushin*. In order to deflect such criticism, Henkin briefly catalogs differences between Jews and non-Jews in how marital relationships are established. He compares each of the three Jewish requirements for marriage (*kavannah*, *ma'aseh*, and *eidim*) with relevant concepts in non-Jewish marriage, and in the process, outlines the content of each of the three requirements for Jewish marriage. Without declaring so outright, Henkin is establishing that Jewish marriage is different than non-Jewish marriage. It is a statement to his readers that he does not consider Jewish marriage to be the same as civil marriage, but is suggesting only

that the halakhic requirements of *kiddushin* may be fulfilled through civil marriage and subsequent living arrangements. Jewish marriage retains its unique character, and Henkin wants to make clear to his audience that he will not compromise on this point.

Before his side discussion to fend off a potential accusation that he does not follow *halakhah*, Henkin had shown that Jews who marry in a civil ceremony express an intention for a sexually exclusive relationship. Henkin has not yet proven that such an intention is the one required as *kavannah* in *kiddushin*. He turns to this task now.

Henkin holds that the only *kavannah* necessary to establish *kiddushin* is intention to make a *kinyan*, not intention to fulfill a *mitzvah*. The man need only desire to marry the woman—to establish *ishut*. Henkin points out that no part of *halakhah* states that the groom must stipulate during his *ma'aseh* that he is acting in order to fulfill a *mitzvah*.[7] Recitation of the phrase "*kidat Moshe v'Yisrael*" demonstrates a groom's intention to marry in agreement with Jewish customs, including those customary legal requirements pertaining to *kavannah*, *eidim*, and *ma'aseh* with which Henkin distinguished Jewish marriage from non-Jewish marriage. Other customs that Henkin includes in the list are the need for a *get*, to provide *she'ar*, *kisut*, *v'oneh*, three biblically-derived requirements of food, clothing, and sexual relations that a husband must give his wife,[8] and all other Toraitic and rabbinic laws. The phrase, then, does not demonstrate intention to fulfill a *mitzvah*. Tosafot offers an alternative explanation for the phrase "*kidat Moshe v'Yisrael*," holding that it demonstrates the groom's agreement that his marriage be subject to

[7] *Ibid.*, sec. 4.
[8] Ex. 21:10.

rabbinic approval.[9] Henkin replies that nonetheless, *kiddushin* does not require any stipulation of this sort, and, therefore, that his own interpretation is valid.

Henkin's evidence that *kavannah* for *kinyan* is the intention necessary for *kiddushin* comes from several halakhic examples in which *kavannah* to perform a *mitzvah* is not needed in order to complete the *mitzvah*. When a *kohen* and a widow join together in marriage, even though they are forbidden by Jewish law to marry each other, their *kiddushin* "takes hold"—they become married under Jewish law. The Jews in this case certainly are not acting in order to fulfill a *mitzvah*, Henkin asserts.[10] Another example Henkin supplies stems from a theoretical possibility that used to exist that a Gentile was part of the lost ten tribes until he was fully proven to be a Gentile.[11] If one of these men or a *mumar* married, certainly neither one intended to fulfill a *mitzvah*. The man's intention would only be to establish a *kinyan*—for the woman to be married to him alone and forbidden to all others, which is the essence of marriage as defined by Henkin.[12] These examples show that intention to fulfill the *mitzvah* of *kiddushin* is not integral to its completion. The same is true for the writing of a *get*. A Jewish man needs only to intend to divorce his wife, not to fulfill the *mitzvah* of writing a *get*, and therefore a non-Jew could write a *get* for the husband although Jewish law does not permit him to do so for other reasons.[13] Henkin draws his final piece of evidence from the first chapter of tractate *Kiddushin*, which discusses many types of *kinyanim*, including marriage. All of these are the same with respect to intention, Henkin argues, in that what is needed is the desire to make a *kinyan*. Thus it is only the intention for a *kinyan* of *ishut* that is

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[9] *B. Ketubot* 3a, *s.v. ada`ata derabanan mekadesh.*
[10] *Perushei Ibra* 1:4, sec. 4.
[11] *B. Yevamot* 16b-17a.
[12] *Perushei Ibra* 1:4, sec. 4.
[13] *B. Gittin* 23a.

necessary in order to fulfill the *kavannah* of *kiddushin*, Henkin holds. If the other two requirements of *eidim* and *ma'aseh* are met, then two Jews who marry in a civil union may achieve *kiddushin* without an explicit intention to do so.

Henkin is not making a particularly strong argument in order to prove his conception of *kavannah*. He has gathered examples that support his position, but he has not worked through the sources in a way that would prove his point more definitively. Someone who challenges Henkin's opinion has only to bring a different set of examples, and it would not be clear who has the stronger case. In addition, Henkin's final example, that the *kinyanim* in Chapter 1 of *Kiddushin* all require the same intention for *kinyan* alone, ignores the fact that the additional element of *hekdesh* in the marriage *kinyan* may make *kiddushin* its own category of *kinyan*. If so, intent to establish a *kinyan* would be insufficient to effect *kiddushin*. Furthermore, Henkin's argument is based primarily on a negative formulation—one does not need intention for *kiddushin* in order to fulfill the *mitzvah*—instead of on the positive idea that intention for *kinyan* fulfills the requirement of *kavannah* in *kiddushin*. Therefore, the principle that a couple need only intend to marry each other in order to fulfill the requirement of *kavannah*, one of the most fundamental elements of Henkin's opinion, is grounded more on rhetoric than on solid halakhic argument.

Nonetheless, it is a remarkably straightforward definition of *kiddushin*, made possible by the worldview through which Henkin reads the texts. The contrast of Feinstein's and Henkin's underlying assumptions is clearly evident on this point. By framing *kavannah* as merely the intention to marry, Henkin bypasses one of the subjects that Feinstein's position compels him to examine in detail: application of the *hazakah*

"*ein adam oseh be'ilato be'ilat zenut.*" The *hazakah* becomes irrelevant to Henkin's argument through the fact of a couple's wedding ceremony. According to Henkin, a couple's *kavannah* for *kiddushin* is established when they register civilly for their marriage, and no further investigation of the matter is required. Their actions indicate their desire for *ishut*. Henkin's interpretation of the sources in this manner demonstrates that he begins his investigation of the textual tradition with the assumption that *halakhah* and the secular world are intertwined. Feinstein, on the other hand, must deal extensively with the *hazakah* because he does not accept that the halakhic and secular worlds inform each other. He faces the problem of establishing that the couple intends to complete *kiddushin* if they have not explicitly stated their desire to do so, so he must investigate use of the *hazakah*. Feinstein's and Henkin's positions on the importance of the *hazakah* to the question of nontraditional marriage as *kiddushin* are directly related to their conceptions of *halakhah* in the modern world.

Although Henkin has established that a couple needs only to want to be married in order to fulfill the requirement of *kavannah*, Henkin still must show that if such *kavannah* is expressed through a civil ceremony, the expression is a valid halakhic act. Perhaps *kiddushin* performed, or begun, in a civil ceremony automatically disqualifies the *kiddushin*. Using an analogy to *gittin* executed by civil courts, which are halakhically accepted as long as they are written and transmitted by Jews, Henkin contends that *kiddushin* enacted in or through non-Jewish courts is valid. Even if the *get* is done to fulfill state law and not for the purpose of fulfilling a *mitzvah*, the *get* is valid. So, too,

with *kiddushin* performed under state auspices; it is valid even if the couple does not intend to fulfill the *mitzvah* of *kiddushin* through their civil ceremony.[14]

Although it is possible that all three requirements for *kiddushin* would be met through a civil ceremony, it is likely that *ma'aseh* or *eidut* would be established later. In such circumstances, Henkin argues, the intention for *ishut* expressed in a civil ceremony remains valid until the other two requirements for *kiddushin* have been met.[15] Henkin is extending his earlier point that people want their intentions to be acted upon. Henkin bases the principle that intention remains valid until *kiddushin* is achieved on *Ketubot* 73b. In this *sugya*, the anonymous voice of the *gemara* rules that *kiddushin* takes hold through *bi'ah* if the original *kiddushin* ceremony is invalid for some reason. Henkin agrees with Feinstein's interpretation of the Talmudic passage: when the groom is unaware that the original *kiddushin* is invalid, the groom certainly does not explicitly intend to create a marriage at the time of his sexual act. Yet whereas Feinstein concludes that for this reason the requirement of *kavannah* was not met,[16] Henkin holds that the groom's original intention for *ishut* goes into effect during *bi'ah*. Henkin adds that regardless of whether the original ceremony was invalid because of lack of *eidim* or *ma'aseh*, the *kavannah* created at that time takes hold later.[17] In addition, the *kavannah* created at the original ceremony remains in effect even if the couple are forbidden to marry each other under Jewish law, and even if the man is a *parutz liz'nut*. The same principle applies to civil marriage, as Henkin explains, "since we know that he [the

[14] *Perushei Ibra* 1:4, sec. 5.
[15] *Ibid.*
[16] *Resp. Iggerot Moshe, EHE* 1:74.
[17] *Perushei Ibra* 1:3, sec. 14-19.

groom] desires *ishut*."[18] As long as the couple expresses a desire to be married to each other, they fulfill the requirement of *kavannah* in *kiddushin*.

