

Egalitarian *Kiddushin*:
Same – Sex and Mixed – Sex Marriages

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DEDICATION

I begin by dedicating this work to the *Makom*. To Him do I sing praises and give thanks as the source of blessing within my life and who has enabled me to reach this day.

In reaching this day, I also thank my teachers and rabbis. I am forever grateful to my thesis advisor – Rabbi/Dr. Mark Washofsky. From the time I discovered his work as an undergraduate student, his words have transformed my understanding of *halakhah* and Reform Judaism. His teachings have enabled me to proudly take my place in the line of Reform Rabbis who have come before me. I am also indebted to Dr. Alyssa Gray, who has taught me not only how to read *halakhah* as a genre, but also for the theology and *aggada* contained within its pages. Finally, I want to thank my *rav*, Rabbi Evan Jaffe. His leadership and inspiration continue to inspire my work and his guidance through times of joy and sorrow cannot be measured.

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I. Introduction

It may seem strange to be devoting so much time and energy to the issue of keeping a couple together in the present age, when so many marriages end in divorce. I do not believe, however, that my efforts are in vain. It has not been the character of the Jewish people to simply take reality and accept it for what it is. Instead, we confront the issues and we strive to make things better, to sanctify the profane and to try and live up to the age-old charge – to be a *l'or goyim*.¹ We take up this charge as we confront the challenges and issues of our era.

In our day and age, we find that one of the most difficult issues is the issue of marriage. There is difficulty in defining what marriage is as well as who has the rights to marriage. Currently, the secular courts of the United States of America are wrestling with these questions. Most recently, the Supreme Court has struck down the Defense of Marriage Act and now State courts are attempting to reconcile law with the will of the people.

Just as the secular world is revisiting the issue of marriage, our Jewish leaders are struggling with the role of marriage in the Jewish world. As in the secular legal system, the *halakhic* system is wrestling with the place of the woman and her lack of power within a marriage, as well as the status of individuals of the same – sex who wish to enter into a sacred union. It is our sacred obligation to provide Jewish answers to these questions and this essay is one more link in the chain of tradition of trying to solve these

¹ According to the interpretation of Rabbi David Kimhi, this means that Jews are to teach and instruct the world in the ways of the Seven Noahide commandments (Novak, (2005) pg. 52). The Seven Noahide commandments are as follows: Prohibition of idolatry, murder, theft, sexual immorality, blasphemy, eating flesh of a live animal and the establishment and maintenance of a court system.

questions within the boundaries of the Jewish legal method.

The purpose of this paper is to explore the issue of *kiddushin* and to propose a method for allowing *halakhic* egalitarian *kiddushin* in both mixed-sex as well as same-sex marriages. It should be noted here that by choosing to define *kiddushin* as egalitarian, it is a clear departure from its use in the past and is the corner stone of this work. In order to arrive at this conclusion and to definitively state that it is *halakhically* possible to see *kiddushin* in this manner, I have setup this paper in the following manner.

The first chapter of this work explores the legal world of the Ancient Near East, as it relates to marriage. This is to provide a context for the world our early rabbinic Sages who created the term *kiddushin*, and to provide evidence that their understanding of marriage may very well have been influenced by their contemporary world. The evidence provided in this chapter will add a key part to my argument as follows: I will argue that our Sages' understanding of *kiddushin*, through the generations, has been influenced through the social context of each era, and that my method of evaluating *kiddushin* in the context of my contemporary world is no different.

Following this chapter, we will explore the early Jewish legal tradition. The texts presented will trace the concept of marriage from the Torah to the Mishnah and into the Talmud. This will frame the how the concept of *kiddushin* entered into the Jewish legal tradition, became influenced by the secular world, and then enshrined by our Sages within Jewish/Rabbinic law.

After exploring the early legal tradition, we will then shift our focus to the medieval era and the world of the *Rishonim* and early *Ahronim*. Through the study of selected texts from this era, roughly 1100 – 1650 C.E., we will see how the concept of

kiddushin continued to evolve within the Jewish world as well as the evolution of the marriage ceremony itself. All of these will be vital pieces of information in tackling the issue of creating the concept of egalitarian *kiddushin*.

Shifting from the medieval world, we will turn our attention to an overview of the development of the Reform approach to Jewish marriage and then a chapter on Reform and Conservative approaches to same – sex marriage.² By tracing the development of liberal Jewish law, we will see how the leaders of both denominations took both the tradition and the context of the world they lived in, in order to adapt Judaism to their time and place. Furthermore, within the corpus of these works, we will also find precedent for changing not only the meaning and understanding of *kiddushin* but the wedding ceremony as well.

At this point, the necessary information will be gathered that will enable me to present the goal of this paper – a proposal for egalitarian *kiddushin* (betrothal) for both same-sex and mixed-sex marriages for the Reform Movement. Through this proposal and the tracing of the development of the concept of *kiddushin* within *halakhah*, I will have demonstrated how Jewish law changes and adapts itself in each generation. The voice of liberal Rabbinic Law that is expressed within this paper is but yet another valid link within the *shalshet ha-kabbalah*.³

II. Betrothal Laws in the Ancient Near East

² For an example of an approach in the Modern Orthodox world, see Rabbi Shmuly Yanklowitz and “5 Reasons Being an Orthodox Rabbi Compelled Me to Support Gay Marriage” (2013) www.huffingtonpost.com/rabbi-shmuly-yanklowitz/orthodox-rabbi-gay-marriage_b_4452154.html.

³ For an understanding of how Jewish law does not speak with one voice, even within the Orthodox world, see Rabbi Mark Washofsky’s work “Against Method: Liberal Halakhah Between Theory and Practice” in Walter Jacob, ed., *Beyond the Letter of the Law: Essays on Diversity in the Halakhah* (Pittsburgh: Rodef Shalom Press, 2004), pp. 17-77.

A. Introduction

Jewish law began within the world of the Ancient Near East. As the Israelites and then Jews lived and worked within a cosmopolitan world, their world influenced the way in which they thought of themselves and their laws. Through the centuries, *halakhah*, the name that Jews would give to their legal system, developed and changed in response and reaction to this world. Therefore, it is necessary to understand the legal world of some of the most important cultures before we venture into the world of Jewish law – Assyrian, Babylonian and Roman and briefly, the status of woman in the Roman world.

The first two sets of laws – Assyrian and Babylonian – are contemporary with the *Torah* and the third, Roman, is contemporary with early Rabbinic Law. The dates for the Assyrian and Babylonian legal systems are roughly 800 – 330 B.C.E. Since the final redaction of the *Torah* is commonly placed around the end of the 5th century B.C.E, it is logical to compare these legal systems with the *Torah*.

On the other hand, the earliest roots of the Roman and Rabbinic legal systems began around the 5th and 2nd centuries B.C.E. respectively, and continued on into the third and fourth centuries of the Common Era.⁴ Furthermore, just as the Babylonian and Assyrian empires ruled the area that encompassed the land of Israel and the population of the Ancient Israelites, so too did the Roman Empire encompass not only the land of Israel, but the majority of the Jewish population as well. Due to the development of Jewish Law, both biblical and rabbinic, that occurred under the political rule of these empires, it is necessary to look at the betrothal and marriage laws of these populations in

⁴ The Rabbinic legal system continued to develop well after this period. For the purposes of brevity, this paper will not go through every era of Rabbinic Law. Instead, I have chosen to focus our attention onto key eras and texts for our study.

preparation for our discussion on the Jewish legal practice.

B. Assyria and Babylon

The Babylonian and Assyrian legal systems contained legal procedures for marriage betrothals. According to E. Neufeld, “the betrothal was a legal covenant between the bride’s father and mother on the one part, and the bridegroom’s father on the other, whereby the former undertook to give their daughter in marriage.”⁵ Furthermore, the ceremony from betrothal to marriage was not immediate and was broken into the steps of betrothal and then marriage. A passing of gifts from the bride’s house to the house of her husband took place and there was a penalty to pay if the betrothal agreement was broken and the betrothed woman was obligated “to be faithful to her future husband.”⁶ Once this transfer took place, the bride and groom became known as “wife” and husband,” though no consummation could take place until after the marriage ceremony.⁷

After bride and groom took the titles of “wife” and “husband,” the law subjected the couple to new sets of laws. For example, the Code of Hammurabi makes it clear that it is a capital offense if one were to violate the “wife” of a “groom.” This would indicate to us that after a complete betrothal ceremony, one could conclude that its actions would create a legally binding, possible marital (or pseudo-marital) relationship between the “bridge” and “groom.”

It is important to note that these rules of marriage were quite developed and it will become apparent that a “two-step” process, from betrothal to marriage, is similar to what

⁵ Neufeld 145. The gift that was paid to the family of the bridegroom was known as the *Tirhatum* in Babylonia and *Teirhatum* in Assyria.

⁶ Neufeld, (1944) pg. 145.

⁷ Neufeld, (1944) pg. 143.

will we find in Roman and Rabbinic law. This process was also more than just the passing of a “gift.” The *Tirhatum/Teirhatum* actually “created a binding legal relationship.”⁸ The act of the bride and groom becoming betrothed to one another and then the completion of the marriage ceremony resulted in the “discharge” of the betrothal contract. It is important to note, however, that the betrothal only took effect once there was an actual exchange of gifts from the family of bride to bridegroom. Once this occurred, the betrothal laws became applicable upon the bride. For example, she needed to remain faithful to her husband, and should she fail to observe these laws, whether by force or by consent, charges and penalties could be brought on behalf of the groom.⁹

C. Greco – Roman World

Moving from the world of Babylonia and Assyria to that of Rome takes one to a much more complicated legal tradition.¹⁰ In the legal system of Rome, the concept of

⁸ Neufeld, (1944) pg. 145. Though a relationship was created, it did not require a legal divorce to break this agreement. In rabbinic law, there are discussions of what breaking the betrothal (*kiddushin* in Rabbinic Law) required and if a *get* would be required.

⁹ Neufeld, (1944) pg. 146. According to Boaz Cohen, we find the following comment comparing Jewish law to Roman law in yKid 1 as follows: “ ‘Thus far we have learnt the form of betrothal in Jewish law, but how is it with the gentiles, to which R. Abbahu in the name of R. Eleazar replied: Sexual commerce with a married, but not a betrothed woman, constitutes adultery in their law...’ and finally they conclude in a quite categorical fashion that betrothal has no legal significance in the pagan legal economy – להם קדושין אין להרי למדנו גוים אין”, (1966), pg. 218. Also of note is the fact that “curious parallels exist between the Tannaitic law of betrothal and *Sponsalia* of classical Roman Law, whereas these particular rules are missing both in Biblical and pre-classical Roman Law”, (1966), pg. 286. Furthermore, there is a reference in *B. Sanhedrin* 57b to the recognition, by the rabbis, that the Gentiles have a one-step marriage process unlike the two-step marriage process under Rabbinic Law of *kiddushin* and then *nissuin*. The Talmud states בעולת בעל להן יש להן, נכנסה לחופה ולא נבעלה אין להן which means that a woman betrothed could is not considered in a state of “pre-marriage” and forbidden to all others, which occurs in the first state under Rabbinic Law.

¹⁰ It is worth mentioning here, in brief, that the concept of *Kiddushin* is perhaps closer to the ancient Greek concept of ἐγγύησις (*engyesis*/betrothal). In this legal system, the concept of *engyesis* “was less an act of affiancing than the beginning of the married state

betrothal was known as *sponsalia*.¹¹ The act of betrothal for Romans meant that a contract would be signed between the father of the bride and bridegroom. In this contract, the mutual stipulations and promises between both parties were spelled out and agreed to during the official signing ceremony. If, at the appointed time for the marriage the proposed marriage did not take place, then it was possible for a judge to award a monetary fine to the offended party. However, this practice, of fining the guilty party, fell out of practice by around 90 B.C.E. and in classical Roman Law, penalties were no longer awarded, even if the parties wrote them into the betrothal agreement.¹²

The term *sponsalia* comes from the term *sponsio* and means “a solemn engagement or promise to perform some act.”¹³ Once the *sponsalia* was agreed to, the man became known as the *sponsus* and the woman *sponsa*. Furthermore, it was a practice among the Romans that once a man became betrothed to his *sponsa*, he would then give her a ring to wear, showing her new status as a betrothed woman.¹⁴

A betrothal between both bride and groom could take effect by the father of either party or with an act of the groom. Furthermore more, in Roman Law, just as in Rabbinic Law, it was possible to engage a woman via a proxy. If one chose this route, then it was necessary, even after the couples agreed to wed via the proxy, that the man had to meet with the father before the marriage could take place.¹⁵

itself, and actually constituted marriage *per se*, the exercise of conjugal rights occurred after the bride was led to the home of the bridegroom.” Cohen, (1966) pg. 293. We will look into this, as it is found within the *halakhic* system in section IIIC.

¹¹ Cohen, (1966) pg. 293.

¹² Cohen, (1966) pg. 293 – 4.

¹³ Burdick, (2002) pg. 219.

¹⁴ Burdick, (2002) pg. 220.

¹⁵ Cohen, (1966) pg. 294. For the *halakhic* regulations regarding the practice of proxy (or *shlichut*), please see the *Tur, Even Ha-Ezer, Siman 34*.

Regardless whether or not one employed the use of a proxy or one enacted the betrothal himself (usually the father of the bride), all parties needed to provide consent. The father of the bride had to agree to the contract and if the husband to be was still a minor under parental control, he too had to give his consent to the marriage. As regards to the woman, so long as she did not refuse, it was deemed as if she had given her consent. It was possible, however, for her to withhold her consent if she believed the person to be “unworthy or infamous.”¹⁶

What is most interesting to our study is when we move from the issue of betrothal, which does not entail much “pomp and circumstance,” and we move into the types of marriage that existed in Roman Law. According to Ilan, three types of marriage existed in Roman Law. The types of marriage that existed at the time were *confarreatio*, *coemptio* and *usus*.¹⁷

The first type of Roman marriage, *confarreatio*, was reserved for the aristocrats of Roman society, or the patrician class. A *confarreatio* marriage took place in the presence of the *pontifex maximus* and a priest of the god Jupiter. Furthermore, ten witnesses (free men) had to be present for the ceremony. The priests would take the sacrificial bread (*far/farreum*) in view of the witnesses, broken, and then give to the bride and groom to eat. After more sacrifices, the bride was then carried to the house of her groom and lifted over the threshold, transferring her (both metaphorically and quite literally) into the realm of her husband.¹⁸

If one were not of the patrician class, then he would marry his bride via *coemptio*.