As part of Henkin's evidence that *kiddushin* performed in or through non-Jewish courts does not result in automatic disqualification of the act, Henkin next takes up Rivash's famous case.[19] Rivash's case represents a serious threat to Henkin's theory, because Rivash held that a couple who clearly desired to be married—they had a wedding ceremony, albeit in a church—was not married under Jewish law. Yet Rivash's *teshuvah* carries no weight for cases of civil marriage as *kiddushin*, Henkin asserts. This is so, Henkin explains, because in Rivash's case, the couple were *mumarim* (apostates), any potential *eidim* at the ceremony were also *mumarim*, and those before whom she was presumed to be his wife, like neighbors, were also *mumarim*. Consequently, no kosher witnesses knew of their marriage, so the couple was not married under Jewish law.[20] As noted in Chapter Two, Feinstein considers Henkin's argument that no valid *eidim* knew of the couple's marriage a misreading of Rivash's *teshuvah*, because if lack of *eidut* were the primary problem, Rivash's argument would have consisted of only a single point. Yet from Henkin's perspective, Rivash's *teshuvah* cannot be a precedent, because Rivash's ruling would exclude Henkin's theory that a couple need only desire to wed one another in order to fulfill the *kavannah* of *kiddushin*.

Henkin's method of rejecting Rivash's *teshuvah* presents an additional problem for his understanding that civil marriage can effect *kiddushin*. If Jews in Spain during Rivash's time could not begin *kiddushin* in a non-Jewish ceremony because they were *mumarim*, then nonobservant Jews today also might not be able to begin *kiddushin* in a

[18] *Perushei Ibra* 1:4, sec. 5.
[19] *Resp. Rivash, Siman* 6.
[20] *Perushei Ibra* 1:4, sec. 5.

non-Jewish, i.e., civil ceremony. Henkin answers that as long as nonobservant Jews today have not made an explicit declaration that they do not wish to be part of the Jewish community and they also keep some *mitzvot*, the fact that their marriage begins in a civil ceremony does not automatically disqualify *kiddushin*. This is so because even nonobservant Jews, those "who throw off the yoke of the *mitzvot*," nevertheless want marriage—*ishut*—according to Jewish law and custom, meaning, they desire an exclusive sexual relationship as an essential part of their marriage.[21] Secondly, Henkin asserts, "even with those who have a civil marriage, nearly all of them return and marry according to Jewish law and custom."[22] It is not clear what Henkin means by the verb "return." He may mean that Jews who have a civil ceremony also have a Jewish ceremony, although he does not surmise to what end. Or possibly Henkin, unlike Feinstein, believes that performance of a civil ceremony makes no statement about whether or not a couple desires to be married under Jewish law. In a final assertion, Henkin says "we must consider that all of them" are also married under Jewish law.[23] While Henkin's language is not clear, it seems he is once again stating his position that Jews married under civil law are also to be considered married by Jewish standards.

Henkin's reading of Rivash is based upon a substantive distinction between *anusim* of 14th century Spain and nonobservant Jews of today. Henkin is unwilling to place nonobservant Jews in Rivash's time within the Jewish community. He accepts entirely, however, the idea that nonobservant Jews today belong within the community as long as they do not categorically reject Judaism. Although we must question if Henkin distinguishes between *anusim* of Rivash's time and nonobservant Jews of today purely to

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[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*

rule out Rivash's *teshuvah*, Henkin's position on nonobservant Jews today nonetheless distinguishes him from Feinstein. Henkin, unlike Feinstein, acknowledges that the reality of the Jewish community today is quite different than centuries ago. A range of Jewish observance is commonplace, and lack of halakhic observance or knowledge should not result in automatic dismissal from the community. Thus while Feinstein rejects nonobservant Jews today as *risha'im*, "evil ones," Henkin welcomes Jews of any denomination as Jews. Their different conclusions regarding Jews today stem from diametrically opposed starting points for thinking about *halakhah* in the modern world. Feinstein's worldview does not give any standing to the secular world or to nonobservant Jews, so a person cannot be a morally upright individual in the absence of halakhic observance. Henkin's view of contemporary society, however, begins with the premise that the religious and secular worlds are intertwined, and a Jew may move freely between them and retain his or her status as a Jew.

Returning to his argument that *kiddushin* enacted through, or begun in, civil courts does not automatically disqualify a Jewish marriage, Henkin discusses the validity of *ma'aseh* performed in a civil ceremony. He says that a marriage *kinyan* is not necessarily invalid if it is executed in a civil marriage. The fact that the woman also makes a statement in favor of the marriage does not disqualify the *kiddushin*. Henkin does not prove that this is so, except to say that the principle of *migo* does not invalidate *kiddushin* performed in a civil ceremony. The principle of *migo* says that we believe what a person says now because if s/he was lying s/he could have told a better lie. *Migo* is not effective when eyewitnesses to the fact exist.[24] In the case of a civil ceremony, the public believes the couple got married because there are Jews who say so. Thus it is not in the

[24] See *B. Ketubot* 13a and 22a.

couple's interest to admit they went to a civil court for marriage: some might think the couple is not married because the ceremony was not performed by a rabbi. Yet this line of reasoning is unnecessary, Henkin insists, because since *eidim* exist, the principle of *migo* cannot be applied. Henkin argues that *eidut* is established by the fact that the public presumes the couple to be husband and wife. It is *eidut gemurah*, complete *eidut*, and nothing further is needed.[25]

Henkin now needs to prove that, in fact, the public's presumption that the couple is married is *eidut gemurah*. Henkin's primary evidence comes from the Jerusalem Talmud,[26] which teaches that if a couple comes from a far away place where no kosher witnesses lived, the couple is nonetheless presumed to be married. Even if it is clear that they did not have a *kiddushin* ceremony, *kiddushin* was established through *bi'ah*. This is so because the performance of *kiddushin* in an uncustomary way does not prevent the establishment of an intent to marry.[27] With *ma'aseh* and *kavannah* in place, since the rabbis hold that the couple is married, it must have been the public presumption that the couple is married that served as *eidut gemurah*, Henkin reasons. Henkin draws upon *Gittin* 81a as proof that a marriage *kinyan* can be established in an unusual manner. In this Talmudic passage, a divorced couple shares a room at an inn, and the rabbis wonder if the woman now requires a second *get*. Some rabbis hold that she does, which demonstrates that even when *kiddushin* is not done in the customary way, then if the man desires *kinyan*, *bi'ah* can create *kiddushin*. Through these two texts, Henkin shows that public understanding of a couple's relationship can serve as *eidut*, no matter how the couple establishes their *kiddushin*.

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[25] *Perushei Ibra* 1:4, sec. 5.
[26] *Y. Kiddushin* 4:8.
[27] *Perushei Ibra* 1:4, sec. 5.

Henkin and Feinstein have vastly different approaches to the public's perception that a couple who had a civil ceremony is married. These demonstrate well how their readings of the textual tradition emerge from widely divergent understandings of how *halakhah* functions in the modern world. Whereas Feinstein draws upon precedent that shifts the public's understanding of a couple's living situation into the category of rumor, Henkin draws upon precedent that shifts the public's perception into the category of *eidut gemurah*, complete *eidut*. The *posek*'s choice of precedent is influenced by assumptions he holds about the permissibility of incorporating anything from outside of halakhic Judaism into halakhic argument. Henkin accepts the public's perception that the couple is married because he, unlike Feinstein, allows the mingling of the religious and non-religious worlds. A man and woman who live together in a permanent way and appear to want to be married, who have solemnized their relationship in a ceremony, are married. Henkin finds it unthinkable that a couple could be married under civil law but not under Jewish law, or that Jews could even want such a distinction in their lives. Feinstein, on the other hand, posits a strict division between *halakhah* and all else, and everything outside of *halakhah* may not influence halakhic thinking. The public's impression that a couple is married is just that—an impression, with no attached halakhic certainty.

Henkin now begins an extended halakhic discourse on the subject of *pilagshut*, the legal category of nonmarital consensual sexual relationships. As explained in Chapter One, according to many *poskim*, a woman today cannot have the status of *pilegesh*, concubine, because the category is no longer active. A *pilegesh* is considered *eved ivri*, a Hebrew slave, and Jewish servitude ended with the destruction of the Second Temple.

While it is a straightforward conclusion that a woman today cannot be a *pilegesh*, the textual tradition which leads to this conclusion is far from easy to decipher. Yet Henkin must wade through the textual complexities because his understanding thus far of civil marriage as *kiddushin* faces a potentially grave threat from the concept of *pilagshut*. Although Henkin accepts that a civil marriage between two Jews cannot result in the woman holding the status of *pilegesh*, he is nevertheless concerned that civil marriage might produce a relationship that is less than *ishut*, full marriage. Based on what Henkin has demonstrated thus far, if a man makes a *kinyan* with a woman outside of a *kiddushin* ceremony, entering a stable, sexually exclusive relationship with her, then the couple could become married under Jewish law through the presumption that they had marital sex. Their *bi'ah* fulfills *ma'aseh*; the man fulfills *kavannah* by intending to have a sexually exclusive relationship with the woman; and the public are *eidim* by virtue of the what they see—a couple that appears to be married. The problem is that the situation Henkin describes sounds strikingly similar to the way in which a *pilegesh* relationship is formed: a man makes a *kinyan* with a woman outside of a *kiddushin* ceremony and enters into a stable, sexually exclusive relationship with her. If it is at all possible today to effect a *kinyan* that is not marriage, then civil marriage might result in just such a relationship through a connection to *pilagshut*. Consequently, a woman married by the state alone would not be halakhically married and would not require a *get*. Henkin, therefore, must prove this is not so, and make clear that if the husband desires *ishut*, the only *kinyan* that will result is marriage, not *pilagshut* or any other lesser status. Henkin's examination of the sources also allows him to clarify some potential problems with reaching a halakhically valid Jewish marriage outside of a traditional *kiddushin* ceremony.