¹⁶ Cohen, (1966) pg. 299.

¹⁷ Ilan, (1995) pg. 88.

¹⁸ Burdick, (2002) pg. 222.

The act of *coemptio* actually finds its roots as “an ancient method of transferring rights in property and called, technically, *mancipato*.”¹⁹ Unlike in the case of *confarreatio*, one only needed five witnesses present for this ceremony. In view of these five men, an official weigher of money would weigh the purchase price of the object (in this case the bride) and once accepted, the groom would place his hand on the object, uttering words that indicate ownership, thereby transferring the wife into his home and under his authority.²⁰

Finally, one more form of marriage could have been employed under Roman Law – *usus*. Unlike the two previous forms of marriage, which began with some sort of religious or commercial type ceremony, this form of marriage was based upon a man and woman who had been living together for a long period of time. Specifically, if a man and woman would have been cohabiting for at least one year, even without either of the two aforementioned ceremonies, then the two could be considered “husband and wife”. Even though there was an absence of a formal ceremony, the law still granted the husband authority over his wife.²¹

What should be noted from this overview of betrothal and marriage in Roman Law, is the legal requirement for the woman’s transfer from the house of her father to her husband’s home. As we will come to find in our study of Rabbinic Law, it is the status of the woman, and her power to control her fate, that is most important to the question of finding an egalitarian method of betrothal. However, before we move to those issues, it

¹⁹ Burdick, (2002) pg. 223.

²⁰ Burdick, (2002) pg. 223.

²¹ Burdick, (2002) pg. 223 – 4. It should be noted, however, that a woman could avoid falling under the jurisdiction of her husband if she spent three consecutive nights each year outside of her husband’s home. Such an act would interrupt the necessary year-long stay required for *usus* to take effect. Burdick, (2002) pg. 224.

is important to briefly mention the status of a woman in Roman Law.

D. The Status of Women in Roman Law

A woman, under Roman Law, was not given much freedom. According to Burdick, women within the Roman Legal system were “always under the legal and protective care of some male relative, either her father, her husband or her guardian.”²² Whenever a woman would enter into a marriage agreement, she would transfer from her father’s custody to that of her husband’s.

According to Roman Law, the man of the house exerted what was known as *manus*. In this system, *manus* meant a man had power over all things that he owned. Once the marriage ceremony was concluded (or year of cohabitation), the woman and the property of the woman would immediately transfer to the *manus* of her husband.²³

Even when *manus* marriage began to decline towards the end of the Empire, as women began to enjoy some more freedoms, such as divorce, the law still greatly restricted women in the public and private realm. Women who were not married were always given a guardian (a *tutor*) to protect her legal rights as well as her property.²⁴ Furthermore, regardless of the era, women were always given during the marriage ceremony and were never allowed to act as equal partners with their future husbands. As will be seen in the coming sections, the status of women in the Roman world was not dissimilar from that of the status women in Rabbinic Law.

III. Israelite and Early Rabbinic Law

A. Introduction

²² Burdick, (2002) pg. 221.

²³ Burdick, (2002) pg. 221.

²⁴ Frier and McGinn, (2004) pg. 448.

Until now, we have cast our glance solely at the ancient and political legal systems that functioned outside and adjacent to the jurisdiction of Biblical and/or Rabbinic Law. The purpose of this has been to provide a context for the world in which the legal systems of both the Bible and Rabbinic period developed. What has been demonstrated thus far is as follows: that the Ancient Near Eastern and Mediterranean world had a notion of betrothal and a process of marriage between a man and a woman and that like later Rabbinic Law, come to see the similarities in transfer of the bride from one domain to the next as well as the requirement for ten witnesses at the time of betrothal. The careful reader will also note that my thesis includes a proposal for betrothal within same – sex marriage as well. Since this is a relatively new and modern concept, I will address it in penultimate section of this work.

This section restrains itself solely to the laws as found within the *Tanakh* as well as within the early Rabbinic legal material. In the first section, I go through examples of betrothal and marriage found throughout the *Tanakh*, with specific emphasis on the book Deuteronomy, chapter twenty. Following this survey and its comparison to Assyrian and Babylonian legal practices, I turn to the rabbinic material.

In section IIIC, Early Rabbinic Law, I focus on legal arguments within the Mishnah and Talmud that deal with matters of *kiddushin*. By focusing on the actual definition of *kiddushin*, the process of its development and the ways in which *kiddushin* can be enacted, it will provide the groundwork for redefining *kiddushin* in our day, as will be found in the final section of my paper. After wading through the rabbinic material, I provide a brief overview of the status of women in Rabbinic Law.

By presenting and explaining the status of women in Rabbinic Law, it allows us

to understand how the rabbis conceived of the process of *kiddushin* in their own day and how it can be re-evaluated in our day. For example, one will see the similarity of the role and status of the woman in both Rabbinic and Roman Law. Taken together, the study of the *Tanakh* and Rabbinic Law will take us into the heart of the matter of *kiddushin* and prepare us for its development over time and its place within the Liberal Jewish world today.

B. Israelite – *Tanakh*

The earliest form of betrothal within Jewish law can be found in the *Torah* as well as the later books within the Hebrew Bible. These works, written, compiled, and redacted between 1000 B.C.E. – 100 B.C.E. deals with the law of betrothal from a pre-rabbinic era, and therefore a time before the hermeneutics of *halakhah* were developed. Furthermore, the world of Assyria and Babylonia most likely influenced their development (as noted in section I) and as a result, the laws found within *Tanakh* “reflect Hebraic and Semitic customs.”²⁵

From what can be gleaned from the *Tanakh*, we can note that there were at least five parts to the marriage ceremony of the Israelite world. These parts, according to Cohen, are as follows: “1) preliminary negotiations between the parents or guardians of the contracting parties; 2) the payment of the *Mohar*²⁶ (the bride price) and gifts; 3) The consent of the father or the parties; 4) Dowry; and 5) the ceremonial celebration and feast.”²⁷ It is important to also note here the textual support that Cohen draws upon for this statement. We find parts one through three can trace their origins to Genesis 34:10 –

²⁵ Cohen, (1966) pg. 282.

²⁶ *Mohar* – according to Cohen, the *mohar* is the bride price and is first found in the *Tanakh* in Gen. 34:12, (1966) pg. 283.

²⁷ Cohen, (1966) pg. 282.

12, Exodus 22:15 – 16 and I Samuel 18:25. Furthermore, evidence of the use of a dowry and a ceremonial feast can be found in Genesis 24:61 and Genesis 24:59 respectively. If one wishes, one could also describe these parts of the marriage process as belonging to a “two stage” ceremony.²⁸ Though the part that concerns us the most in the study relates to the betrothal of the bride, we will look at the entirety of the marriage process, as found in *Tanakh*, since it is much less complex than what follows in the rabbinic period.

In Deut. 24:1, we learn the following: “A man takes a wife and possesses her.” The Hebrew root that is used here is *l-k-h*. Though not stated in this passage, but made clear from the passages above, the potential groom also had to pay a *mohar* for his bride.²⁹ What is unclear from any of our texts, is whether or not the woman possessed the ability to either consent to or disagree with the marriage proposal and the biblical material is sparse on this matter except in the case of Gen. 24:58. In that verse, we find that Rebecca’s consent is sought before she leaves her father’s home to marry Isaac.³⁰ What is known, however, is that during this time, between betrothal and marriage, the bride was obligated to observe the laws of marital fidelity just as a wife would be obligated under the law.³¹

As mentioned earlier in this section, the entire process was a two-stage (or five

²⁸ Lewittes, (1994) pg. 66 – 67. Lewittes also notes that Deuteronomy 22:23 informs us that though betrothed, the bride is still living in her father’s house; however, the *Torah* does not explain the ceremony that finally transfers the bride from her father’s house to the house of her husband.

²⁹ According to Adler, this applied only in the case when the “woman is young and still under her father’s roof.” (1998), pg. 170.

³⁰ Adler, (1998) pg. 171. According to Rashi, “from this, [we learn], that there is no marriage of a woman without her consent.”

³¹ Cohen, (1966) pg. 285. Cohen also notes the similarity between this relationship to the terms used in Assyria and Babylonia where the parties were known as husband and wife after the betrothal. Once the gifts were given, the bride became known as *kalatum* 285. For more on this, refer to section IIA.

part) marriage process and the roots for this process can be found within Deuteronomy.

The process begins with the betrothal and then after a time period (generally a year), the marriage is completed and the bride formally enters into the home of her husband.³²

According to Deuteronomy 20:7 and 28:30, we can see a textual reference to the difference between betrothal and marriage.³³ In Deuteronomy 20:7 it states “Is there anyone who has paid the bride price for a wife, but who has not yet married her?” and in 28:30 we find “If you pay the bride-price for a wife, another man shall enjoy her.” Both of these texts indicate that some other act must take place in order for the marriage to be finalized.

It is apparent from the above textual citations that some form of legalized marriage existed in the biblical era. The marriage process occurred in two distinct phases and both parties were obligated to each other, with different sets of obligations. Specifically, the woman had to obey laws prohibiting her from engaging in sexual relations with any man aside from her betrothed (which would occur after the marriage).

It is from the basis of these laws and practices, as well as in the shadow of the Greco-Roman world that the rabbis further developed the laws of betrothal. However, before

³² Adler, (1998) pg. 171. See Deuteronomy 22:20 regarding violations of a betrothed woman. Also note the term that is used for betrothal is *erusin* or אֵרֶס. According to Weiss, the term אֵרֶס is employed when a betrothal has taken place without intercourse. He believes that this is due to the use of the term *מתקדשת בביאה*, which is found in *mMiddah* 5:4 where the term *מתארסת בביאה* is not found. Since the term *בביאה* means sexual intercourse and only accompanied the former term, he believed this was sufficient evidence to conclude that אֵרֶס did not carry a connotation of sexual intercourse (from David Weiss, “The use of Qnh in Connection With Marriage,” in *Harvard Theological Review* 57 no.3 1964, pg. 244 – 248). Cohen also stated that the term אֵרֶס was the common term when describing a proposal between an Israelite man and a free woman. Biblical examples, according to Cohen, for the time of interlude between betrothal to finalization of the marriage can be found in Gen. 24:54 – 55, Deut. 27:7, Jud. 14:8, and Hosea 3:3 285.

³³ Cohen, (1966) pg. 285.

we turn there, it is important to look at the status of women within the scope of biblical law.

According to Adler, the texts in Deuteronomy 20 present the marriage of the woman to the man, “as a private commercial transaction in which rights over the woman are transferred from the father to the husband.” The understanding that this process is of a “commercial origin” can be seen in the terminology that is employed by the *Torah*. The word for husband in this act is *ba'al*, which is a “general term for an owner, master, possessor of property, bearer of responsibility, or practitioner of a skill.”³⁴ On the other hand, the term for the woman is *isha*, which means woman. Furthermore, “the sole signifier for martial relationship is the grammatical form of the construct, which binds man and woman as subject and object of an implied preposition: *ba'al isha*, the master of a woman; *eshet ish*, the woman of a man.”³⁵

However, this is not the complete picture of the situation. As Adler notes, “marital ownership in the Bible transcends the purely commercial.”³⁶ This can be gleaned from the fact that the human act of adultery makes the land of Israel impure and pollutes it. According to Adler, “adultery...is an act of war against both the social order and the physical terrain. Thus, perpetrators are not fined as they would be for theft, but are executed.”³⁷ One need only look at Leviticus 18:24 – 28 and 20:22 – 24 to see how the *Tanakh* describes how the punishments for such acts causes “the land to vomit out its inhabitants.” Truly, an act of adultery causes more harm than just to its immediate

³⁴ Adler, (1998) pg. 171.

³⁵ Adler, (1998), pg. 171. See also Deuteronomy 22:22 and the term *b'ulat ba'al*.

³⁶ Adler, (1998) pg. 171.

³⁷ Adler (1998) pg. 171 – 2.

victims, for it effects the entire spiritual heritage of the people of Israel.³⁸

From the terminology and the process from betrothal to marriage, we can see that the status of the woman and her place in the marriage exists on two levels. On the one hand, she is bought and paid for and literally transfers from the house of her father to her husband's home. On the other hand, any act that would violate her, in a sexual sense, transcends the material world and is a violation of the religious and spiritual order of Israel. This ambiguity of the woman's place, not equal and not yet somehow a piece of "property," is examined in greater detail in the following section on Early Rabbinic Law.

C. Early Rabbinic Law

When we move from the world of the *Tanakh* to that of the Rabbis, we find that the entire process of betrothal to marriage has become codified. More than that, the rabbis of this era (roughly 100 B.C.E. – 700 C.E.) created new terminology for the betrothal process and assigned rights, duties, and privileges to the men and women who would enter into the covenant of marriage. To properly study and make sense of the material, we will first look at the laws of betrothal as found in the *Mishnah* and then move onto a study of these laws as they developed within the Babylonian *Talmud*.

i. Mishnah

One does not have to look very far within the *Mishnah* to find laws that regulate the process of betrothal. These laws are found within the tractate of *Kiddushin* ("betrothal"), which is itself found within the order of *Nashim* ("women").³⁹ An

³⁸ Adler (1998) pg. 171.