As may be obvious from the description of how a woman becomes a wife or a *pilegesh*, one of the key problems with which Henkin must contend is differentiating the status of *pilegesh* both from wife, *ishah*, and harlot, *zonah*, or as the texts on *pilagshut* term her, *kideishah*, professional prostitute. The Torah discusses both *pilagshim* and wives,[28] indicating that differences must exist between the two. Yet if a *pilegesh* does not have the status of a wife, intercourse with a *pilegesh* may fall dangerously close to sexual relations with an unmarried woman, which is *zenut*, harlotry, and may make the woman *kideishah*. A *pilegesh* thus holds an intermediate position between an *ishah* and *kideishah*, but establishing the boundaries of her status that allow for differentiation between wife and harlot are difficult. Furthermore, the Jewish textual tradition offers a contradictory picture on when a potential *pilegesh* crosses the line to become either a wife or a prostitute.

In the first part of Henkin's *pesak*, we followed his argument point by point as he set out his theory on how civil marriage results in *kiddushin*. Henkin's discussion on *pilagshut*, however, will be easier to follow if we first outline Henkin's argument and its conclusion.

Henkin's argument begins with a review of the textual sources on the status of a *pilegesh*. These break into two main camps. The primary *posek* on one side is 12th century scholar R. Moshe ben Maimon (Maimonides or Rambam), arguing, as Henkin interprets his writings, that *pilegesh* has the status of *eishet ish*, a woman who needs a *get* to dissolve the relationship. The other side is represented by 12th century R. Avraham ben David (Ravad) and by 13th century R. Moshe ben Nachman (Nachmanides or Ramban). These *poskim* argue that *pilegesh* has the status of *penuyah*, an unmarried woman. In

[28] See Gen. 35:22, Gen. 36:12, II Sam. 3:7, II Sam. 21:11, I Chron. 2:48.

determining how it is possible that a *pilegesh* could be *penuyah* if many *poskim* hold that intercourse with an unmarried woman is the definition of *kideishah*, Henkin derives that a *pilegesh* has the status of *amah ivriyah*, a Hebrew maidservant, a conclusion supported later through Rambam's writings. At this point, Henkin leaves behind those who argue that *pilegesh* is *penuyah* because they are not dealing with the same type of relationship that Henkin is investigating, in which a man makes a *kinyan* with a woman outside of a *kiddushin* ceremony and enters into a stable, sexually exclusive relationship with her.

Henkin then focuses on *pilegesh* as *eishet ish*. First he proves that *ishut* means that a woman has the status of *eishet ish* no matter the type of *kinyan* that establishes the woman's *ishut*. A *get* is always required to dissolve a relationship of *ishut*. *Pilagshut* is a relationship of *ishut* since the man desires a sexually exclusive relationship with the woman. Next, Henkin explores more fully Rambam's position, which, it turns out, does not state as clearly as Henkin first indicated that *pilegesh* has the status of *eishet ish*. Rambam says in his list of *mitzvot* that sexual relations without *kiddushin* and a *ketubah* are forbidden, because it is intercourse with a *kideishah*.[29] He also says in his *Mishnah Torah* that a wife receives *kiddushin* and *ketubah*, but a *pilegesh* does not.[30] As a result, how Rambam defines a *pilegesh* is unclear, because according to these two sources, a *pilegesh* does not have *kiddushin* or *ketubah*, but intercourse is forbidden without these. In a third source, Rambam teaches that intercourse without *kiddushin* for the purpose of *zenut* is sexual relations with a *kideishah*.[31] Henkin resolves these and several other internal contradictions of Rambam's by explaining that *kiddushin* and *ketubah* can each be understood in two ways. A wife receives both kinds of *kiddushin* and *ketubah*, but a

[29] *Rambam, Sefer HaMitzvot, lo ta'aseh* #355.
[30] *MT Milakhim* 4:4.
[31] *MT Ishut* 1:4.

pilegesh receives only one of each. The explanation satisfies Rambam's requirement that intercourse requires *kiddushin* and *ketubah*, and that a *pilegesh* does not receive *kiddushin* and *ketubah*, while also establishing *pilegesh* as *eishet ish*.

Thus as Henkin concludes from the sources on *pilagshut*, a *pilegesh* is an *amah ivriyah*, a Jewish indentured servant. Servitude does not exist today, so neither does the status of *pilegesh*, except that she would be permitted to the king of Israel if one still reigned. A *pilegesh* also has the status of *eishet ish*, a married woman, and needs a *get* to dissolve the relationship. A *pilegesh* receives *kiddushin* and a *ketubah*, as required by any woman who has *ishut*. Yet a *pilegesh* does not receive the same type of *kiddushin* and *ketubah* as a wife. The *kiddushin* of a *pilegesh*, like that of a wife, is a type of *kinyan* that makes the woman *eishet ish* and therefore forbidden to any other man. The *kiddushin* of a *pilegesh* is called *yi'ud*.[32] A *pilegesh* does not receive the type of *kiddushin* that is *likukhin*, a type of *kinyan* before *nisuin*, the actual marriage. *Ketubah*, as Henkin reads the sources, is both the customary monetary stipulations of a community or state, and also the three Toraitic requirements of *she'ar*, *kisut*, *v'oneh* (food, clothing, and sexual relations) that a husband must provide for his wife. A *pilegesh* receives the three Toraitic requirements as her *ketubah*, but not the customary monetary stipulations. Thus the dividing line between a *pilegesh* and a wife is the types of *ishut* and *ketubah* the woman receives. The dividing line between a *pilegesh* and a *kideishah* is twofold: firstly, whether or not the man desires *ishut* with her, a permanent, sexually exclusive relationship, and secondly, if he obligates himself to *she'ar*, *kisut*, *v'oneh*. Like a marriage, a relationship of *pilagshut* requires *kavannah* for *ishut*, *ma'aseh* (in this case, *bi'ah*), and *eidim*. With

[32] *Yi'ud*, literally, "designation," is more generally understood as the betrothal process by which a female Hebrew servant is designated as a bride for her owner or his son, based on Exodus 21:8-9.

this overview in mind, it is hoped that the reader will find it easier to understand Henkin's reading of the textual tradition on *pilagshut*.

Henkin's long argument begins with several sources that hold that the status of a *pilegesh* is *eishet ish*. The Babylonian Talmud *Shabbat* 55b and *Bereishit Rabbah* 32 and 38 each indicate that *pilegesh* has the status of *eishet ish*. Henkin also thinks that Rashi, an 11th century commentator, in his comment to *Sanhedrin* 21a, says that a *pilegesh* is *eishet ish*, because Rashi writes that a *pilegesh* has *kiddushin* but no *ketubah*. Henkin interprets Rashi's statement as meaning that the *kiddushin* of a *pilegesh* is not the customary *kiddushin* ceremony prior to a woman's incorporation into a man's household, but instead, that the presumption that the woman is in the house to be the man's concubine makes for a type of *kiddushin*. Henkin next links Rashi's statement with Rambam's understanding of *pilagshut*, saying, "And so it is with Rambam, who teaches that *pilagshim* do not have *kiddushin*. The intention is not that she is not *eishet ish*, but that he did not treat her like a wife by having an *erusin* [*kiddushin*] ceremony prior [to taking her into his household]."[33] In Henkin's reading, neither Rashi nor Rambam thinks that a *pilegesh* has the customary *kiddushin* ceremony prior to entering into a sexual relationship with a man, even though Rashi says that a *pilegesh* has *kiddushin*. Henkin understands them both as saying that instead of a *kiddushin* ceremony, a *pilegesh* effects *kiddushin* through the *ma'aseh* of *bi'ah*. In fact, nothing about either *posek*'s statement—and Henkin does not point to a specific citation from Rambam—indicates that a *pilegesh* is *eishet ish* and not some unstated interim status between wife and *kideishah*. Rambam's position, however, represents the closest match with Henkin's understanding of *pilegesh*

[33] *Perushei Ibra* 1:4, sec. 6.

as *eishet ish*, so he continues with Rambam as the main representative of this position. How Henkin is able to read Rambam in this way will become clear below.