³⁹ It is important to make *mention* that the term *kiddushin* is not found within the *Tanakh* and should signal to the reader that the rabbis have already begun to make their own mark on the marital process. The rabbis' selection of the term *kiddushin* over other terms will be discussed in the following pages.

examination of the applicable sections are presented below:

1. A woman is acquired (*q-n-h*) in three ways and acquires herself in two ways. She can be acquired via money, a document, or with intercourse.⁴⁰
2. A Canaanite slave is acquired through money, document, and possession. He acquires himself through the money of others and a document of his own, according to Rabbi Meir; and the Sages said: through his own money and through the document of others...⁴¹
3. A man betroths [a woman to him] either by himself or through the use of his agent. A woman is betrothed either by herself or through her agent. A man betroths his daughter while she is a minor either by himself or through his agent. The man says to the woman: "Be betrothed to me with this date, be betrothed to me with this." If one of them has the value of a *perutah*, she is betrothed and if not, she is not betrothed...⁴²
4. [If the man says] "Be betrothed to me with this cup of wine, and it is found that it is of honey; [if he says] "of honey," and it is found to be of wine...; [be betrothed to me] "on the condition that I am rich" and it is found that he is poor, [if he says] "poor," and he is found to be rich, she is not betrothed. Rabbi Shimon says: "If he erred to her advantage, she is betrothed."⁴³
5. [If the man says be betrothed to me] "on the condition that I am a *kohen*," and it is found that he is a *levi*; *levi* and found that he is a *kohen*... "resident of a town," and found to be a resident of a large city...and with all of these [conditions found to be untrue] despite the fact that she [the intended woman] says: "In my heart, [I thought to be] betrothed to him despite all of this," she is not betrothed. Such is also the case if she erred [in a likewise manner].⁴⁴

These *mishnayot* tell us a number of things about the role of the man and woman during the process of betrothal and the mindset of the rabbis who created and shaped these laws. First, in comparison to the laws of Rome that we studied in section IIC, we see a much more detailed manner of betrothal and transfer of the woman from her father's home to the home of her husband to be. It would appear as though the process of taking on a wife, in contrast to Rome, has taken on an entirely different aspect within the realm of Rabbinic Law. Furthermore, there is no discussion of "levels" based upon class and how one would acquire a woman. According to Ilan "...the acquisition became

⁴⁰ *mKid* 1:1. The *Mishnah* continues the conversation regarding how much money one needed to acquire a woman as well as how she frees herself from the marriage. What is important for our discussion is limiting it to the first line, as shown above.

⁴¹ *mKid* 1:3.

⁴² *mKid* 2:1.

⁴³ *mKid* 2:2.

⁴⁴ *mKid* 2:3.

merely symbolic, devoid of any real monetary value and became also more egalitarian, so that theoretically every bride became acquirable by every groom.”⁴⁵ Ilan is making reference here to the debate between *Beit Hillel* and *Beit Shammai* regarding the exact amount of money that is necessary to “acquire” a woman in *mKid* 1:1. Since they both agree that it needs to be done with money and are debating the “exact amount,” it is clear that what mattered the most was not the “amount” but the fact that both schools agreed that *some money* was necessary for the action to take effect. Moving from comparison to the laws themselves, it is important to first look at the language used in describing how one “acquires a woman.”

In *mKid* 1:1, the root that is employed is no longer *l-q-h* (as in the *Tanakh*), but is instead *q-n-h*. According to Adler, “the mode by which women are legally transferred from one domain to another is called *kinyan*, acquisition, an act by which a subject unilaterally acquires specified rights over an object. *Kinyan* is essential in commercial transactions.”⁴⁶ It is made explicit, from the very first *Mishnah*, that women are acquired and not the reverse. The basis for this comes from “an analogy between the language of ‘taking’ in Abraham’s purchase of the field of Ephron (Gen. 23:13) and the phrasing, ‘if a man takes a wife’ (Deut. 22:13).”⁴⁷ Adler cites here the *baraita* in *B Kiddushin* 2b and it is explored in further detail in the following subsection.

This process, of betrothing the woman, was only one phase of the marital process as it was then accompanied by *nissuin* [or *hupah* – the term already used in the *Mishnah*] – when the marriage process is completed by the act of the groom taking the bride into

⁴⁵(1995), pg. 89.

⁴⁶ (1998), pg. 174.

⁴⁷ Adler (1998) pg. 174.

his home. What was important, however, was that the second stage of the process, *nissuin*, could not begin without the act of the man “acquiring” his wife.⁴⁸ That is, a woman could not become a man’s legal wife, and his acquisition of her sexual rights, without first going through *kiddushin* so that *nissuin* could then be executed. After the completion of the act of *kiddushin*, the woman is now the legal wife of the man and even if *nissuin* were not performed, a *get* would still be needed in order to permit the woman to be married to another man.

To the modern reader, the focus on and use of the term “acquiring” can be quite bothersome as it appears as though the woman is being placed into the category of an object – something that can be possessed. Of course, it is more than just something that “appears to be so” as one can look at *mKid* 1:3, where the *Mishnah* explains that a Canaanite slave can be acquired through similar manners as a woman is acquired for marriage. Furthermore, the same word – *q-n-h* – is used in describing the process of how one “acquires a slave.”

According to Wegner, “the sages here equate the wife to chattel in several ways.”⁴⁹ The first way is through the use of the term *q-n-h*, as explained in the previous paragraph. Secondly, as also explained above, the woman is acquired in a manner similar to a Canaanite slave. Finally, “after setting out the list, the *Mishnah*’s framers drop the subject of property; espousal of wives occupies the entire tractate.”⁵⁰

If the text stopped here, just with the use of the term *q-n-h*, then a woman would simply be property and there would be no way that one could begin to formulate an

⁴⁸ Friedman, (1980) pg. 193.

⁴⁹ (1988), pg. 43.

⁵⁰ Wegner, (1988) pg. 43.

argument of changing the concept of *kiddushin*.⁵¹ However, this is not the case as the language changes in the following *mishnayot*. Once one moves into *mKid* 2:1, the term employed there is *q-d-s*. This term, from the root meaning “holy,” dramatically changes the scope of the process and moves betrothal from simply an act of acquiring a wife (just as one would acquire any piece of property) and shifts it “to the language of sacralization and the metaphor of *hekdes*h, property set apart and earmarked as a pledge to the temple.”⁵² We will now explore this issue through our study of the next set of rabbinic documents – the *Talmud*.

ii. Babylonian Talmud

In moving to the *Talmud*, we will see that the rabbis were quite familiar with the term *q-d-s* and it begins our discussion. Below are a number of selected passages from the Babylonian *Talmud* that deal directly with our issue.

1. A woman is acquired. Why is it here [*mKid* 1:1] that a woman is “acquired” and there [*mKid* 2:1] *the man betroths (m'kadesh)*? This is because the term money is used [for acquiring a woman]. And from where do we learn that money [is a valid form of *kiddushin*]? This is learned from “taking” – from “taking” from the field of Efron, for it is written “when a man will take a woman” [Deut. 24:1] and written there [Gen. 23:13] “I have given money of the field, “take” it from me.” And therefore, “taking” [*l-q-h*] is referred to as acquisition [*q-n-h*].⁵³
2. ...[If the term acquired is preferred] then let [the Mishnah] there [2:1] state “a man may acquire.” At the beginning [in the Mishnah], the Tanna uses the language of the Torah, and in the end, the Tanna uses the language of the rabbis. And what is there to the language of the rabbis? For [the man] makes her [the woman] forbidden to everyone like *hekdes*h [consecrated property].⁵⁴
3. ...Or if you prefer, say [that the Mishnah chose to phrase it in this manner because] if it had taught “a man may acquire,” I might have thought [that the woman would be acquired] against her will, [therefore], it teaches a woman is acquired, [implying]

⁵¹ It is important to note the work of D. Weiss here in connection with the term *q-n-h*. According to Weiss “The root קנה is ill-suited for normal use in connection with regular marriage because of its predominant connotation of purchase. Hence, the technical term for betrothal in the Bible is אָרַם...However, when marriage (or betrothal) is discussed in conjunction with salable objects...biblical Hebrew, just as Mishnaic, uses a term which will embrace the latter as well...”, (1964), pg. 248.

⁵² Adler, (1998) pg. 175.

⁵³ *B Kiddushin* 2a.

⁵⁴ *B Kiddushin* 2b.

with her consent, yes [she may be acquired], without her consent, no [she may not be acquired].⁵⁵

4. ...Whoever betroths [a woman via marriage according to Rabbinic Law], betroths her subject to the consent of the rabbis...⁵⁶
5. It was taught in a *baraita*: How [is *kiddushin* made effective] through money? If the man gives her money or items worth money, and said to her “Behold, you are *mikudeshet* (betrothed) to me;” “Behold, you are *mioreset* (betrothed) to me;” “Behold, you are *l’intu* (wife) to me;” she is betrothed to him. However, if she gave [him money or something equal to money] and she said “Behold, I am *mikudeshet* (betrothed) to you;” “Behold, I am *mioreset* (betrothed) to you;” “Behold, I am *l’intu* (wife) to you;” she is not betrothed.⁵⁷
6. ...if he gave [money] and spoke to her, it is obvious that this is *kiddushin*. If he gave and she spoke, it is like the case of her giving and her speaking, and this is not *kiddushin*.⁵⁸
7. ...if he gave [money] and she spoke, it is doubtful, and we suspect [it may be *kiddushin* from the] Rabbinic [point of view as opposed to it being a matter of Torah Law].⁵⁹
8. ...Whoever betroths [a woman via marriage according to Rabbinic Law], betroths her subject to the consent of the rabbis...⁶⁰
9.Whoever betroths [a woman via marriage according to Rabbinic Law], betroths her subject to the consent of the rabbis...Ravina said to Rav Ashi: “This [explanation] sits well where [the husband betrothed the wife] through money...⁶¹
10. ...Whoever betroths [a woman via marriage according to Rabbinic Law], betroths her subject to the consent of the rabbis...Ravina said to Rav Ashi: “This [explanation] sits well where [the husband betrothed the wife] through money...⁶²

The laws of the *Mishnah* set forth a process of betrothal that became expanded within the later material of the *Ammoraim* within the *Talmud*. From the first selection of texts within *B Kiddushin*, it is possible to see that the rabbis struggled with the concept of *q-n-h*. Instead of keeping this word, the rabbis immediately switch to the term *q-d-s*. Furthermore, the rabbis provided us with an explanation as to why the *Mishnah* would have used the term *q-d-s* and why they are using it here – through the process of

⁵⁵ *B Kiddushin* 2b.

⁵⁶ *B Ketuvot* 3a.

⁵⁷ *B Kiddushin* 5b.

⁵⁸ *B Kiddushin* 5b.

⁵⁹ *B Kiddushin* 5b.

⁶⁰ *B Yevamot* 90b.

⁶¹ *B Gittin* 33a. Furthermore, *Tosafot* explain here that this phrase gains its power at the time of *Kiddushin*, during the marriage ceremony, when the man says to the woman “*k’dat Moshe v’Yisrael*.” Of course, this comment by the *Tosafot* must be seen and understood in its context for it was written centuries after the comment was codified within the *Talmud*. Furthermore, in section IV of this paper, this phrase “*k’dat Moshe v’Yisrael*” will be examined in greater detail.

⁶² *B Gittin* 73a.

kiddushin, the man is making the woman forbidden to any other man, in the same manner as he would sanctify something to the Temple (beyond the use of the root ק נ ה in *mKid* 1:1, the Rabbis turn instead to the use of ק ד ש or ר ט א).

This dedication parallel informs us that the woman in the marriage is not an equal counterpart to her husband. Labovitz informs us that “both [dedication to the Temple and betrothing a woman] are part of the realm of property ownership, but also include special restrictions on the current and future use of the items so acquired.”⁶³ Though the rabbis are using a word that connotes holiness, it does not necessarily mean that marriage is holy.

According to Adler, citing Isaiah Gafni, “...the rabbis did not view marriage as intrinsically holy. It was instead *instrumental* to holiness, since it offered men the opportunity to sanctify themselves by performing the (exclusively male) commandment to increase and multiply.”⁶⁴ Satlow supports this view for he wrote: “There is no evidence that the rabbis reflect in their use of the term *kiddushin* a notion that marriage is ‘holy’.”⁶⁵ Through the betrothal of the woman, the man is “ensuring that the wife reserves her sexuality to her husband alone.”⁶⁶

It is therefore by act of the man this process occurs and it is detailed explicitly within the passage cited above from *B Kiddushin* 5b. In those statements, the rabbis detail a process by which the man is giving and speaking and the woman becomes his after these acts are fulfilled. Though the rabbis did cite cases if the woman were to try

⁶³ Labovitz, (2011) pg. 33.

⁶⁴ (1998), pg. 178.

⁶⁵ (2001), pg. 77. The term *holy* here implies a notion of something that is “set aside” and sacred, belonging only to that couple and for that couple alone.

⁶⁶ Wegner, (1988) pg. 42.

these acts, according to the rabbis “there is no *kiddushin*” via the actions of the woman if she is the initiator.⁶⁷ However, this is not so “clear cut” as there seems to be one exception – “the man gives, and the woman speaks.” Furthermore, the woman has to give her consent, as noted above in the reference to *B Kiddushin* 2b. This informs us that the woman has some sort of active role in the process, not merely just being passive when she receives the ring from the man and the Talmud goes so far as to note that should she decide to take action about her lack of consent to the marriage, the marriage may be annulled.⁶⁸

Returning once more to *B Kiddushin* 5b, it appears as though there is some validity to the act of *kiddushin* if the man gives to the woman and she replies to him. Though one *sugya* would seem to suggest there is “nothing to this,” the second *sugya*, as quoted above, shows a disagreement within the *Talmud*. Though the text itself does not make it explicit as to why this “could” count as being *kiddushin*, it is something that we will keep in mind when we turn to a modern day proposal for egalitarian *kiddushin* within the final section of this paper.

Back to the task at hand, we must also pay close attention to the final quotes brought from the *Talmud*. According to these statements, it is the rabbis who determine what is and what is not *kiddushin*. Specifically, this statement informs us that the *consent*

⁶⁷ One should note here that there is no mention of “*k’dat Moshe v’Yisrael*” as needing to be uttered at the end of the phrase “Behold, you are *mikudeshet* (betrothed) to me.” All that is needed to satisfy the requirements of *kiddushin* is the act of giving something of monetary value and the phrase “Behold, you are *mikudeshet* (betrothed) to me.” Since this phrase as well as the concept of “whoever betroths [a woman via marriage according to Rabbinic Law], betroths her subject to the will of the rabbis” were coexistent, without the statement of “*k’dat Moshe v’Yisrael*”, it may negate the statement of the Tosafot as cited in footnote 62.

⁶⁸ See *B Kiddushin* 8b – 9a and Rambam, *Hil. Ishut ch. 4*.

of the Rabbis was a key part in the marriage process between the two parties. Should the rabbis at some point withdraw their consent of the marriage, they have the ability to declare the marriage invalid. Thus, all of the power to determine the status of a marriage, the actions of a couple and what constitutes *kiddushin* is within the purview and understanding of the rabbis. Just as in the previous paragraph, this *halakhic* principle is important for our final section.⁶⁹

In this rabbinic world, we have found that, like in the *Tanakh*, the man actively acquires his wife and through this act, he sets aside her sexual rights to him and him alone. As stated by Lewittes “It should, however, be emphatically clear this this acquisition by the groom is not that of the bride’s person...It is the acquisition of certain rights [specifically her sexual rights] to her property and earning supervision over her vows.”⁷⁰ Though the language changes, from “taking” to “acquiring” to “betrothing,” it is still a world of the man having most of the power. However, all was not entirely lost for the woman. Though the woman has almost no active role within this process, it does not mean that the woman had no rights within this world. It is to these rights and the status of the wife within the world of the early rabbinic sages, that we now study.

D. Status of Women

The role of the woman in the eyes of rabbinic law from this era is complex. As was seen in IIIC, a woman’s sexual rights belong to her husband alone. According to Wegner, “*Mishanic* laws governing the matrimonial bond, particularly those involving

⁶⁹ According to a discussion with R. Mark Washofsky, he believes that the *Tosafot* meant that a specific statement needed to be declared by the couple that affirmed their consent to rabbinic officiation and that this is most likely what is meant by the phrase *k’dat Moshe v’Yisrael*.

⁷⁰ (1994), pg. 68.

conjugal relations, have one common denominator – an underlying perception of the female as a sexual chattel whose biological function may be acquired, controlled, and disposed of by the male for his own advantage.”⁷¹ This does not mean that the man had the authority to exploit his wife’s sexuality, but what it does mean is that the man retained the rights of the woman’s sexuality in order to fulfill his *halakhic* duty. As found in *mYev* 6:6 “No man is exempt from the duty to be fruitful and multiply unless he [already] has children.”⁷² Therefore, in order for a man to fulfill this obligation, it needs to be done through intercourse with his wife and by ensuring that her sexual rights belonged to him, and him alone, could he be guaranteed fulfillment of his *halakhic* obligation.

A man only acquired these aforementioned rights to his wife’s sexuality through the act of *kiddushin*, when the woman passed from the authority of her father’s house (or from her own *r’shut*) to the house of her groom.⁷³ For this act to occur, she is slightly empowered in this act of transferal from one domain to the next. According to *Tosefta Yevamot* 2:1 קונין אינן קונין אאל מדעת שתיהן – “just as the betrothal is not active without their mutual consent”, supporting the notion that a woman’s consent is needed for *kiddushin*. Once this is done, and betrothal is over, the man has exclusive control over his wife’s sexuality. Ironically, it does not mean that he is the initiator of sex – it is his vocation that determines how many times a week, month or year sex with his wife is required and she becomes the initiator of this process.⁷⁴ Thus, through legislation, our Sages enshrined a certain amount of intimacy between husband and wife.

What happens, though, when we move out of the realm of sexuality? Does the

⁷¹ (1988), pg. 41.

⁷² Wegner, (1988), pg. 41.

⁷³ Wegner, (1988) pg. 15.

⁷⁴ See Exodus 21:10 regarding the conjugal rights of the wife.

wife remain a passive participant in married life? No. Wegner writes, “in nonsex-related contexts the *Mishnah*’s framers treat the wife quite differently, assigning her specific rights and powers as well as legal duties. Her right to maintenance is made explicit as is her husband’s duty to provide for her...although the wife cannot dispose of her property without the husband’s approval, neither can he sell it without her consent.”⁷⁵

Herein lies the crux of the issue: “the wife owes a duty of sexual exclusivity to her husband.”⁷⁶ However, once we move into the realm of the maintenance of a home, a woman’s status changes dramatically in the eyes of the law. She, like her husband, is now given certain rights and privileges as well as protections. “Indeed,” Wegner stated, “it is only in matters involving her biological function, and in no other context, that we find the *Mishnah* treating the wife as her husband’s chattel.”⁷⁷

Continuing on the topic of expanding our view of women to the entire enterprise of marriage we continue to see a somewhat “empowered” woman. Thanks to the rabbinic institution of the *ketubah*, one can find the rights and entitlements that were granted to women. The *ketubah*, a rabbinic invention, is a marriage document that is written up at the time of *kiddushin* “setting forth obligations of the husband to the wife.”⁷⁸ The *ketubah* itself “does not have a constitutive role in establishing a binding marriage, as the *kinyan/kiddushin* money does. In addition, the protections offered to

⁷⁵ (1988), pg. 16. It is possible, however, to see some rights granted to the woman via the issue of *onatah*, in which the wife is entitled to conjugal relations. Furthermore, the woman is empowered by the *Talmud* to refuse her husband’s sexual advances in order to receive a *get* from him. This may be an attempt of the Rabbis to try and bring some sort of balance to what is inherently, a very unbalanced marital equation. See *B Ketubot 47b* and Rambam *Hil. Ishut* 14:8.

⁷⁶ Wegner, (1988) pg. 15.

⁷⁷ (1988), pg. 16.

⁷⁸ Elon, (1994) pg. 277.

women by the *ketubah* need to be recognized as ambiguous.”⁷⁹ They are ambiguous because the rabbinic texts argue about when and how a woman’s *ketubah* could be denied to her. Though the purpose of the *ketubah* may be a rabbinic attempt to afford the bride some protections in the event of divorce, such as its guarantee of the payment 200 *zuz* to her if a divorce did occur, it did not undo the one-way act of acquisition – divorce, like marriage, is all at based upon an active male participant.⁸⁰

Even with these limitations, such forms of redress and rights within Rabbinic Law informs the modern reader that the wife had a place within the legal system. According to Wegner “the wife’s personhood also emerges from her legal duties...Possession of such entitlements and obligations makes an important statement about the wife’s status: *she is no chattel*. Otherwise, the *Mishnah*’s framers would neither have granted her those entitlements nor imposed those obligations...unless the wife challenges her husband’s ownership of her sexual function, the sages invariably treat her as a person in all matters of private law.”⁸¹

From our survey of the rabbinic material, we find the role of the woman as wife a complex one. She is both chattel, in the sense of her sexual rights, and at the same time, she is an individual person, with rights and privileges that she can exercise. When we look at these issues involving *kiddushin*, it becomes clear that our focus must be on the issue of a woman’s sexual rights belonging to her husband. Though our texts do not state that a man and woman are equal on these matters, or that egalitarian *kiddushin* exists, instead, what they have done is to give us a framework on which to build a proposal for

⁷⁹ Labovitz, (2009) pg. 221.

⁸⁰ Labovitz, (2009) pg. 221.

⁸¹ (1988), pg. 71 – 4.

such a form of *kiddushin*. Knowing that even a notion of “doubtful *kiddushin*” entered the rabbinic mind and that a woman had numerous rights, aside from her sexuality, gives us some room on which an argument can and will be built. In the following section, we will look at how the *Rishonim* and *Ahronim* viewed the laws of *kiddushin*. Again, though they will not provide a solid answer for how we will arrive at egalitarian *kiddushin*, we will be able to build upon their work and cite precedence for advocating a change in our day.

IV. *Rishonim* and Early *Ahronim*

A. Introduction

In the previous section, we explored the development of Jewish Law from its earliest days as Israelite Law, found with the *Torah*, to its rebirth as *Halakhah* via HaZaL. Though the rabbis closed the *Talmud* from further editing by the end of the 8th century of the Common Era, this was not the end of Jewish Law. Instead, shortly after this period, the rabbis continued to develop Jewish Law through the development of the legal codes as well as the activity of rabbinic responsa.

In this section, we will explore the concept of *kiddushin* during the period of *Rishonim* and early *Ahronim*. I have chosen to look at a few sources that represent the major *halakhic* works of these eras. These works are as follows: the *Mishneh Torah* of the Rambam, the *Sefer Mitzvot Gadol (SeMaG)* of Rabbi Moses of Coucy, the *Tur* of Rabbi Yaakov ben Asher and the *Shulkhan Aruch* of Rabbi Yosef Karo. Beyond these sources, I have included a brief subsection – entitled “Survey of Other Sources.” That section provides some more insight into the rabbinic mind on *kiddushin* beyond the aforementioned major *halakhic* works. Through a survey of this material, it will continue

to shed light on the development of *kiddushin* within Jewish Law as a foundation for developing a method of egalitarian *kiddushin* for today.

B. *Mishneh Torah* (12th Century)

The *Mishneh Torah* represents one of the greatest works of *halakhic* literature within the Jewish world. This work, composed during the 12th century by the Rambam (Rabbi Moses ben Maimon), was his attempt at creating a work of *halakhah* that could speak to the common man and allow one, with just the *Torah* and the *Mishneh Torah*, to know what was needed to live a mitzvah-compliant life. Though controversial in his own time, the work has survived the ages and is a necessary work for us to consult in our study.

Below are some brief passages from the work that are relevant to our discussion.

Chapter 1: 1 – 3

1. ...Once the Torah was given, Jews were commanded that if a man desires to marry a woman, he first acquires her in front of two witnesses and after this, she becomes his wife. For it is stated [in Deuteronomy 22:13]: “When a man takes a wife and is intimate with her...”
2. The process of acquisition fulfills a positive commandment of the Torah. The process of acquiring a wife can occur in three ways: with money, a document, or through sex. The use of sex or a document originated in the *Torah* and the use of money from Rabbinic origin. The process is known as *kiddushin* or *erusin* and a woman who is acquired in one of these three ways is called a *mikudeshet* or *mioreset*.
3. Once this process of acquiring a woman and she is betrothed, even though they have not had marital relations or entered into his home, she is his wife.

C. *SeMaG* (13th Century)

The *SeMaG* finds its place as a product of Ashkenaz. Rabbi Moses of Coucy, a native of Northern France, traveled the European world and encountered the *Mishneh Torah* of the Rambam during a stop in Spain. While simultaneously intrigued and frustrated with the *Mishneh Torah* (for its style of composition was foreign to the world of Ashkenaz), he decided to write a law code that would present the *Mishneh Torah* for

an Ashkenazic world and at the same time, include the thinking of the Tosafists (those who sought to make the Talmud internally consistent and were extremely analytical) within a law code.⁸²

The Laws of *Kiddushin*

1. It is a positive commandment to betroth a woman with money, or documents or through intercourse, all done with witnesses present, as we learned at the beginning of *mascehet Kiddushin*.
2. With money – from where do we learn that? For it is written “For a man will take a woman and marries her” (Deut. 24:1), there is no “taking” other than with money.
3. ...When she is betrothed through one of these three [ways], she is considered a married woman and is forbidden to the whole world...
4. ...The man who betroths, [it is] necessary that he will say words that are understood to be that he is acquiring her [the woman] to be his wife and then gives her the money...however, if he gives [her the money], and she speaks, this is considered ‘doubtful *kiddushin*.’
5. The words that the man will say when he betroths, it is necessary that they are matters that [conveys the notion] that he is acquiring the woman and not that he is acquiring himself to her [i.e. becoming her husband].
6. A woman is not betrothed unless she desires it...and one who betroths a woman against her will is not betrothed...

D. *Tur* (14th Century)

The *Tur* represents a *halakhic* work that comes out of Ashkenaz, but composed within the Sephardic world. Rabbi Yaakov ben Asher, son of the Rosh, composed his work while living in Spain and relied on a *beit din* of the Rosh, Rif, and Rambam whenever there seemed to be a disagreement among his sources and he codified by way of majority (often concluding according to the Rosh). I have cited a number of comments located in *Hilchot Kiddushin*, within the section of *Even Ha-Ezer*.

Siman 27:1, 7 – 8

1. How [is a woman betrothed] with money? [The man] gives her a *perutah* or something equal to a *perutah* in front of two [witnesses]...and says to her “Behold,

⁸² Notes from *Medieval Halakhah* with Dr. Alyssa Gray, 2012.

you are betrothed (*mikudeshet*) to me” or “Behold, you are engaged to me” or “Behold, you are to be my wife”, and [may say similar] in any language [phrasing] whose meaning is understood to be betrothal...so long as she understands that it is the language of betrothal.”

7. She gives [an object valued to be worth a *perutah*], and says to him “Behold, I am betrothed to you with this [object]” – she is not betrothed.
8. If the man give [an object valued to be worth a *perutah*], and she speaks to him, if he was speaking to her about matters relating to *kiddushin*, this is certainly *kiddushin*, and if [they were not discussing these matters beforehand], this is doubtful *kiddushin*.

Siman 34: 1 – 4

- 1– 2. [When the man] betroths the woman, he says a blessing...What blessing does he say? “Praised are you, *Adonai* our God, who sanctifies us through His commandments and commanded us concerning the forbidden partnerships, and forbids to us (certain) betrothals, and permits to us the (acceptable) marriages through *chuppah* and *kiddushin*, praised are you, the Eternal our God, who sanctifies Israel.” And my lord, my father the Rosh, may his memory be for a blessing, wrote “and it is the custom in our day to say ‘who sanctifies Israel through *chuppah* and *kiddushin*.’” The Rambam, may his memory be for a blessing, wrote “It is the custom of the people to organize it [the blessing] over a cup of wine or alcohol and to first bless the cup [of wine or alcohol] and then afterwards recite the blessing [of betrothal] and if there is no wine or strong drink, recite the blessing [of betrothal] and furthermore, if one said the blessing before the *kiddushin* and then betrothed and did not recite a blessing, do not recite a blessing after the *kiddushin* for this is a blessing said in vain, for what is done, is already done.” And my lord, my father the Rosh, may his memory be for a blessing, wrote “there are those who wrote that it is necessary to say the blessing of *erusin* before the *kiddushin*, as was stated [in *B Pesachim* 7b] ‘every commandment one blesses then does [the action],’ and there are those who wrote that it is necessary to bless after the *kiddushin* for perhaps the order is found in ‘the woman’ and it is a blessing [said] in vain, and furthermore since all of the commandments are according to mentioning the action of the commandment, to bless and then do the act, but here [regarding the order of the blessings], we did not bless ‘Who sanctifies who through His commandments and commands us to betroth a woman,’ and since the one reciting the blessing mentions the action of the commandment [which is to be fruitful and multiply], it is not necessary to bless and then act.
3. ...and our Rabbi Nissim declared that if one did not recite the blessing of *erusin* at the time of *erusin*, one recites it with the blessings of *nissuin*, and my lord, my father the Rosh, may his memory be for a blessing, wrote thus [as well].⁸³
4. Rav Shmuel haNagid wrote “the blessing of *erusin* does not require ten adults,” but Rav Hai wrote “it [the blessing of *erusin*] requires ten adults,” And my lord, my father the Rosh, may his memory be for a blessing, agreed with him [Rav

⁸³ Rabbenu Nissim, whose full name is Nissim ben Jacob, lived between 990 – 1062 and wrote a well-known Talmudic commentary known as “The Key” or *Hamaftach*.