The side of the argument that believes that *pilegesh* has the status of *penuyah*, an unmarried woman, is best represented by Ravad[34] and Ramban.[35] Henkin immediately questions how it is possible to interpret a *pilegesh* as *penuyah*. If the woman is not reserved sexually for a single man, then many *poskim* would term her *kideishah*, not *pilegesh*. But if the woman is set aside for sexual relations with one man exclusively, then such a situation represents the definition of marriage (*ishut*) and the man establishes a *kinyan* with the woman through the presumption that his *bi'ah* is for the purpose of *kinyan*. How, then, could a *pilegesh* possibly be *penuyah*? The simplest way to resolve the problem, as Ravad does, is to say that a *pilegesh* does not have the presumptive status of marriage. A *pilegesh* is *amah*, a servant, Ravad writes, and therefore, the public does not presume that the man brought the woman into his household for a marriage-type relationship.

If a woman and man are in a sexual relationship outside of the boundary of marriage, however, a concern arises that the woman is a *kideishah*, not a *pilegesh*. Ravad deals with this possibility by explaining that the woman "sets herself apart for one man."[36] For Ravad, sexual exclusivity, no matter whether initiated by the man or the woman, is the boundary between a *pilegesh* and a *kideishah*, because some sort of *kinyan* has taken place through the couple's *bi'ah*. For Henkin, however, a relationship in which the woman establishes sexual exclusivity is not *ishut*. It is the man whose *kavannah* must be for *ishut* in order for a *kinyan* to take hold. Thus although Ravad discusses *pilagshut*

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[34] *Ravad*, Ishut 1:4.
[35] *Teshuvos HaRashba Hameyuchasot LaRamban* 284.
[36] *Ravad, Ishut* 1:4.

as if it has an element of *ishut*, Ravad did not state that the man "sets her aside as a wife." Thus from Henkin's perspective, no *ishut*, and no *kinyan*, exists in this relationship since the man was not the active party in setting sexual exclusivity.[37] The woman remains *penuyah* and does not require a *get* to dissolve the couple's relationship. If any type of *kinyan* exists in a relationship of *pilagshut*, it is a *kinyan* to establish her status as an *amah*, servant. This kind of *kinyan* is not the one that Henkin believes takes hold in a *pilegesh* relationship.

Although Henkin does not agree with the idea that *pilegesh* is *penuyah*, *pilegesh* as *amah*, servant, is nonetheless a useful concept for Henkin. A Hebrew maidservant does not require a *ketubah*; her betrothal requires nothing more than *yi'ud*, that she be designated for a sexual relationship with her owner or his son. The money the owner pays to purchase her is considered to be for the purpose of her betrothal.[38] An *eishet ish*, however, requires a *ketubah*, so to ensure that a woman is *pilegesh* and not *kideishah*, Henkin needs for a *pilegesh* both to receive a *ketubah* and for her not to receive a *ketubah*. It is a *pilegesh*'s status as *amah* that explains why she does not receive a *ketubah*, just as both Rashi and Rambam state she does not[39] (although Henkin is not yet discussing the particulars of Rambam's position). Henkin will prove later how a *pilegesh* also receives a *ketubah*. Henkin finds support for the idea that a *pilegesh* has the status of a Jewish female servant in *Ketubot* 57a, which indicates that it is forbidden for a man to stay with his wife even one hour without a *ketubah*. Henkin asks why, if the woman is married but without a *ketubah*, the *gemara* does not call her a *pilegesh*, because that case

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[37] *Perushei Ibra* 1:4, sec. 7.
[38] Adin Steinsaltz, *The Talmud: The Steinsaltz Edition, A Reference Guide*, (New York: Random House, 1989), 201.
[39] *Rashi, B. Sanhedrin* 21a; *MT Milakhim* 4:4.

would seem to fit Henkin's proposal of *pilegesh* as *eishet ish* without a *ketubah*. The *gemara* does not call a married woman without a *ketubah* a *pilegesh*, however, because a *pilegesh* is an *amah*, one who is not required to have a *ketubah*.[40]

After this point, Henkin does not discuss again the possibility that a *pilegesh* holds the status of an unmarried woman. Those who say that *pilegesh* is *penuyah* do not believe that the man desires a sexually exclusive relationship with the woman. As Henkin understands Jewish marriage, without the man's desire for *ishut*, a woman cannot become *eishet ish*. Those who understand *pilegesh* as *penuyah* argue that even though she is unmarried, intercourse with her does not establish her as *kideishah* because she does not make herself sexually available to any man. Any *kinyan* that does take place binds the woman to the man as a servant.[41] Thus Henkin's overarching goal in this section does not match the situation described by those who hold *pilegesh* is *penuyah*. Henkin wants to determine the status of a woman brought into a stable, sexually exclusive relationship following a *kinyan* made outside of a *kiddushin* ceremony. In other words, Henkin is dealing with a situation in which *ishut* is taken for granted, and according to Henkin, *pilegesh* could only be *penuyah* if she did not have *ishut*. Therefore Henkin moves to explore more thoroughly questions surrounding *pilegesh* as *eishet ish*.

Henkin first seeks to establish that desire for *ishut* creates a relationship that can only be dissolved through a *get*, no matter how a woman becomes *eishet ish*. Critics of civil marriage as *kiddushin* might claim that since the couple does not marry in a *kiddushin* ceremony, the woman does not achieve the same kind of *ishut* offered by a *kiddushin* ceremony. No, Henkin argues, no matter the method by which a woman is

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[40] *Perushei Ibra* 1:4, sec. 7.
[41] *Ravad, Ishut* 1:4; *Teshuvos HaRashba Hameyuchasot LaRamban* 284.

acquired for *ishut*, whether through a *kiddushin* ceremony or through *bi'ah*, she requires a *get*.[42]

Henkin's first proof is from *Gittin* 43a, which discusses the case of a *shifkhah kharufah*, a woman whose status is half as servant and half as freewoman, originating in Leviticus 19:20-22. The biblical passage instructs that the penalty for intercourse with a *shifkhah kharufah* who is betrothed to another man is a guilt offering, not death, but if she had already been given her freedom, the penalty would be death. R. Yishmael teaches that these verses refer to a *shifkhah kina'anit* who is designated for a Hebrew slave. The fact that the penalty for intercourse with the woman if she had been freed is death, the penalty in a case of adultery, demonstrates that her marriage is a real marriage, even though she did not have a *kiddushin* ceremony but married the Hebrew slave through *yihud*. The case of a *shifkhah kharufah* proves that when a couple marries without any specific ritual to effect *kiddushin*, with only the intent to form a marriage, their marriage nevertheless achieves the status of full *ishut*.

Henkin finds more proof in *Kiddushin* 6a that if a man intends *ishut* with a woman, then her resulting status is *eishet ish* and she needs a *get* to dissolve the relationship. The *gemara* investigates the language of *kiddushin* used before Sinai, but it is not clear whether these words describe intention for *kiddushin* or *milakhah*—a relationship of husband and wife or a man and his servant. Those who hold that *pilegesh* is *penuyah* say that the language describes a relationship of servitude, with no intention for *ishut* and no withholding of the woman from sexual relations with other men; in short, the language describes *pilagshut* as they define it. Henkin, however, reads the *gemara* differently. Henkin understands that the question asked by the *gemara* hinges on whether

[42] *Perushei Ibra* 1:4, sec. 8.

or not the man desires *ishut*. If the man intends *ishut*, then the woman is *eishet ish* and requires a *get* if the couples divorces.[43] The *gemara* demonstrates Henkin's point through the following logic: if a *pilegesh* has *ishut* but does not require a *get*, then the *gemara* would have had to ask whether the man wanted her to be his wife or his *pilegesh*, which it does not. Thus the *gemara* teaches that regardless of whether the man wants to establish a relationship of marriage or servitude with the woman, as long as he desires a sexually exclusive relationship, a *get* is needed. If a difference exists in the requirement for a *get* between a *pilegesh* or a wife, then the *gemara* would have had to make that clear. When a man takes a woman into his household with intent for *ishut*, meaning that she will be in a sexually exclusive relationship with him and forbidden to other men, then their *bi'ah* is for the purpose of *kinyan*. The public are *eidim* through the presumption that the couple is living together as husband and wife, as discussed above, and therefore the woman becomes *eishet ish*.

Thus far, Henkin has shown that a *pilegesh* cannot be *penuyah* when the man desires *ishut* with the woman. Once *ishut* is established through a *kinyan* and with *eidim*, the woman—no matter if she is a wife or *pilegesh*—requires a *get* to dissolve the relationship. Thus one of the defining factors dividing a *kideishah* from a *pilegesh* is the man's desire for *ishut* with the woman. Henkin has not yet differentiated *pilegesh* from wife. He has also not taken up the problems Rambam raises regarding the status of a *pilegesh*. Henkin turns to these now.

Rambam's position regarding the law of a *pilegesh* may be assembled through several of his texts. As noted earlier, these statements do not offer unequivocal support for Henkin's understanding of the status of a *pilegesh*, but Henkin proposes a creative

[43] *Ibid.*, sec. 9.

interpretation of Rambam's texts that resolves potential internal contradictions both within Rambam's writings and between Rambam and the *gemara*. Much of this section of Henkin's argument focuses on untangling these contradictions, some of which have no bearing on Henkin's overarching goal of determining the status of a *pilegesh*. This chapter will include only those problems that are directly relevant to Henkin's objective.