Hai].⁸⁴

Siman 42:1

1. A woman is not betrothed unless she wishes to be. If she is betrothed and did not desire the betrothal, she is not betrothed.⁸⁵

E. *Shulchan Aruch* (16th Century)

The *Shulchan Aruch* represents the last great law code that was generally accepted throughout the Jewish world. Rabbi Yosef Karo composed the work while he was living in Safed (then a part of the Ottoman Empire). The work itself is setup like the *Tur* of Rabbenu Asher and is derived directly from his commentary to the *Tur*, known as the *Beit Yosef*. Furthermore, Rabbi Karo's rulings are supplemented, in many areas, by the Ashkenazic rabbinic authority – Rabbi Moses Isserles (known as the *Rema*). Below are the legal rulings from this work, with glosses of the *Rema*, included where applicable.

Siman 27:1 – 3

1. How [is a woman betrothed] with money? [The man] gives her a *perutah* or something equal to a *perutah* in front of two [witnesses]...and says to her “Behold, you are betrothed (*mikudeshet*) to me”...(According to the *Rema* “and there are those who say that he [the man] says to her ‘k’dat Moshe v’Yisrael,’ and it is the practice/custom to betroth with a ring...” and the same rule applies if he says to her “Behold, you are engaged to me” or “Behold, you are to be my wife”, and [he may say similar] in any language [phrasing] who’s meaning is understood to be betrothal...so long as she understands that it is the language of betrothal.”
 - a. [in the words of the *Beit Shmuel*, commenting on the words “that she understands”]...this is the language of the *Tur*, means that even if the man says to her “you are betrothed to me,” it is necessary that she understand that this is the language of *kiddushin*, for not every woman understands that this is the language [of *kiddushin*]...and the *Beit Hadash* agrees with this interpretation, but the *Beit Yosef* disagrees for he sees that this all applies to the matter if it is known that this woman understands, then it is *kiddushin*, and with any other language [of betrothal], if she says that she does not understand, that it is considered doubtful *kiddushin*...

⁸⁴ Rav Shmuel haNagid and lived between 996 – 1056 in Moorish Iberia. Rav Hai, also known as Hai ben Sherira, lived between 939 – 1038 and spent his life in Pumbedita (a city in what is now modern-day Iraq).

⁸⁵ The *Beit Hadash* cites the *SeMaG* that teaches the following: “if the text had been written as ‘a man acquires a woman,’ then one might think that a woman could be acquired against her will; however, since it says ‘a woman is acquired,’ a woman cannot be acquired without her consent.

3. ...[in the words of the Ramah] One who says to a woman that he will give to her due to/out of love and fondness, it is suspected of being considered *kiddushin* for perhaps he said that he will give [a ring] to her for there will be love and fondness between them, and this is as if he said to her “you are known to me,” or “you are mine alone”... if he uses a formula that does not necessarily mean *kiddushin* and she understands that it *was* for the purpose of *kiddushin*, then the *kiddushin* is valid

Siman 34: 1 – 4

1. Anyone who betroths a woman, whether by himself or through an agent, [says the following] blessing “...who sanctifies us through His commandments and commanded us concerning the forbidden partnerships, and forbids to us (certain) betrothals, and permits to us the (acceptable) marriages through *chuppah* and *kiddushin*, praised are you, the Eternal our God, who sanctifies Israel” and afterwards, he betroths her.
2. It is customary to order this blessing on a cup of wine...and if there is no wine, it can be recited on its own.
3. If one does not recite the blessing of betrothal (*erusin*) at the time of *kiddushin*, then one does not recite it during *nissuin*.
4. The blessing of *erusin* requires ten people.

Siman 42:1 – 2

1. A woman is not betrothed unless she wishes to be. If she is betrothed and did not desire the betrothal, she is not betrothed.
2. One who betroths [a woman] without witnesses, even with one witness, they [the man and woman] are not betrothed. [Furthermore], even if the two of them agree in the matter [of betrothal] and even if she is betrothed in front of one witness and at a later time betrothed in front of another witness...she is not betrothed.

F. Survey of Other Sources

i. *Shitah Mikubetzet: Ketuvot Chapter 1*⁸⁶

“...And now, since we say ‘*k’dat Moshe v’Yisrael*’, certainly they two [man and woman under the *chuppah*] agree that in this matter [of betrothal and marriage] that their *kiddushin* is according to the consent of the Rabbis...”

ii. *Tosafot HaRosh: Ketuvot Chapter 1*⁸⁷

“All who are betrothed with the consent of the Rabbis are betrothed (*mikudeshet*).

⁸⁶ This is a collection of *halakhic* insights of many *rishonim*. Rabbi Betzalel Ashkenazi, who lived from 1520 – 1598, composed the work during the 16th century.

⁸⁷ These are collections of statements of the Rosh (Rabbenu Asher 1250 – 1327).

Therefore, it is customary to say at the hour of *kiddushin* ‘*k’dat Moshe v’Yisrael*’.”

iii. ***Shut Tzemach Tzedek: Hoshen Misphat Chapter 8***⁸⁸

“...According to the explanation of Rashi, since it is said at the time of *kiddushin* that one is betrothed (*mikudesh*) ‘*k’dat Moshe v’Yisrael*’, therefore, the Rabbis have the authority to annul [the marriage] since one became betrothed according to the custom in accordance with their [rabbinic] law...”

G. Explanation of Rabbinic Material

In this section, we have rabbinic legal opinions that range from the 12th century to the 18th century, just before the dawning of the modern era. The opinions cited span the rabbinic world from the Ashkenazic opinions of Eastern Europe to the Sephardic world and the tip of N. Africa. I assembled such a collection of rabbinic thought in order to present not only a wide range of rabbinic opinion, but also to demonstrate the almost “singular voice” in which these texts speak – all descendants of the arguments preserved within the *Talmud*.

When we finished our discussion on the Talmudic material, we found the following answers regarding *kiddushin*. First, that a man acquires a woman, and that this could be done either through a document, the transfer of money, or through intercourse. Second, the amount of money transferred does not matter so long as at least some money transferred from the groom to the bride. Third, there needs to be some sort of statement that the man says to the woman that indicates that she is being acquired (and not him betrothing himself to her). In this part of the betrothal process, we found that a minority opinion did exist that allowed for the man to give the woman some money and that the

⁸⁸ Collection of responsa by the third Chabad Rebbe – Menachem Mendel.

woman could be the one to utter a phrase of betrothal. However, it is not clear if a betrothal conducted in this manner resulted in *kiddushin* or *safek kiddushin*. Finally, we came across the following phrase “Whoever betroths [a woman via marriage according to Rabbinic Law], betroths her subject to the consent of the rabbis...” Based on these four “basic” criteria of what constitutes a betrothal or act of *kiddushin* within Jewish law, our aforementioned material from the *Rishonim* and *Ahronim* can now be explained.

First and foremost, we must look at the issue of a woman being “acquired by the man.” According to the *Mishneh Torah*, *SeMaG*, *Tur*, and *Shulkhan Aruch*, all four are in agreement that the woman must be acquired by the man and the opposite or an equal act of “acquisition,” does not result in *kiddushin*. The *SeMaG* goes so far as to inform us that it is even a positive commandment for a man to betroth a woman with money and cited *B Kiddushin* for his proof – text. Later on, the *SeMaG* also writes that it is a positive commandment for a man to be “fruitful and multiply,” but that this does not apply to the woman.⁸⁹

Furthermore, the Rambam informs us that the language that is spoken from the man to the woman at this time must be very clear that *he*, the *groom*, is acquiring the bride, that it take place in front of witnesses, and that it cannot be the opposite. All three of the later codes all agreed with him in this matter. The *Rambam* also notes that this commandment, of acquiring a woman, originates with the passage of Deuteronomy 22:13 and that it is a rabbinic concept to betroth a woman through the transfer of money. The *SeMaG* agrees with the *Rambam* on this point, however, he cites Deuteronomy 24:1 as our source text for this process.

⁸⁹ This is also cited within the *Tur* and *Shulkhan Aruch* in *Hilchot Kiddushin*.

It should be stated here that this process does not proceed unless the bride gives her consent to be acquired by the groom. All four of our codes inform us that a bride must give her consent to be betrothed. Though we found that this was necessary due to a comment in *Tosefta Yevamot 2:1*, it is made clear and explicit within the codes. Even though the woman is not the “fully active” agent in this process, the rabbinic tradition is now allowing for the woman to have some sort of “active” part in this process. She is no longer merely the woman given from father to husband. Now, her opinion (possibly desire) must be given a voice in the process. We must be careful not to read too much into this legal opening as giving woman much power within this process. At the same time, it is important to see that when the rabbis believed that they could give woman some power, some voice, within the *halakhic* process, as they understood it, they acted.

At this point, after consent is granted and it is clear the man is going to acquire a specific woman, the transfer of money between parties takes place. This part of the process is codified by all four of our major texts and all of the codes support the position of *Beit Hillel* – that is, that the amount of money to be transferred from groom to bride, need only be equal to a *perutah*. When this act occurs, all four texts note the importance of two witnesses being present at the time of the process. It is not possible for there to only be one witness present and asking for a second witness later. Instead, the two witnesses must be present at the time the transfer of money takes place.

The concept of transferring of money has its origins, as explained in the previous chapter, in the story of Abraham acquiring a field, with money, and comparing this to the statement found in Deuteronomy 24:1. The *SeMaG* explicitly states that acquiring is only effective when done with money. The later sources take this concept for granted as an

enshrined principle within the process of *kiddushin*. At this point, when the man gives the woman the money, this is when the later texts provide us with a detailed ritual. No more does it suffice for the man to just state a sentence that makes his betrothal of the woman clear to the witnesses and the community. Now, with the later codes, we have a detailed explanation of the ritual, and that brings us to our third point – what is said as the money is transferred from groom to bride.

According to the codes, there is a detailed formula of the statement that man makes as he transfers the money (what becomes a ring) to his bride. The man states to the woman “behold, you are consecrated to me.” This statement acknowledges that the man is actively acquiring the woman and as a result, she becomes forbidden to any other man and is “like a wife” to him at this point. There is the custom, as noted in the codes by the Rema, that a man can choose to add on to this phrase the following: “according to the laws and customs of Moses and the People of Israel.” As noted by the Rema, this is only a custom and one does not have to add this statement. How do we know it is a custom? He tells us “there are those,” and this statement informs us that it was a custom among the people of Ashkenaz..

At this point, we turn to the blessing of the betrothal part of the ceremony. According to the two latest texts, the man says to the woman the following: “Praised are you, *Adonai* our God, who sanctifies us through His commandments and commanded us concerning the forbidden partnerships, and forbids to us and permits to us through *chuppah* and *kiddushin*, praised are you, the Eternal our God, who sanctifies Israel.”⁹⁰

⁹⁰ *Shulchan Arukh, Even Ha’ezer* 34:1 informs states that “some say that another” may recite the blessing. It is possible that this could be the *m’sader kiddushin* and this is the *minhag* in our day. See also Rashi on this blessing regarding *v’asar lanu et ha’arusot*

Furthermore, it became a custom, according to the *Shulkhan Aruch*, that one should recite this blessing over a cup of wine; however, if one does not have a cup of wine, it is possible to say the blessing without it.

We should take note here that this is a later development and a result of this, there is some room to question if one should fail to mention this blessing. In the *Tur*, it is made clear that there is some disagreement here; however, it is possible to fail to mention this blessing and still have the act of betrothal considered a valid. The *Shulkhan Aruch* picks up the conclusion of this argument and only notes that “if one fails to say the blessing at the time of *erusin* (betrothal), then one does not say it [at all].”

At this point, the entire act of *kiddushin* is now completed. From the survey of the four codes, we find a complete description of the process of betrothal. Once the two parties consented, the man gives the woman money and makes his statement (with or without a blessing of *erusin*), Rabbinic Law now considers the couple a betrothed couple. Before we move on to our next chapter, how modern liberal law has taken this ceremony and attempted to make it more if not fully egalitarian, we must return to the final text brought in this section – “Whoever betroths [a woman], betroths her subject to the consent of the rabbis”...[and therefore adds] “*k’dat Moshe v’Yisrael*.”

Each of the three texts notes how it is only *custom* that a couple adds the words “*k’dat Moshe v’Yisrael*” and that it is done because the couple is acknowledging that the marriage is taking place in accordance with Rabbinic law and with the consent of the

who tells us that this means that the groom is forbidden to be intimate with this bride until after *nissuin* and thus, the blessing is a warning not to engage in marital relations until after *chuppah*. Finally, the *Rema* teaches us to conclude the blessing with the following words: “... who sanctifies Israel through *chupah* and *kiddushin*” and this is also our *minhag* today.

halakhic authorities. Note also that this statement, since it is a custom, does not need to be said at the time of the betrothal in order to make *kiddushin* valid, but is only added as an acknowledgment of the power of rabbinic law as well as “common law” or the customs of the people. Through the act of the rabbi being present, the rabbi is giving legitimacy to this act, allowing it to be called *kiddushin*. Furthermore, in regards to the rabbinic ability to annul the marriage, Elon writes “since all marriages are entered into ‘pursuant to the law of Moses and Israel,’ they are subject to the approval and consent of the halakhic authorities. These authorities, like anyone else whose approval and consent are required for the validity of a transaction, may declare that under certain conditions they do not consent, and thus the marriage is annulled *ab initio*.”⁹¹ The addition of this statement - “*k’dat Moshe v’Yisrael*” – to the marriage formula and that it testifies to the couple’s understanding of the rabbi giving rabbinic consent to the marriage and the concept of *kiddushin* sets us up well for our next chapter. In our next chapter, we will study the rabbinic development of *kiddushin* as seen through a modern and liberal rabbinic attempt to further enhance or create a true egalitarian method of *kiddushin*.