The first of Rambam's potential internal problems that affects Henkin's view of *pilegesh* stems from differences between Rambam's list of *mitzvot* and his *Mishneh Torah*. Negative commandment #355 is the prohibition of sexual relations without *kiddushin* and *ketubah*, derived from Deuteronomy 23:18, "Do not have a *kideishah* among the daughters of Israel." Rambam teaches a slight variation of this in his *Mishneh Torah*, however, adding that intention matters, and leaving out the receipt of *ketubah*: "Anyone who has intercourse with a woman for the purpose of *zenut* without *kiddushin* is deserving of lashes from the Torah, because he has had sexual relations with a *kideishah*."[44] The main complication arises from the beginning of *Hilkhot Ishut*, which instructs that before Sinai, if the man and woman agreed, he took her into his house, they had sexual intercourse, and she became his wife. After Sinai, a man must acquire the woman beforehand in front of witnesses, as taught in Deuteronomy 22:13, "If a man takes a wife, and goes in to her...."[45] The implication of the passage is that if a man skips the formal act of acquisition with witnesses and only performs the pre-Sinai action (sexual relations to establish the marriage), then he violates a positive commandment but not a negative commandment; he violates the law that marriage requires *kiddushin* and *ketubah*, but he does not violate the injunction against intercourse without *kiddushin* and

[44] *MT Ishut* 1:4.
[45] *Ibid.* 1:1-2.

ketubah, and the woman is not a *kideishah*.[46] Thus one of Rambam's texts states that sexual relations without *kiddushin* do not create a marriage and the woman is a *kideishah*, and another text states that sexual relations without *kiddushin*, while not preferred, create a marriage and the woman is not a *kideishah*. Quite possibly, then, Rambam teaches that intercourse without *kiddushin* cannot establish a marriage and makes a woman a *kideishah*.

Henkin is concerned by this conclusion. Not only might *bi'ah* without *kiddushin* not serve as a *ma'aseh*, thereby excluding the potential for Jewish marriage outside of a *kiddushin* ceremony, but any woman today who has intercourse outside of marriage might be a *kideishah*. This potential conclusion is further complicated by another of Rambam's texts in the *Mishneh Torah*, which states that a wife has *kiddushin* and *ketubah* while a *pilegesh* has neither.[47] Here, Rambam differentiates between a wife and a *pilegesh* on the basis of *kiddushin* and *ketubah*. Yet did Rambam not state that sexual relations with a woman without *kiddushin* and *ketubah* is forbidden because of the prohibition against intercourse with a *kideishah*? Even more problematic for Henkin, the fact that a *pilegesh* does not receive *kiddushin* and *ketubah* may indicate she is not *eishet ish* and does not require a *get* to dissolve the relationship. The conclusion is precisely the opposite of Henkin's understanding of *pilegesh*. And Henkin *chose* Rambam as the best representative of his position of *pilegesh* as *eishet ish*! In order to resolve these monumental difficulties (and several others not discussed in this thesis) and establish Rambam's position as supportive of *pilegesh* as *eishet ish*, Henkin devises an ingenious, remarkably simple, solution.

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[46] *Ibid.* 1:1.
[47] *MT Milakhim* 4:4.

Henkin's solution is based upon the premise that two kinds of *kiddushin* and two kinds of *ketubah* exist. A *pilegesh* is entitled to one of each type, while a wife receives both kinds of each. In this way, a *pilegesh* can hold a status different from both *ishah* and *kideishah*.

Henkin must first demonstrate that *pilegesh* receives any *ketubah* at all, given that Rambam writes in *Hilkhot Milakhim* that a *pilegesh* is acquired without one. Henkin's proof, coincidentally, emerges from the same passage that teaches that *pilegesh* does not have *kiddushin* or *ketubah*. The relevant part of the *halakhah* reads, "And in this manner the king takes wives and *pilagshim* from throughout Israel: wives, with a *ketubah* and *kiddushin*, and *pilagshim*, without a *ketubah* or *kiddushin*; rather, through *yihud* [*bi'ah*] alone he acquires her and she is permitted to him. But a commoner is forbidden to have a *pilegesh* except a female servant after *yi'ud*."[48] Earlier in his argument, Henkin began discussing *pilegesh* as an *amah ivriyah* in order to explain why a *pilegesh* does not receive a *ketubah*: a Hebrew maidservant does not receive a *ketubah*. Now, based on Rambam's statement, Henkin fully accepts the position that *pilegesh* has the status of *amah ivriyah*. Surprisingly, it is the fact that a *pilegesh* has the status of a servant that entitles her to a *ketubah* as Henkin defines it. In Exodus 21:10, the Torah instructs that after an *amah* has *yi'ud*, her husband may not diminish "*she'eirah*, *kisutah*, *v'onatah*," her food, clothing, and right to sexual relations. According to Henkin, these three requirements serve as a *ketubah* for the *amah*; they are obligations the man promises to the woman. Henkin has broken down what is generally understood as a *ketubah* into the specific commitments a husband makes. A *pilegesh*, as an *amah ivriyah*, receives certain of these pledges, which Henkin calls a *ketubah*, even if Rambam does not call it such.

[48] *Ibid.*

The result, however, is that even according to Rambam, a woman who might be a *pilegesh* cannot be a *kideishah* instead through lack of *ketubah*. Even though the Talmud debates whether or not these three requirements apply to a wife and a *pilegesh* or only a *pilegesh*,[49] they certainly apply to a *pilegesh* as Henkin reads the *sugya*.[50]

Although Henkin has now established that a *pilegesh* receives a type of *ketubah*, he is still concerned that if she receives only a *ketubah* and not *kiddushin*, then the woman might have a lesser status than a wife and potentially not need a *get*. To deal with this possibility, Henkin demonstrates that *kiddushin* and *ketubah* are linked.[51] If a woman has one and not the other, she is not married, and intercourse with her would make her a *kideishah* according to Rambam. Henkin explains the principle in the following way. When a man marries a woman, he obligates himself to the three biblically-derived requirements of *she'ar*, *kisut*, *v'oneh*, and in exchange, the woman agrees to be acquired by the man. If the man does not want to obligate himself, then she does not agree to the *kinyan*. The proof for this idea emerges from Isaiah 4:1, which indicates that a woman might be willing to have a *kinyan* without receipt of the man's three obligations in a time of great difficulty, like war. It is for the woman's benefit that *kinyan* and *ketubah* are linked.

Thus it follows that if the man does not want *ishut* with the woman, to be in a sexually exclusive relationship, they have no *kinyan* and she is a *kideishah*.[52] The status of *pilegesh*, therefore, indicates that the man desires *ishut* with the woman. With desire for *ishut* as the *kavannah*, *bi'ah* as the *ma'aseh*, *eidim* are the final needed requirement

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[49] *B. Ketubot* 47a-b.
[50] *Perushei Ibra* 1:4, sec. 13.
[51] *Ibid.*, sec. 14.
[52] *Ibid.*, sec. 15.

for establishing a *pilegesh*'s status as *eishet ish*. If witnesses exist to the couple's *yihud*, then the woman becomes *eishet ish*, Henkin explains. If no witnesses see their *yihud*, the *pilegesh* does not become *eishet ish*, although she does not become a *kideishah*. When Henkin discussed marriage (with a wife), he held that the public serve as *eidim* through the presumption that the couple is living together in a sexually exclusive relationship that looks like marriage. [53] He did not question whether or not *eidim* might see the couple living together, whereas he does now, in the situation of a *pilegesh* becoming *eishet ish*. With a wife, Henkin has no incentive to admit the possibility that a woman in a stable connubial relationship might not become *eishet ish*. With a *pilegesh*, in order to clear up a potential clash that will arise later in Henkin's argument between his conception of *pilagshut* and one of Rambam's comments, Henkin needs to have the possibility that a man desires *ishut* but the woman does not become *eishet ish*. As with a wife, it is still the case with *pilagshut* that if *eidim* see the couple, the woman becomes *eishet ish*. Henkin has only made explicit the possibility that *eidim* may not see the couple. Furthermore, even though Henkin admits here that *eidim* may not see the couple living together in a permanent, sexually exclusive relationship, Henkin is not seeking to determine whether or not *eidim* actually see the couple, as Feinstein does. Characteristic of their different outlooks on the interaction of *halakhah* with the modern world, Henkin begins with the premise that *eidim* will see the couple, while Feinstein begins with the idea that *eidim* will not see the couple.

Note further that this first part of Henkin's resolution of Rambam's internal contradictions has been about distinguishing *pilegesh* from *kideishah*. To avoid the status of *kideishah*, a woman must receive both *ketubah* and *kiddushin*, but Henkin has not yet

[53] *Ibid.*, sec. 5.

shown that a *pilegesh* has *kiddushin*. Based on Rambam's teaching in *Hilkhot Milakhim* 4:4, Henkin accepts that a *pilegesh* has an act of acquisition called *yi'ud*, which has the same effect as *kiddushin*, in that it betroths a woman. Henkin needs to establish *yi'ud* as a type of *kiddushin* and at the same time, distinguish *yi'ud* from the *kiddushin* of a wife. He turns now to this task.