V. Liberal Jewish Law Today I: The World of Reform and Conservative Responsa

A. Introduction

We are now making a shift. This chapter begins the exploration of the concept of egalitarian *kiddushin* from the viewpoint of Liberal Judaism – specifically, from the perspective of Reform rabbis. These rabbis, sometimes taking positions that seemed heretical at the time, forced the liberal Jewish world to explore concepts that seemed incompatible with liberal Judaism, such as the concept of *kiddushin* and its inherent non-

⁹¹ Elon, (1994) pg. 633.

egalitarian process. Through their own approaches to Jewish Law, these rabbis found ways to re-envision age-old concepts, and gave them new found meaning in a dynamic, modern world. In these pages we will explore the approaches of these rabbis, and how their work provides the foundation for my own foray into the field of Liberal Jewish Law and the concept of egalitarian *kiddushin*.

B. Reform Rabbis

As the Reform Movement came into existence in the mid to late 19th century, its leaders wasted no time in tackling a number of ritual issues that they felt needed to be reevaluated within a logical and rational religious context. One of these ritual issues, the concept of Jewish marriage, and specifically the issue of *kiddushin*, faced early scrutiny by the Reform leaders of this era. Beginning with liturgical change and individual rabbinic opinions, these early reformers sought to change what had until then seemed a law of *Moses m'Sinai* regarding the concept of *kiddushin* – as a one way, non-egalitarian process.

Among the early Reformers, the European rabbi Samuel Holdheim (1806 – 1860), represented what is perhaps best known as “radical reform.” According to Holdheim’s understanding of Jewish Law, authority existed solely in “reason and conscience” and therefore, the individual is free to choose how he or she understands the role of Jewish Law within one’s life.⁹² When any topic of *halakhah* came up for discussion, Holdheim would apply these principles to understanding the role of Jewish Law for that era and he applied them in his understanding of the concept of *kiddushin*.

Holdheim explored the topic of *kiddushin* in an era where Jews began to socialize

⁹² Meyer, (1988) pg. 81.

freely with non-Jews and the concept of civil marriage became a reality. In this milieu, Holdheim explored the Codes and *Talmud* regarding the act of *kiddushin* and if it the act is inherently different from all other acts of *kinyan*. Furthermore, he sought to explore the theory that perhaps “the act of marriage transformed the character of *kinyan* in such a way that the *kinyan* of marriage could be regarded as so qualitatively distinct from *kinyan* in other cases of legal acquisition that it no longer constituted a civil act.”⁹³ Through his study of *kinyan*, he found that the parties involved had to, while being in a state of free will, affirm the acquisition of the property as well consent to the transmission of those rights. In noticing that these issues were present in the act of Jewish marriage, he found that the *kinyan* of a Jewish marriage did not change the concept of *kinyan* from being a civil matter or simply, a business transaction. He noted further “the sentiments of love and trust that may well have existed between the man and woman were of no legal relevance in establishing a state of *kiddushin* between them as husband and wife.”⁹⁴ As a result of this inquiry, and noticing that the *kinyan* of marriage was no different than any other type of *kinyan* (i.e. transactional and a “secular” act), Holdheim came to believe that marriage in Judaism should be seen as an act that must lie within the scope of civil law and not “Jewish religious law.”⁹⁵ From that standpoint, he then concluded “just as Jewish law – through the principle of *di’na d’malchuta di’na* – accorded state law sovereignty over Jewish Law in civil matters, so too should state law have dominion over Jewish law in relation to marriage.”⁹⁶

Radical a departure as this conclusion may seem, Holdheim’s study provided a

⁹³ Ellenson, (1999) pg. 3.

⁹⁴ Ellenson, (1999) pg. 3.

⁹⁵ Ellenson, (1999) pg. 6.

⁹⁶ Ellenson, (1999) pg. 6.

new way for the nascent Reformers to confront changes of societal norms (i.e. emancipation and equality for Jews in a non-Jewish society) and use their knowledge of the *halakhic* process to respond to these new conditions. During this same era and across the Atlantic, the early American Reformers also sought to make changes to tradition when presented with the challenges of modernity.

In Charleston, South Carolina, the earliest Reformers in the United States sought answers to these same questions. The Reformed Society of Israelites, formed in 1825, found itself needing to respond to the issue of non-egalitarian nature of *kiddushin*. In their prayer book, written sometime in that same year, the group decided to create a radical invention in the marriage ceremony. The liturgy for the marriage ceremony contained a line in which the bride could respond to the groom, during the act of *kiddushin*, with the following words: “I accept this ring in token of the bond of marriage.”⁹⁷ Unfortunately for our study, we do not have the minutes of the meeting that led to this change and which would tell us how they defended this change beyond the influence from secular principles. However, what this text does give us is precedence within the Reform tradition for creating change in sacred ceremonies due to changing societal norms. Though the next major reforms did not occur until decades later, their actions, like those of the earliest Reformers, continued to create precedence for liturgical and ritual change within Reform Judaism.

In 1869 at the Philadelphia Conference of liberal rabbis, David Einhorn led the charge in forging new ritual paths. Like his colleague Samuel Holdheim, he too believed in the method of applying rationalism, logic and secular ethical norms to the process of

⁹⁷ Meyer, (1988) pg. 232.

ritual and liturgical change. At the conference, Einhorn applied this method specifically to the issue of Jewish marriage.

Einhorn and his committee “agreed that in the wedding ceremony the bride would no longer play merely a passive role. Not only would she give the groom a ring in exchange for the one he offered her, she would speak the same Hebrew formula beginning ‘Be thou consecrated unto me with this ring.’”⁹⁸ Like the Society in Charleston, Einhorn and his colleagues believed that the words spoken at the ceremony could change; however, unlike the Society, we have clear evidence for the committee’s reasoning – equality of both partners in the marriage ceremony. The committee, however, did not stop at empowering the bride – they went further and changed the final words of the declaration of *kiddushin* – the formula of *k’dat Moshe v’Yisrael*.

These final words of the rite – *k’dat Moshe v’Yisrael* – bothered the committee because in their view, “Mosaic and Rabbinic Law did not provide for mutual espousal...”⁹⁹ Almost all the members of the conference agreed that the words needed to change in order to reflect their understanding that marriage was both a religious ritual as well as an act that occurred between two equal partners. After numerous debates, a vote was taken and Einhorn’s solution – to replace the wording with “according to the law of God” – won with a slim majority of the votes.¹⁰⁰

Ultimately, the actions of this conference led not to radical change, as the majority of rabbis in America did not accept its findings. Instead, the actions of the conference set the stage for rabbinic precedence as the Reform Movement began to

⁹⁸ Meyer, (1988) pg. 256.

⁹⁹ Meyer, (1988) pg. 256.

¹⁰⁰ Meyer, (1988) pg. 256.

officially take shape within late 19th century America. At the dawning of the 20th century, these liberal rabbis laid the *halakhic* groundwork upon which the CCAR and its members would build a body of Reform Responsa to meet the needs of its members and the laity of the Reform Movement. We now turn to the responsa and works of these rabbis and scholars who continued to delve into the world of *halakhah* and search for an answer to the question of egalitarian *kiddushin*.

One of the first instances that we have in our possession is a responsum by Solomon Freehof – the man now known as the “founding father” of Reform Responsa.¹⁰¹ In a responsum titled “Reform Marriage Formula,” Rabbi Freehof answered the following question asked by a member of the CCAR (Central Conference of American Rabbis): “In order to express the equal status of bride and groom in the wedding ceremony, I have used a variation of the traditional formula used by the groom...the bride says, *haray ata mekudash*, etc. But on reflection this double use of the formula seems to create a *Halakhic* difficulty...what formula could be used which would obviate such difficulties, and yet indicate clearly the equal status of bride and groom?”¹⁰² This question raises the issue that we have been studying all throughout this study – our modern society equates men and women and yet, the *halakhah* seems to prevent making men and women equal within the marriage ceremony. Rabbi Freehof responded directly to that issue.

In his response, Rabbi Freehof brought to the reader the issue of the *get*.¹⁰³ He

¹⁰¹ Freehof, (1977) pg. 191.

¹⁰² Freehof, (1977) pg. 191.

¹⁰³ The *get* is a document of Jewish divorce, given by the man to the woman during the divorce ceremony. According to traditional Jewish Law, only a man can give the *get* to the woman, though she is allowed to receive the document via an agent.

informs us that the Reform Movement made the decision to accept the concept of civil divorce and therefore, a woman does not need to turn to a *beit din* for a *get*. As a result of this action, Freehof wrote the following: “[we] have brushed aside the vast section of Jewish law that deals with divorce. Yet we brush all these laws aside without hesitation because there is a matter of conscience involved. We insist upon the equal status of men and women, and are willing to put aside a large section of the law and face unpleasant consequences.”¹⁰⁴ These words by Freehof inform us what is the guiding principle here in deciding Jewish law – “the matter of conscience.” Though well informed and a great student of *halakhah*, Freehof made it clear that his decisions were counter balanced by his conscience and ethics, and he freely applied this hermeneutic to the issue of the marriage formula.

Freehof continued to respond to the issue as he stated, “the same situation [as was found regarding the issue of the *get*] can apply to the question asked here. Since it is a matter of conscience with us that the bride be of equal legal status with the groom, and if we use a formula to express that equal status, then if the formula possibly involve such *Halakhic* difficulties as mentioned here in the question, then, just as in the case of the *get*, we must be willing, for the sake of conscience, to brush aside the possibilities of these *Halakhic* consequences.”¹⁰⁵ Freehof freely admits that, as explained above, conscience must override the law at this point. However, Freehof did note to his reader that there is still the inevitable issue of contradiction between his ruling and Rabbinic Law.

Regarding this, he declared, “Here we are eager as a matter of principle to prove the

¹⁰⁴ Freehof, (1977) pg. 194. Such consequences, for example, would be the issue of *mamzerut* – children born to a married woman by a man who is not her husband.

¹⁰⁵ Freehof, (1977), pg. 194.

equal status of bride and groom. Our declaration of their equality is totally against the *Halakhah*. Then, when we do violate the *Halakhah* for the sake of principle, we worry about the *Halakhic* consequences of our action... We declare and live by our principle and face the *Halakhic* difficulties involved therein.”¹⁰⁶ Thus, Freehof assures his reader that though he has every right to be concerned about *halakhic* difficulties, as Reform Rabbis, however, they must see that principle (in this case the principle of conscience) overrides any and all *halakhic* difficulties and they must face these difficulties as they occur. Through this answer, Freehof has given us another precedent to follow by declaring outright that men and women are equal in the eyes of Reform Responsa. Unfortunately, Freehof still leaves us with the matter of the *halakhic* difficulty – how to achieve *egalitarian kiddushin*. For that matter, we turn now to a responsa by Rabbi Eugene Mihaly.

In 1985, Rabbi Mihaly found himself opposed to the proposed changes in the CCAR Rabbi’s Manual in which the members decided to translate the meaning of *kiddushin* as sacred Jewish marriage. According to his responsum, Mihaly first dealt with the issue of how to properly translate *kiddushin*, which he felt has “no precise English equivalents.”¹⁰⁷ He continued by informing the reader that it is a “rabbinic innovation” and “the equivalent biblical words are ‘*erusin*’ and ‘*likkuhim*’”.¹⁰⁸ Therefore, after tracing the Talmudic argument (which I have done in the earlier chapters of this work), Mihaly informs the reader that the rabbis selected the term *kiddushin* because of what happens to the woman after the ceremony – her status changes and she

¹⁰⁶ Freehof, (1977), pg. 194.

¹⁰⁷ Mihaly, (1985) pg. 29.

¹⁰⁸ Mihaly, (1985) pg. 31.

becomes prohibited to any other man. Thus, “by using a new term, *kiddushin*, the Rabbis subtly imply that *kiddushin* is a special kind of acquisition, one which involves an essential change in the status of that which is acquired” – the woman is prohibited to all others.¹⁰⁹

This conclusion, that *kiddushin* is a word that represents something else, a change in status, led him to assert that, “*kiddushin* is a metaphor.”¹¹⁰ Therefore, it is impossible to simply translate *kiddushin* as “sacred marriage.” As a result of this inquiry, he then provides a warning to his colleagues as follows: “When we extend a metaphor beyond its legitimate limits, or when we translate a metaphor literally, and thereby obscure its true intent, we not only distort and abuse the text, we are used by it. We substitute the mask for the face and the model for the thing modeled...”¹¹¹ It is disingenuous, to paraphrase Mihaly, to translate *kiddushin* as “sacred Jewish marriage” for it refers to the man’s acquisition of the woman’s sexual rights. In light of this *halakhic* reality, “Reform Judaism,” in his words, “so changed the liturgy and the marriage ritual that they reflect the aspect of Jewish tradition which perceives marriage as a sacred union of two equals who find completion and wholesome fulfillment in each other.”¹¹² Through this responsum, we that Mihaly continued in the tradition of Freehof – of asserting a place of prominence of conscience – while also drawing a distinctive *halakhic* line and preventing a redefinition of a difficult concept.

In light of these *halakhic* difficulties, the Reform Movement could have stayed away from challenging the concept of *kiddushin* once more. *Kiddushin*, at this point, had

¹⁰⁹ Mihaly, (1985) pg. 34 – 5.

¹¹⁰ Mihaly, (1985) pg. 36.

¹¹¹ Mihaly, (1985) pg. 37.

¹¹² Mihaly, (1985) pg. 41.

already been evaluated by two of its greatest *poskim* and yet, the tale of Reform Judaism and egalitarian *kiddushin* did not stop in the 1980s but continued into the 1990s and twenty-first century. We turn now to their efforts, building upon work of their teachers – Rabbis Freehof and Mihaly.

Our first document from this new generation of Reform Rabbis comes from the responsum titled “On Homosexual Marriage.” Though the title may seem to suggest it belongs in the following chapter, buried deep within this responsum is a section important to our work - a section on “Reform Judaism and *Kiddushin*.” The authors of the responsum included this section within this responsum as they deemed it necessary to properly define what is and what is not *kiddushin*, in their perspective, in order to understand the concept of same-sex marriage.