Kiddushin, like *ketubah*, has two meanings. The first meaning is the marriage itself, whether *yi'ud* or a standard *kiddushin* ceremony. The second meaning of *kiddushin*, Henkin explains, is *kikhah*, literally "taking," prior to the marriage (*nisuin*). Henkin identifies *kikhah* as the positive commandment Rambam derives from Deuteronomy 22:13, "If a man takes a wife, and goes in to her...." For the dignity of Jewish women, *likukhin*, the "taking"—the legal act to establish the marriage—should occur before *bi'ah*. If a man marries by bringing a woman into his house and having intercourse with her, he violates the positive commandment of *kikhah*, even though *kiddushei bi'ah* is technically one of the acceptable methods of *likukhin*.[54] A passage in the Talmud challenges the idea that *kikhah* before marriage is a separate positive commandment.[55] The *sugya* says that Rav would whip those who did *kiddushin* through *bi'ah* because the act is *peritzut*, licentiousness. If *kikhah* is truly a separate *mitzvah*, Rav should have argued instead that the act annuls a positive commandment. He does not, Henkin explains, because *bi'ah* to establish *kiddushin* is *likukhin*. It is *bi'ah* prior to *nisuin*—*kiddushin* before marriage—and thus is itself the sign of honor to Jewish women.[56] Henkin has postulated two kinds of *bi'ah*: one as *kikhah* prior to marriage, and another to establish *nisuin* itself. Henkin has found a way for Rav's statement to support

[54] *MT Ishut* 1:2.
[55] *B. Kiddushin* 12b.
[56] *Perushei Ibra* 1:4, sec. 17.

kikhah, but he ignores Rav's point that people ought not to marry through *bi'ah*, even if it is a halakhically valid method.

Kiddushin, then, is *ishut* with a wife. A *pilegesh* has *ishut*—the man intends to establish a permanent, sexually exclusive relationship with her. A *pilegesh*, however, has *ishut* without the second definition of *kiddushin*. The man is not obligated to fulfill the separate positive commandment of *likukhin* prior to marriage. A *pilegesh* does not have this separate ceremony, because *yi'ud* does not include this type of *kiddushin*, but only the indication that the man desires *ishut*. A wife, however, has both *likukhin* prior to marriage and the *kiddushin* of marriage itself. In this way, Henkin establishes that a *pilegesh* has *kiddushin*, and thus the woman cannot be a *kideishah*, but she is not a wife, either, because she does not have the *kiddushin* of a wife.

As discussed above, Henkin has divided *ketubah* into the component parts that a husband pledges to his wife. The first meaning of *ketubah* as Henkin defines it is the three biblically-derived requirements of *she'ar*, *kisut*, *v'oneh*, of food, clothing, and sexual relations. The second definition of *ketubah* is the standard monetary formulae mentioned in a traditional written *ketubah*. The amount is whatever is customary for the community in which the couple lives. A *pilegesh* does not receive this second type of *ketubah*.[57] At this point, Henkin has finished the task of separating *pilegesh* from *ishah*, wife. The dividing line between *pilegesh* and *ishah* is the types of *ketubah* and *kiddushin* each receives.

Henkin makes one more note on the status of a *pilegesh* in order to discuss the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*." Henkin emphasizes that if the man does not want *ishut*, then the woman is a *kideishah*. Desire for *ishut*, Henkin argues, is the

[57] *Ibid.*, sec. 18.

underlying principle that the *gemara* uses in deciding whether or not to apply the *hazakah*. He asks, "If you were to say that there is no prohibition on a woman setting herself aside for a single man even if he does not want a *kinyan* with her, why would we need the *hazakah*?"[58] The *hazakah* is necessary only because the man must desire *ishut* with the woman, or she is a *kideishah*. Without saying so explicitly, Henkin is criticizing those who hold that *pilegesh* is *penuyah*, who understand, as mentioned above, that a woman may avoid being a *kideishah* by setting up a sexually exclusive relationship with a man.

As proof for his position, Henkin discusses the case of rape or seduction.[59] It is here that Henkin reopens the possibility that *eidim* do not see the couple living together, with the result that the woman does not become *eishet ish*. The standard case of a rapist or seducer, in which sexual relations do not establish *ishut*, seems to violate the prohibition against *kideishah*. Henkin explains, however, that since the rapist or seducer can say that he intends to have a *kinyan* with the woman, there is no problem with *kideishah*. The woman's father may refuse the union, but even so, she would not be a *kideishah*.[60] Henkin's principle is that "in every case in which he intends and desires a *kinyan*, then she is not a *kideishah*, even if he never establishes *ishut* with her, for whatever reason: a lack of *eidim*, or her father refuses."[61] Thus because in a case of rape or seduction the man can desire *ishut*, the woman will not be a *kideishah* even if he never marries her. The case is parallel to use of the *hazakah*: if desire for *ishut* is present, even if it remains unfilled, then the woman is not a *kideishah*.

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[58] *Ibid.*, sec. 19.
[59] While today we may view rape and seduction as separate situations requiring different responses, Jewish law deals with them in a similar manner.
[60] *Perushei Ibra* 1:4, sec. 15.
[61] *Ibid.*, sec. 19.

Henkin concludes his long argument by reviewing the potential for a *pilegesh* today. On this question, Henkin follows Rambam, who teaches that *pilagshim* are forbidden today, except for an Israelite king.[62] First of all, no one—king or commoner—is permitted to acquire a *pilegesh* through *bi'ah* until he fulfills the *mitzvah* of "*ki yikakh*," the *kikhah* of acquisition before *nisuin*. Since *kikhah* is only performed with a wife, *pilagshim* are permitted only after a man is married, even for a king. If a king has already fulfilled the *mitzvah* of "*ki yikakh*," then he may have a *pilegesh*, without a prior *kikhah* and without the kind of *ketubah* that applies to a wife. This practice is forbidden to everyone else, who may only acquire an *amah ivriyah* as a *pilegesh* if they do *yi'ud* first as a type of *kiddushin*. Yet *pilegesh* applied only when *yoveil* was in effect; there is no indentured servitude today.[63] As further proof that *pilagshut* does not exist today, Henkin notes that the Talmud never discusses *pilagshut* as an existing legal institution, but raises the issue only in the context of explaining biblical verses.[64]

Through the discussion of *pilegesh*, Henkin has presented the case that if a woman has a civil ceremony, she receives both *kiddushin* and *ketubah*. The man desires *ishut* with the woman, so she will have a *kinyan* of marriage, and she receives pledges from the man in return for her consent to acquisition. When *eidim* see the couple's relationship, the woman becomes *eishet ish*. Every kind of *eishet ish* requires a *get* to dissolve the relationship, regardless of whether the marriage was established through *bi'ah* or a standard *kiddushin* ceremony. For all of these reasons, a woman who marries in a civil court alone is considered married under Jewish law, with no lesser status than any other Jewish wife.

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[62] *MT Milakhim* 4:4.
[63] *Perushei Ibra* 1:4, sec. 19.
[64] *Ibid.*, sec. 20.

In the absence of many of the details of Henkin's argument, it is hard to see the brilliance of his solution to the potential difficulty of *pilegesh* with civil marriage. Henkin's conclusion is relatively straightforward: when a man desires *ishut* and a woman receives *kiddushin* and *ketubah*, then through intercourse and public knowledge of their permanent, sexually exclusive relationship, the woman becomes *eishet ish* and requires a *get* in case of a divorce. Yet with this simple conclusion, Henkin is able to resolve numerous ambiguities in Rambam's statements regarding the differences between *ishah*, *pilegesh*, and *kideishah*. For example, Henkin's formulation that intention for *ishut* is needed or the woman is *kideishah* addresses different problems in cases of a minor orphan, a rape or seduction, *shifkhah kina'anit* (Canaanite slave), *shifkhah nikhrefet* (freed Canaanite slave), and a statement in Targum Onkelos, a 2nd century Aramaic translation of the Torah. With a minor orphan, the Torah says that there is no *kinyan* with her, so one might think that she is *kideishah*. Not so, Henkin explains. Since they both desire *ishut* and it is the law that refuses to grant them *kinyan*, this is not a situation of *kideishah* because of lack of *ishut*. The case of a rape or seduction is similar, as seen above; the man may desire *kinyan*, but the woman's father might refuse the union. A *shifkhah kina'anit* cannot have *kiddushin*, but Henkin understands that if the man sets her aside, then she is not a *kideishah*. And so on. Henkin is able to untangle many aspects of *halakhah* through his theory of *pilagshut*.

At this point, Henkin clears up several potential challenges to his position, but he does so in a way that indicates that he has concluded his argument and these final matters present no serious difficulty. Henkin reads biblical sources dealing with *pilegesh* and explains how they indicate that *pilegesh* holds the status of *eishet ish*. He reads Tosafot

on *Gittin* 6b, and Ramban, and other medieval commentators who hold that *pilegesh* is *penuyah*, and demonstrates how their statements do not violate Henkin's understanding of *pilegesh* as *eishet ish*.

The last point in Henkin's *pesak* deals with a potential objection in the type of case that gives rise to the need for the *pesak* in the first place: a woman wants to (re)marry following a civil marriage and divorce but does not have a *get* because the man refuses or cannot be found. Some might argue that since the man ran away, he never desired *ishut* in the first place. Henkin responds that the man's actions subsequent to the marriage ceremony do not make any statement about his original intention. A Talmudic case[65] in which the rabbis act upon a man's unstated intention does not apply to marriage, Henkin asserts. With marriage, the fact that the man does something afterwards that indicates he does not want the marriage does not alter the validity of the marriage. The *kinyan* has already taken hold.[66] With this paragraph, Henkin responds to Feinstein's claim that because civil divorce was available in Hungary, the couple could never fully intend to be married at the time of their initial ceremony. The option of dissolving their relationship was always before them, so intent for *ishut*, Feinstein claims, could not be established. Henkin counters that intent for marriage, once acted upon, cannot be retroactively annulled.

Henkin's primary argument regarding civil marriage as *kiddushin*, it will be recalled, is that intent for *ishut* is the needed *kavannah* to establish *kiddushin*. It is much easier to ascertain that this standard has been met than Feinstein's position that the needed *kavannah* is intent to fulfill the *mitzvah* of *kiddushin*. In addition, due to his

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[65] *B. Hullin* 39b.
[66] *Perushei Ibra* 1:4, sec. 23.

outlook on the interaction of *halakhah* with the secular world, Henkin is more willing to say that what looks like marriage, is marriage. For these reasons, when Henkin turns to the question of whether or not marriage ceremonies in Reform settings result in *kiddushin*, the answer requires no new arguments, unlike Feinstein's position on the topic. Henkin's understanding of how the three requirements of *kavannah*, *eidim*, and *ma'aseh* are fulfilled through a Reform ceremony also shows how uncomplicated Henkin's conception of *kiddushin* is.

Kavannah for marriage in a Reform setting—indeed, any marriage, according to Henkin—is established through the man's desire for *ishut*. The couple needs only to want to be married, and their intention remains in effect until the requirements of *ma'aseh* and *eidim* have been met. Consequently, the couple does not need to have a particular intention in mind at the time of their first *bi'ah*, even though they may not have completed a *ma'aseh* during their ceremony. Their *bi'ah* will serve as *ma'aseh* nevertheless. Furthermore, kosher *eidim* are not needed at the ceremony. When valid witnesses see that the couple is living together in a relationship that looks like marriage, the public becomes *eidim* through *anan sahadei*. The fact that the couple is married is a matter of public knowledge, an idea apparent to all who see the couple, and thus comparable to the presence of actual witnesses at the ceremony. Application of the *hazakah* "*ein adam oseh be'ilato be'ilat zenut*" is unnecessary because the couple's intention for *ishut* is demonstrated both through their marriage ceremony and through living together in a stable, monogamous relationship. Henkin does not need to ask if the *hazakah* can be applied to *mumarim* (or even if Reform Jews are *mumarim*), because level of observance cannot affect a bond of *ishut*. Lastly, Henkin established that no

matter where the ceremony takes place, the resulting bond is *ishut*. A woman becomes *eishet ish* through a Reform ceremony and requires a *get* in case of divorce.[67]

Thus although many assumptions about Reform Jews and Reform Jewish practice color Feinstein's interpretation of *kiddushin* in a nontraditional setting, Henkin does not share Feinstein's assumptions about non-Orthodox Jews. Non-Orthodox Jews are to be considered part of the Jewish community, because as explained, Henkin believes that a Jew can move freely between the religious and secular worlds. Lack of religious observance is not indicative of immorality, as Feinstein would have it, so Henkin will not exclude non-Orthodox Jews from the Jewish community on the basis of nonobservance. Furthermore, since a Jew may live in both the religious and secular worlds, Henkin insists that s/he retain the same personal status in each setting. An individual cannot be held as both married and single at the same time. In fact, Henkin asserts in an open letter to Feinstein,[68] the cost to the Jewish community of doing so is too great to bear, as it "is likely to cause destruction over *yihus* in Israel." Henkin is incredulous that Feinstein would allow a woman to remarry without a *get* simply because her original wedding ceremony took place in a Reform setting. Feinstein's position, Henkin believes, would destroy the sanctity of Jewish marriage, negating any presumption of married status. We cannot tear apart the Jewish community in this way, he argues.

Henkin's worldview that *halakhah* and the modern world are linked emerges clearly in *Siman* 4 and his open letter on *kiddushin* by Reform rabbis. Henkin believes that in contemporary society, in which the secular and religious exist in much closer relationship than in pre-Enlightenment times, personal status must cross the boundaries

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[67] *Perushei Ibra* 1:76.
[68] *Ibid.*

between the two worlds. In addition, he assumes that events and ideas in the nonreligious world may effect a positive change on halakhic status. These assumptions underlie Henkin's textual interpretation and choice of precedent. They lead to his ruling that desire to be married is sufficient to establish the requirement of *kavannah* for *kiddushin*. They lead to Henkin's idea that the public's impression that a couple is married is *eidut gemurah*, complete *eidut*. His assumptions lead directly to his conclusion that if a couple today solemnizes a long-term, monogamous relationship, then no matter the setting in which the individuals marry, Jewish law considers them married. The nature of Henkin's assumptions places him on the left within the Orthodox world. Ironically, then, it is by virtue of Henkin's left-wing outlook that he reaches a strict conclusion—a woman married in a nontraditional setting requires a *get*.

Epilogue: Halakhic Decision-Making Today

The approaches of R. Moshe Feinstein and R. Eliyahu Henkin to the question of nontraditional marriage as *kiddushin* are strikingly dissimilar. Although the two rabbis delve into the same textual tradition, they prioritize concepts differently, their interpretations of the sources frequently are incompatible, and to some extent, their precedents differ. This thesis has argued that the *posek*'s view of *halakhah* in the modern world strongly influences his textual interpretation during halakhic decision-making. Underlying assumptions about the interaction of *halakhah* with the nonreligious world today account for the widely divergent opinions of Feinstein and Henkin on the subject of civil and Reform ceremonies as *kiddushin.*

Interestingly, these underlying assumptions lead to counterintuitive conclusions on the question of nontraditional marriage as *kiddushin.* Feinstein, whose more right-wing view of the world recognizes only the validity of *halakhah* and its followers, reaches a lenient conclusion: civil and Reform ceremonies are not *kiddushin*, so the woman does not require a *get* to dissolve the relationship. Henkin, whose more left-wing approach accepts the reality of the secular world, arrives at a stricter halakhic conclusion: marriages in nontraditional settings effect *kiddushin*, so divorce necessitates a *get*. One would have expected that the more right-wing decisor would reach a stricter conclusion, and the *posek* farther on the left within Orthodoxy would reach a more lenient view. Here, however, the right-wing decisor, *by virtue of his right-wing argument*, reaches a lenient conclusion and the left-wing decisor, again by virtue of his left-wing argument, reaches a strict conclusion.

The question of nontraditional marriage as *kiddushin* therefore drives a "natural" wedge between argument and outcome in *halakhic* decision-making. Imagine a future halakhist whose inclinations lean toward the right within Orthodoxy. If such a person is ruling on nontraditional marriage as *kiddushin* and cites Feinstein or Henkin as precedent, that halakhist has to make a choice. If he accepts Feinstein as precedent, then he can embrace a more right-wing argument that better suits his worldview, but then he must accept a lenient conclusion. Alternatively, the *posek* can cite Henkin and reach a strict conclusion in keeping with his general preference, but only by embracing a more left-wing argument. Our theoretical, right-wing halakhist cannot both embrace a right-wing argument *and* reach a right-wing conclusion. He must choose whether the argument or the conclusion is more important to him.

A similar tension between argument-based decision-making and outcome-based decision-making has been a subject of considerable debate among students of secular judicial decision-making.

Scholars who advocate the "legalist model" hold that judges in common law systems are or ought to be bound in their judicial decision-making by deference to a variety of legal rules and judicial norms.[1] To greater or lesser degrees, these legalist scholars believe that judges primarily are motivated not by their personal preferences over outcomes, but rather by the need to make decisions based on legally valid arguments and principles. Such scholars, in general, do not embrace the strict claim that there is one correct decision based on legalist principles. They do, however, contend that a legalist

[1] For example, Robert H. Bork, *The Tempting of America* (New York: Free Press, 1990); Bruce A. Ackerman, *We the People* (Cambridge: Harvard University Press, 1991); Ronald Dworkin. *Law's Empire* (Cambridge: Harvard University Press, 1986).

judge is motivated to make legal judgments in accordance with established principles as he or she understands those principles.

Other scholars have challenged the legalist model, proposing instead the "policy-oriented model," two prominent examples of which are Segal and Spaeth's "attitudinal model"[2] and Knight and Epstein's "strategic model."[3] Scholars who adopt this approach contend that judges are motivated not by judicial norms and legal rules, *per se*, but rather by the desire to see their personal policy preferences implemented. Still other scholars argue that policy-oriented judges adhere nonetheless to a variety of established judicial norms because such norms are useful in implementing their policy preferences.[4] Both sides in the debate over the sources of judicial decision-making marshal empirical evidence to support their claims.

One can easily conceive of models of halakhic decision-making that would parallel these two models of judicial decision-making. A "legalist" *posek* would be concerned primarily with making a halakhic decision in accord with precedents and sound halakhic arguments and principles as he understands them, even if such an argument led to an undesirable outcome. A "policy-oriented" *posek*, in contrast, would be concerned primarily with reaching the conclusion he wanted, even if he had to make an unwanted argument in order to reach that conclusion.