In this section of the responsum, the authors first inform us that “...we celebrate a joining together of two individuals in a relationship of equality and of love...This, in its essence, is what we mean when we call our marriages by the name *kiddushin*.”¹¹³ Furthermore, they even went on to note that what currently happens in weddings, when a Reform Rabbi is the officiant “suggests that we have transformed [via the act of the bride also giving a ring and making a statement of betrothal to the man] marriage into an egalitarian, reciprocal reality that differs substantially from the structure of *kiddushin* in the *halakhic* tradition.”¹¹⁴ Moreover, they did not stop there and continued to parse the word and concept of *kiddushin*:

...The classical Rabbinic conception of *kiddushin* retains much of its relevance for us...thus, even if we no longer hold that the husband ‘acquires’ the wife, both parties do indeed “acquire” from the other all the legal obligations that flow from the formation of marriage...it is our conviction that both bride *and* groom pass into the other’s domain.

¹¹³ Washofsky, (2010) pg. 239.

¹¹⁴ Washofsky, (2010) pg. 238.

The exclusivity of the marital relationship, the “setting apart” that lies at the heart of the idea of holiness and *kiddushin* itself, is not a mutual reality. We have not discarded the idea of *kiddushin*. On the contrary: we have extended its definition and its essence so that all its power and stringency apply to the husband as well as to the wife.¹¹⁵

For these authors, they reiterate the points of previous teachers by informing us that both parties are equal in the marriage ceremony and that we no longer have to shy away from calling it *kiddushin*. Now, in 1996 with this responsum, these Reform Rabbis freely declared that the actions under the wedding canopy, in which both parties are now equal, can be considered an act of *kiddushin*. As comfortable as these authors were in reinterpreting the meaning and concept of *kiddushin* for their day and age, to declare it as an equal and reciprocal action, not all Reform leaders remained convinced of this change. Enter Rabbi/Dr. Rachel Adler, at the end of the 20th century (1998), who takes us away from *kiddushin* altogether, before we revisit it again in the early 21st century.

With the publishing of her work *Engendering Judaism*, Rachel Adler takes the reader on a remarkable journey through issues of gender, equality, and feminism within the Jewish tradition. Though try as she did to do what the authors of the previous responsum did, imbue *kiddushin* with an egalitarian notion, she could not bring herself to do that. In her own words “We need a wedding ceremony that embodies the partners’ intentions to sustain and strive with each other all their lives, to endure like the protagonists of the stormy but ultimately redemptive covenant marriage of biblical prophecy. This intention is not reflected in an act of acquisition.”¹¹⁶ The act of acquisition, which is central to the process of *kiddushin*, Adler rejects as fundamentally anathema to her understanding of what an egalitarian and reciprocal marriage ceremony entails. Therefore, Adler cannot support a reinterpretation and understanding of the

¹¹⁵ Washofsky, (2010) pg. 239.

¹¹⁶ Adler (1998), p. 192.

concept of *kiddushin* and instead offers us an alternative – a *b’rit ahuvim*.¹¹⁷

The concept of a *b’rit ahuvim* (or covenant of lovers) falls under the scope of Rabbinic Law known as *hilkhot shutafut* or laws of partnerships. According to Adler, “the model of a partnership reflects the undeniable fact that marriage is not only a social but an economic institution. But unlike the *ketubah* which presumes that the majority of economic power and resources belong to the male, the *b’rit ahuvim* presumes communal resources and requires joint decisions about their distribution.”¹¹⁸ Adler continues by informing her reader that unlike the process of *kiddushin* and its act of *kinyan*, in which the man acquires the sexual rights of his wife, in a partnership, the two acquire “legal obligations for maintain the partnership and its projects.”¹¹⁹ Such a partnership, a *b’rit ahuvim*, would be created through the following three steps:¹²⁰

1. A partnership deed.
2. A statement of personal undertaking in which partners committed themselves to certain acts on behalf of the partnership.
3. A *kinyan* or symbolic acquisition of the partnership. Partnerships were first understood as just ownerships achieved by pooling resources. “Pooling resources” in Talmudic idiom is *l’hatil b’kis* to put into one pouch, and an ancient legal gesture for partnership acquisition was for each partner to put a sum into one pouch and to lift it up together. Lifting is one of the fundamental halakhic indications of taking something into one’s domain. By lifting the pouch together, contributors would signify joint acquisition both of the money in the bag and the investment it represented.

Through this process of the *b’rit ahuvim*, the man and woman would become responsible to one another and the woman would no longer remain passive in the marriage process. As detailed above, both partners place an object into a bag and both partners have to lift the bag into the air to symbolize their agreement. Thus, just as in *kiddushin* the woman’s consent is given, but unlike in *kiddushin*, she becomes a full and

¹¹⁷ Adler (1998), p. 192.

¹¹⁸ Adler (1998), p. 192.

¹¹⁹ Adler (1998), p. 192.

¹²⁰ Adler (1998), p. 193. For the full text of the *b’rit ahuvim* please see pgs. 214 – 215 of her work *Engendering Judaism* (1998).

equal partner in the ensuing marriage. With this work, Adler presents us with a new way to understand marriage within the Reform Movement, but at the same time, an answer for egalitarian *kiddushin* still eludes us. Fortunately for our work, another rabbi enters the discussion in an effort to bridge the gap between the previous responsum and Adler's efforts.

Though published only briefly before her work, Rabbi Peter S. Knobel seized upon Adler's new definition of what marriage could be within Reform Judaism and yet he sought to affix it to *kiddushin* in his article *Love and Marriage*.¹²¹ Like Adler, Knobel believes that Reform Judaism needs to be honest in stating what *kiddushin* has become for Reform Jews, but unlike Adler, he believes that even in the context of a *b'rit ahuvim*, Reform Jews can still use the term *kiddushin* to describe the marriage process. According to Knobel, Reform Judaism has transformed "marriage in Judaism from its classical form as *kiddushin*, rooted in property law, into an egalitarian partnership, *Brit Ahuvim*..."¹²²

Knobel defends his thesis that Reform Judaism has created a transformation as follows. First, one need only look at the manner in which Reform Judaism has reinterpreted and organized the marriage ceremony. For example, in the current wedding ceremony, there is the near elimination of the blessings of *erusin* and the existence of an exchanging of rings between partners. These changes all resulted from the fact that the classical notions do not fit with the contemporary, liberal notions of Reform Jews. Secondly, "Progressive Judaism has spiritualized the term *kiddushin* and mutualized the

¹²¹ Knobel, (1999) pg. 29.

¹²² Knobel, (1999) pg. 29.

act of *kinyan*.”¹²³ He explains this part by stating the following:¹²⁴

This does not mean [by writing that Progressive Judaism has spiritualized the term *kiddushin* and mutualized the act of *kinyan*] that our understanding of marriage is merely spiritual, not *halakhic*. Although a considerable amount of current liturgical creation is in relation to marriage, it only reflects the fact that the marriage paradigm is undergoing a significant shift. The ceremony is a legal act whose language is performative. Its speech acts to create a new reality, i.e., two unrelated individuals become a married couple. These acts have legal and economic consequences and must be terminated by a legal process. Our spiritualization of *kiddushin* reflects a changed *halakhic*, not merely *aggadic*, understanding.

Furthermore, Knobel reminds us, in a third part, of a major underlying principle in Reform Judaism – “the egalitarian principle.”¹²⁵ Knobel, following in the footsteps of Freehof and Mihaly, informs us that Reform practice needs to incorporate this principle, even when the *halakhah* seems to contradict this principle. In such cases, such as in the context of classical *kiddushin*, egalitarianism needs to be present and if possible “the *halakhah* must be changed to reflect commitment of male female equality...[and] in marriage it means that husband and wife have equal worth and equal responsibility.”¹²⁶ For Knobel, Reform Jews are free to accept Adler’s new ritual while also retaining the language of *kiddushin* since Reform Judaism retains the right to provide new meaning to the concept of *kiddushin*. It is here, at the nexus of new ritual and reinterpretation that the current leader of Reform Responsa steps into the fray as we cross the threshold to the twenty-first century – Rabbi Mark Washofsky.

In Rabbi Washofsky’s seminal work *Jewish Living*, he provides his own insight on egalitarian *kiddushin*. As we have seen until this point, both the classical and modern halakhists have tried to provide forms of redress to the woman in what is, inherently, an unequal process – the process of *kiddushin*. Rabbi Washofsky makes this point clear as

¹²³ Knobel, (1999) pg. 29.

¹²⁴ Knobel, (1999) pg. 51.

¹²⁵ Knobel, (1999) pg. 29.

¹²⁶ Knobel, (1999) pg. 29.

he states the following:¹²⁷

Halakhah, we should note, was sensitive to this situation and sought in various ways to redress the imbalance between husband and wife. The rabbis instituted the document known as the *ketubah*, which specified the wife's financial claims on her husband in the event their marriage came to an end so that 'it would not be easy for him to divorce her.'...Rabbinic law has for a full millennium prohibited a husband from divorcing a wife without her consent, and it does allow the wife to sue for divorce, that is, to ask the authorities to pressure her husband into divorcing her. These remedies demonstrate that the Rabbis were aware of the injustice done to Jewish wives under the law, and they strove mightily to rectify the system's most egregious efforts.

As great as these efforts have been in the name of providing some sort of redress, Washofsky notes that it was not enough. When all is said and done, the process of *kiddushin* is still a process in which the husband acquires his wife's sexual rights, and even though it is done with her consent, he still retains the majority of power within the relationship. Therefore, like his predecessors, Washofsky returns us to the principle of equality as he writes:¹²⁸

Reform Judaism has taken the insight of the tradition, namely that equality and justice must be done, and proclaimed it as principle. In the Reform Jewish view, *kiddushin* continues to establish a bond of exclusivity between a man and a woman, but this bond is understood as *mutual* in character and in force. Husband and wife are consecrated *to each other* unconditionally; they are set apart for each other and only for each other. Each spouse passes into the other's domain...Thus while we retain the vocabulary and the symbolism of traditional Jewish marriage, we demand that these be interpreted and applied equally, to both husband and wife, so as to remove any suggestion of the dominance of one partner over the other.

With these words, Washofsky is bridging the gap not only between the 20th and 21st centuries of Reform Jewish law, but also between the earliest reformers and those of the modern era.¹²⁹ He is reclaiming the classical words, but buttressing them with the principles and ideas that guide the Reform Movement of today. By creating this bridge, he is acknowledging the difference between the classical law and modern law, but at the

¹²⁷ Washofsky, (2010) pg. 154.

¹²⁸ Washofsky, (2010) pg. 154.

¹²⁹ For another overview of the transformation of Jewish marriage from the biblical era to the modern, Reform Movement, please see Rabbi Nancy Wiener's article "Jewish Marriage Innovations and Alterations: From Commercial/Legal Transaction to Spiritual Transformation" in *The Sacred Encounter: Jewish Perspectives on Sexuality*, CCAR Press: New York, 2014.

same time, he is trying to provide a way to save and preserve these words for the modern marriage ceremony.

These efforts on behalf of the Reform Movement, from the early 19th century and into the 21st century provide us with at least three key points to use in the final section of this work. First, we have a precedence of nearly two hundred years of Reform efforts to provide a measure of equality between men and women during the marriage ceremony. Second, the principle of egalitarianism is key within Reform Judaism and must accompany any and all discussions of changing or reinterpreting any piece of Rabbinic Law. Our third and final point – there are at least two practical efforts within Reform Judaism to provide equality between the sexes in Jewish Marriage. One can choose either the path of Adler and the *b'rit ahuvim* or the path of Washofsky and continuing to employ the language of classical *halakhah* while imbuing them with the understanding of Reform principles. We will use all three of these key items in our final discussion, but for now, we turn to a brief overview of the approach within Conservative Judaism to egalitarian *kiddushin*.

VI. Liberal Jewish Law Today II: Same-Sex Marriage

A. Introduction

Until now we have stayed within the confines of marriage law as it applies to a mixed-sex couple. The reason for this is quite logical – until the last two decades, Rabbinic Law, regardless of denomination, only recognized Jewish marriage as one in which there was a male groom and a female bride. However, as society changed and agitation grew within the rabbinic ranks of the Reform and Conservative Movements for equality for couples in same – sex relationships, the leadership of the Movements had no

choice but to respond to the voices of their colleagues and congregants. In the following pages, we will look at how the Reform and Conservative Movements responded to the questions brought by this new generation of rabbis, and how the leaders wrestled with and ultimately responded to the voices of those who searched for rabbinic sanctioning of same-sex marriages.

B. Reform Responsa

The Reform Movement, through its rabbinic arm, began addressing the issue of same-sex marriage as recently as 1996 via the work of the CCAR Responsa Committee.¹³⁰ The responsum, titled “On Homosexual Marriage,” dealt with the following question: “May a Reform Rabbi officiate at a wedding or a ‘commitment’ ceremony between two homosexuals? Does such a union qualify as *Kiddushin* from a Reform perspective?” In the argument that followed, the committee focused on why, as a majority opinion, felt that they could not sanction such officiation and why, if one were to officiate, it should not be called *kiddushin*.¹³¹

The argument begins by going over where the biblical and rabbinic literature, to present, has stood on the issue of homosexuality. Citing Leviticus 18:22 and 20:13, the Committee turns our attention to the following biblical prohibitions: “Do not lie with a male as one lies with a woman; it is an abhorrence [*to-eivah*]” and “If a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing [*to-eivah*].”

¹³⁰ In 1990, the CCAR voted to approve the report of The Ad Hoc Committee on Homosexuality and the Rabbinate in which the document stated, “...The committee urges that all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation that they have chosen.” Hence, the by the time this question was being asked, the Reform Movement had already had six years of men and women who could be open about their sexuality while serving as rabbis.

¹³¹ Washofsky, (2010) pg. 215.

At this point, the responsum adds, “rabbinic literature adds relatively little to this legal material...At any rate the Rabbinic sources, which we utilize as the building blocks of our own textual conversation, imply that the phenomenon was either not widespread or successfully hidden or suppressed...[and that according to the rabbinic tradition] Jews are not suspected of homosexual relations and of buggery.”¹³²

As for the issue of female homosexual activity, the responsum informs us that the biblical tradition does not mention this behavior at all. The Committee believes that this is so, “because, unlike the forbidden unions [*arayot*] of Leviticus 18 and 20, it does not involve actual intercourse.”¹³³ Rabbinic tradition, on the other hand, does take some issue with the subject. For example, Rav Huna, an *amora* of the Babylonian community stated, “women who commit lewdness with each other are, forbidden to be married to a priest.”¹³⁴ Furthermore, “female homosexual behavior, if not one of the *arayot*, is nonetheless stigmatized as an example of ‘Egyptian practice’ that is prohibited to Jews under the broad sweep of the prohibitions of Leviticus 18. ‘And what is ‘Egyptian practice?’ For men to marry men, women to marry women, and for a woman to marry to men.”¹³⁵

Following these rabbinic and biblical statements, the committee comes to the conclusion that the reason rabbinic and biblical traditions rule against homosexual behavior is that there is a fear that such behavior could cause a “breakdown of marriage,

¹³² Washofsky, (2010) pg. 219. See *mKid* 4:14, *B Kiddushin* 82a, *Mishneh Torah Hilchot Issurei Biah* 22:2 and *Shulkhan Aruch Even Ha-ezer* 24.