In general, Orthodox *poskim* would not declare themselves to be "policy-oriented" decisors (and neither would most judges). Since *halakhah* is understood by

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[2] Jeffrey A. Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993).
[3] Jack Knight and Lee Epstein. *The Choices Justices Make* (Washington, DC: CQ Press, 1998).
[4] For example, Ethan Bueno de Mesquita and Matthew Stephenson, "Informative Precedent and Intra-Judicial
Communication," *American Political Science Review* 96:4 (2002): 755-766; Jeffrey R. Lax, "Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four," *Journal of Theoretical Politics* 15:1 (2003): 61–86.

Orthodox Jews to be Divine revelation, it is deemed inappropriate to begin with the conclusion and then formulate an appropriate argument. As J. David Bleich says, "The law must be determined on its own merit and let the chips fall where they may."[5] Yet it is clear that the desire for a particular outcome influences, both overtly and covertly, halakhic decision-making.

The halakhic process incorporates a number of elements that allow *poskim* to reach a preordained conclusion in an open manner. These include special principles that permit *poskim* to rule based upon the effect of their ruling. Examples of these rules are *hora'at sha'ah* (a temporary decision),[6] *le-migdar milta* (to safeguard the matter),[7] *la'asot seyag la-Torah* (to create a protective boundary for the Torah),[8] and *eit la'asot ladonai* (a time to act for God).[9] While these principles generally are reserved for situations of emergency, they have been employed throughout Jewish history.[10] In addition, the principle that *poskim* should rule leniently in situations of *igun* and *mamzerut*[11] also favors a particular conclusion, in many cases, before specific arguments are formulated.

Desire for a particular halakhic conclusion also affects decision-making in a more subtle manner. For example, halakhic decision-making based on outcome played a large role in defining the boundaries of newly formed Orthodox communities. In several cases, Orthodox rabbis set conclusions based on opposition to Reform practices, as with Chatam

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[5] J. David Bleich, *Contemporary Halakhic Problems, Volume I* (New York: KTAV Publishing House, Inc., 1977), xv.
[6] *MT Mamrim* 2:4.
[7] *B. Yevamot* 90b.
[8] *Ibid*; *B. Sanhedrin* 41a.
[9] *B. Temurah* 14b; *M. Berakhot* 9:5; *B. Yoma* 69a.
[10] Elon, 536, n.177.
[11] *SA EHE* 17:1ff.

Sofer's injunction against prayer in the vernacular.[12] David Ellenson has argued convincingly that Orthodox rabbis brought their preferences for certain conclusions to the responsa they wrote.[13] Rabbi Marcus Horovitz of Frankfurt, for instance, in order to promote his opinion that Orthodoxy should remain within the larger Jewish community, ruled that it is a *mitzvah* to circumcise the son of a Jewish father and non-Jewish mother. By doing so, he sought to bring the family back into Judaism.[14] Halakhic decision-making in which the conclusion is known but undeclared in advance also takes place when *poskim* seek to insert halakhic support under a practice already widespread in a community. One example of this practice occurred in the Middle Ages, when Jewish law recognized new modes of acquisition that the Talmud had not considered legally valid.[15] Rabbis engaged in this practice of *ex post* halakhic rationalization in every generation.[16]

As Mark Washofsky argues, the fact that a *posek* knows his halakhic conclusion in advance does not make it an invalid conclusion.[17] The *posek* must still make a halakhic argument based upon traditional sources, using the halakhic process. Validity of a *teshuvah* or *pesak* does not rest on its objective nature, but on its ability to persuade the audience for which it is intended that its legal argument is valid.[18] Thus the fact that a

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[12] Meyer, 58.
[13] See "Jewish Legal Interpretation: Literary, Scriptural, Social, and Ethical Perspectives," *Semeia* 34 (1985); The Role of Reform in Selected German-Jewish Orthodox Responsa: A Sociological Analysis," *Hebrew Union College Annual* LIII (1982); *Tradition in Transition: Orthodoxy, Halakhah, and the Boundaries of Modern Jewish Identity* (Maryland: University Press of America, 1989); *After Emancipation: Jewish Religious Responses to Modernity* (Cincinnati: Hebrew Union College Press, 2004).
[14] Ellenson, "Accommodation, Resistance, and the Halakhic Process: A Study of Two Responsa by Rabbi Marcus Horovitz of Frankfurt," in *Jewish Civilization: Essays and Studies in Honor of Mordecai Kaplan's 100th Birthday*, Vol. 2, ed. Ronald Brauner (Philadelphia: Reconstructionist Rabbinical College Press, 1981): 83-100.
[15] Elon, 914-916.
[16] *Ibid.*, 881, 911.
[17] Mark Washofsky, "*Halakhah* in Translation: The Chatam Sofer on Prayer in the Vernacular," *CCAR Journal* 51:3 (2004): 156.
[18] Washofsky, "Responsa," 19-20.

posek interprets his sources with a goal in mind does not detract from the conclusion's status as *halakhah*.

If we accept that there may exist both legalist and policy-oriented *poskim*, the subject of civil and Reform ceremonies as *kiddushin* provides an opportunity to gain insight into what motivates halakhic decision-making today. It does so by creating a "natural experiment." As already discussed, a *posek*, depending on either Henkin's or Feinstein's ruling as precedent, must choose between the pairing of a right-wing argument and a lenient outcome or the pairing of a left-wing argument and a strict outcome. One might expect, however, that in general *poskim* fall into one of two types: *conservatives* who favor right-wing arguments and strict outcomes and *liberals* who favor left-wing arguments and lenient outcomes.

The fact that a modern halakhist is forced to choose between the type of argument he prefers and the outcome he prefers means that how he decides cases involving Reform or civil ceremonies reveals information about whether his decision-making is primarily legalist (i.e., informed primarily by the desire to make the right argument from his perspective) or policy-oriented (i.e., informed primarily by the desire to reach the right outcome from his perspective). Consider, for instance, a *posek* who in general favors left-wing *halakhic* arguments but is also concerned with the problems of creating more *agunot* and *mamzerim*. Such a *posek*, in deciding whether to employ Feinstein's *teshuvah* or Henkin's *pesak* as precedent, must choose whether to follow the opinion that matches his preferred type of argument (i.e., Henkin) or the one that matches his preferred outcome (i.e., Feinstein). If that *posek*'s decision-making is best described by a legalist

model, then he would be more likely to follow Henkin. If his decision-making is best described by a policy-oriented model, he would be more likely to follow Feinstein.

More generally, this wedge between argument and outcome creates an opportunity to study empirically the determinants of modern halakhic decision-making. If we were to discover that right-wing *poskim* overwhelmingly defer to Feinstein and that left-wing *poskim* overwhelmingly defer to Henkin, this would constitute evidence in favor of a legalist model of halakhic decision-making. If we were to find the opposite, that right-wing rabbis defer to Henkin and left-wing to Feinstein, this would constitute evidence for a policy-oriented model of halakhic decision-making. By surveying the opinions of contemporary rabbis, we can ascertain whether argument or outcome is playing a greater role in the development of *halakhah* today.

Limits exist on the extent to which the conclusion of such a survey can be generalized. The primary constraint arises from the fact that the question involves the problem of *agunot* and *mamzerim*, and rabbis traditionally have gone to great lengths to avoid bestowing these statuses on individuals. Perhaps the potential for *agunot* and/or *mamzerim* skews decisions towards the side of outcome. It would not be surprising for rabbis today to express a preference for obtaining a *get*, but be willing to rule leniently for the sake of the woman applying to them for a halakhic decision on her personal status.

A second consideration might cause rabbis to gravitate either to Feinstein or Henkin. While both rabbis' interpretations of the sources were seen as valid when they were published, perhaps, in the ensuing decades, one opinion has come to be seen as false. If the two opinions are no longer considered equally halakhically possible, then a survey of rabbis' choices today on this subject will not yield information about

preference for argument or outcome. The survey would only demonstrate that public opinion has coalesced around a particular argument and conclusion, but not whether argument is preferred over outcome in halakhic decision-making today.

Thirdly, whether rabbis today rule based on argument or outcome may be influenced by the community in which they live, especially on a question as fraught with communal controversy as whether or not Reform ceremonies should be considered *kiddushin*. In smaller Jewish communities, Jews of varied backgrounds maintain closer relationships than in larger Jewish communities, in which the need for Jews of different backgrounds to rely upon each other is lessened. Therefore, a rabbi in a small community deciding whether or not to call a Reform ceremony *kiddushin* is motivated by different communal considerations than a rabbi in a larger Jewish community. For this reason, it will be preferable to survey rabbis who live in comparable Jewish communities.

Even though several potential problems exist for interpreting the data, a survey of the decisions rabbis make today on the question of nontraditional marriage as *kiddushin* would still be informative about the nature of halakhic development. Rabbis *are* deciding this issue in their communities, and understanding their priorities in doing so will allow us to compare contemporary halakhic decision-making with that of previous generations. Halakhic decisions have always been influenced by the social and political realities of Jewish communities. The Enlightenment, however, brought momentous changes to Jewish communities, in ways never before fathomed. Whether rabbis altered the nature of halakhic decision-making in response to their new situation is a compelling question touching upon the very heart of Jewish tradition. By examining the preference of rabbis

today for argument or outcome, we can begin to unlock one small part of this complex question.

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