¹³³ Washofsky, (2010) pg. 219.

¹³⁴ Washofsky, (2010) pg. 220.

¹³⁵ Washofsky, (2010) pg. 220.

the bearing of children, and ‘normal sexuality.’”¹³⁶ They support this thesis by bringing a statement from *B Sanhedrin* 58 that notes, “the prescription that the male shall ‘cleave unto his wife’ (Gen. 2:24) comes explicitly to prohibit homosexual intercourse; that is to say, homosexual behavior threatens marriage and childbirth.”¹³⁷ Thus, in their opening statements, the Committee concludes with the following words: “...in Jewish tradition, homosexual behavior is a transgression against the order of nature...”¹³⁸ The Committee continues their discussion and brings us to the meaning of *kiddushin* in order to answer the question regarding same – sex marriage as *kiddushin*.

As we have seen earlier in this work, we know that once *kiddushin* takes effect, the woman becomes forbidden to all other men. The blessing of *erusin*, as noted in chapter three, declares that God “has sanctified us through *mitzvot* and commanded us concerning the *arayot*” and it is this concept of *arayot* that prevents them, the Committee, from providing their *heter* [permission] to the ritual of same-sex marriage. In their own words, they write the following:

“it is through reference to the *arayot* [in the blessing of *erusin*] that we can understand the meaning of *kiddushin* as a legal institution. It is a ‘sanctification,’ a ‘setting apart,’ the creation of an exclusive sexual relationship between husband and wife by which God sanctifies Israel...There is no such thing...as Jewish marriage in the absence of the prohibitions of the *arayot*, the recognition of the boundaries of permitted and prohibited sexual intercourse. And marriage is a valid *Jewish* marriage if it is contracted between persons prohibited to each other as *arayot*.”¹³⁹

From this statement we learn that the Committee considered homosexual behavior to fall under the category of *arayot* – the category of prohibited sexual unions.

Kiddushin, in the Committee’s view, and supported by the traditional blessing of *erusin*, seems to prohibit any union that appears to violate the boundaries of the *arayot*.

¹³⁶ Washofsky, (2010) pg. 220.

¹³⁷ Washofsky, (2010) pg. 220.

¹³⁸ Washofsky, (2010) pg. 221.

¹³⁹ Washofsky, (2010) pg. 237 – 38.

Therefore, the Committee concludes, “homosexual relationships, however exclusive and committed they may be, do not fit within this legal category; they cannot be called *kiddushin*...[and] although a minority of us disagree, our majority believes that Reform rabbis should not officiate at ceremonies of marriage or ‘commitment’ for same-sex couples.”¹⁴⁰ Though the responsum concluded in the negative, it did not stop the conversation within the Reform Movement.¹⁴¹ The next major statement published by the Reform Rabbinate followed in 2000 at the 111th convention of the CCAR.

In the time leading up to the 2000 convention, the CCAR reviewed the responsum of “On Homosexual Marriage” as well as the results of the 1998 Ad Hoc Committee on Human Sexuality. Following the release and study of these documents, the CCAR formulated a resolution to be released at the 2000 convention. The CCAR, in its official capacity, declared the following:

WE DO HEREBY RESOLVE, that the relationship of a Jewish, same gender couple is worthy of affirmation through appropriate Jewish ritual, and
FURTHER RESOLVED, that we recognize the diversity of opinions within our ranks on this issue. We support the decision of those who choose to officiate at rituals of union for same-gender couples, and we support the decision of those who do not, and
FURTHER RESOLVED, that we call upon the CCAR to support all colleagues in their choices in this matter, and
FURTHER RESOLVED, that we also call upon the CCAR to develop both educational and liturgical resources in this area.¹⁴²

This resolution of the CCAR was the first official step of the Reform Rabbinate to publicly support rabbinic officiation at same-sex marriages. Importantly, this resolution left room for rabbis who disagreed with this statement and were in agreement with the

¹⁴⁰ Washofsky, (2010) pg. 247.

¹⁴¹ Following the release of this responsum, the CCAR put together an Ad Hoc Committee on Human Sexuality. In their report, the committee stated that “*kiddusah* may be present in committed, same gender relationships between two Jews.” For the full text, please see *The Sacred Encounter: Jewish Perspectives on Sexuality*, CCAR Press: New York, 2014.

¹⁴² <http://ccarnet.org/rabbis-speak/resolutions/2000/same-gender-officiation>.

responsum of 1996, to continue to hold their position. At the same time, it encouraged the rabbinate to continue to look into the ritual and liturgical aspects of same-sex marriage and continue the discussion in both a private and public manner. In that vain, of discussion *l'shem shamayim*, members of the Reform Rabbinate continued to discuss and debate issues that related to the responsum of 1996 and two prominent rabbis sought to address the issue.

The first rabbi sought to deal with the issue of *arayot* and *to-eivah* that was the crux of the issue in the 1996 responsum. In her article titled “A Reform Understanding of *To-Eivah*” by Rabbi Nancy Wiener, Wiener seeks to reorient our understanding of the concept of *arayot* and the meaning of *to-eivah* within a contemporary Reform world. Wiener points us first towards a document titled “Reform Sexual Jewish Values.”¹⁴³

In this article, Wiener refers us to the statement that “our sexuality and sexual expression are integral and powerful elements in the potential wholeness of human beings. . . . Each Jew should seek to conduct his/her sexual life in a manner that elicits the intrinsic holiness within the person and the relationship.”¹⁴⁴ Furthermore, she tells us “we must acknowledge that in the area of human sexuality, activities and interactions that were once understood to be natural for all human beings or divinely ordained, such as heterosexuality, are no longer automatically accepted as such.”¹⁴⁵ With this understanding, it is possible to reevaluate and understand that what was once a *to-eivah* may no longer exist within the twenty-first century.

Wiener reminds us that what is considered acceptable in the twenty-first century

¹⁴³ For this article, please see the full text in the forthcoming *The Sacred Encounter: Jewish Perspectives on Sexuality*, CCAR Press: New York, 2014.

¹⁴⁴ Wiener, (2001) pg. 35.

¹⁴⁵ Wiener, (2001) pg. 36.

may not have been acceptable in the era of the biblical authors and vice-versa. For example, she notes that “our acceptance of ex-spouses remarrying each other, even if they’ve been married to others in the interim, and our acceptance of adult consensual sex between members of the same gender. Conversely, today we do object to adults engaging in sexual activity with minors, a practice tolerated in biblical and postbiblical Jewish texts.”¹⁴⁶ It is in that vein that she urges us to see ten concrete values that should guide us in understanding *to-eivah* for the modern Reform community and she suggests the following, from the statement of “Reform Sexual Jewish Values”¹⁴⁷:

1. *B'tzelem Elohim* (In the image of God)
2. *Emet* (Truth)
3. *B'riut* (Health)
4. *Mishpat* (Justice)
5. *Mishpachah* (Family)
6. *Tz'niyut* (Modesty)
7. *B'rit* (Covenantal Relationship)
8. *Simchah* (Joy)
9. *Ahavah* (Love)
10. *K'dushah* (Holiness)

These ten values all affirm that in a relationship, one needs to respect and care for the other and that to violate any of these ten values would in fact be to err and lead one to an “abhorrent behavior” or a *to-eivah*. Just as in the biblical accounts, if one were to deceive another in business or violate marital bounds, such behaviors are considered by the Torah as *to-eivah*, Wiener urges us to apply these ten values to a Reform understanding of *to-eivah* and see that what we are doing is not so different from what is written in the biblical material. For example, one can be engaged in a same – sex relationship and it would only be considered as an act of *to-eivah* were one or both of the partners to commit an act that would violate the aforementioned ten principles. Thus,

¹⁴⁶ Wiener, (2001) pg. 36.

¹⁴⁷ Wiener, (2001) pg. 37.

when we are true to ourselves, when we understand that what was once acceptable is no longer and vice-versa, it is possible to understand *to-eivah* in a liberal, egalitarian Reform context and perhaps provide a way to strike down the argument of the 1996 responsum.

Wiener's work seeks to breakdown one side of the 1996 responsum – the issue of *to-eivah* – and on the other side, Rabbi Peter Knobel envisages a way to permit a Reform understanding of *kiddushin* that would sanction same-sex marriage. In his article “Reform Judaism and Same-Sex Marriage: A Halakhic Inquiry,” Knobel tries to provide a way for the Responsa Committee, within *halakhic* bounds, to apply the new understandings brought regarding same-sex relationships (particularly how Wiener seeks to demonstrate how modernity can follow in the path of tradition and yet bring about new interpretations) to pave the way for a new responsum. For his answer, Knobel points us towards the words of Rabbi Joel Roth and his work *The Halakhic Process: A Systemic Analysis*.

Knobel brings the work of Rabbi Roth for one particular purpose – how changes in Rabbinic Law can occur, even when it goes against the *Torah*. Knobel brings us the following quote of Roth “when the ultimate goals of the Torah would be better served by its abrogating, even in its entirety, it is within the purview of the sages to take that step.”¹⁴⁸ Importantly, “the circumstances that might warrant such action are never defined. In the final analysis, the determination of the need for such action lies with the sages themselves.”¹⁴⁹ Furthermore a second principle, *shinnui ha-ittim* (a changed reality) “became the vehicle that enabled later sages to make use of new medical and scientific knowledge without vitiating the smooth functioning of the halakhic

¹⁴⁸ Knobel, (2001) pg. 175.

¹⁴⁹ Knobel, (2001) pg. 175.

system...”...[and further citing Roth] “...the extralegal sources allow the norm to be overturned by the claim of *shinnui ha-ittim* if the evidence is strong enough.”¹⁵⁰ These *halakhic* principles became the basis that allows Knobel to shift to the argument of same-sex marriage and advocating for its acceptance within the concept of Jewish marriage.

According to Knobel¹⁵¹:

it is clear that the sages had no concept of sexual identity...in addition, the identification of homosexuality with Canaanite and Egyptian practices suggests that the rabbis connected homosexuality with idolatrous practices. Sexual orientation is a new category. Rabbinical literature does not have a concept of sexual orientation...In fact it would be no exaggeration to say that the conceptual framework within which we understand sexuality and sexual relations is irrevocably different from that of our tradition...We cannot simply start quoting *halakhic* sources without stopping to ask ourselves about the context of these sources and its implications for their relevance.”

Knobel thus encourages us to see that not only are we a) given *halakhic* freedom to interpret as well as change Torah when the era calls for it but b) to note, as does Wiener, that our interpretation of sexuality is worlds apart from that in which the Torah and our Sages sought to create and impart their world view on the society of our forbearers. Therefore, it is our sacred duty to, in his view, be willing to challenge these notions of the Sages and, if possible, open up the discussion once more through the Responsa Committee. Perhaps it is because of the work of these and other rabbis, as well as a social milieu of continually changing attitudes towards same-sex marriage, that resulted in the Responsa Committee once more taking up the issue of same-sex marriage. Shortly before I finished this study, in early 2014, the CCAR Responsa Committee ruled once more on the issue of same-sex marriage as *kiddushin*.

In the beginning months of the Jewish year 5774, the CCAR Responsa Committee was tasked once again with deciding whether to uphold or change its stance

¹⁵⁰ Knobel, (2001) pg. 175 – 76.

¹⁵¹ Knobel, (2001) pg. 178.

against rabbinic officiation for same-sex couples. This responsum, titled “Same-Sex Marriage as *Kiddushin*,” came into existence in a completely changed secular legal landscape from when the Committee wrote the 1996 responsum. The Supreme Court of the U.S. Government struck down the Defense of Marriage Act and for the first time, a majority of U.S. Reform Rabbis could serve as a legal officiant for same-sex marriages. The time had come for another look at the issue.

As noted in the earlier paragraphs of this section, the crux of the issue in 1996 centered on the Committee’s understand of *to-eivah*. In previous paragraphs, we noted that Wiener tries to show us how it is possible to see the issue of *to-eivah* in a new light. With this responsum, the Committee appears to be appreciating her work and they seem willing to do away with the concerns posed by the issue of *to-eivah* and *arayot* as follows¹⁵²:

The tradition's linkage of marriage to the *arayot* is also problematic for us. It is a fact, first of all, that we no longer observe the laws of *yibum*, *chalitzah*, and *mamzerut*. And, as we discuss above, the very notion of *arayot* has been reconstructed in our discourse from a ritual to a moral problem. Thus, while we without any doubt acknowledge that numerous sexual relations remain forbidden, our primary concern is that the union between spouses be one that expresses our deepest moral conceptions of marriage, that it be one of exclusive sexual commitment. And there is no reason why gays and lesbians cannot establish such a union. When we stand under the *chupah*, we celebrate a joining together of two individuals in a relationship of equality and of love, one that promises emotional as well as sexual fulfillment, one which allows them to build a home that expresses Jewish values. This, in its essence, is what we mean when we call our marriages by the name *kiddushin*. If gay and lesbian couples, no less than their heterosexual counterparts can aspire to that kind of relationship, it would seem that *kiddushin* or “marriage,” as *we Reform Jews* understand those terms, are fit names for it [emphasis in original].

The above paragraph, which was the minority position in the 1996 Responsum, has flipped and become the majority position of the Committee in 2014. Furthermore, the Committee states that it relies upon the *halakhic* principle of *Gadol k’vod ha-briot she-docheh lo ta’aseh she-ba-Torah* (“So great is the requirement of human dignity that it supersedes a negative commandment of Torah”) in reversing course and giving its

¹⁵² Washofsky, (2014) pg. 3.

sanction to the understanding of same-sex marriages as falling under the rubric of *kiddushin*.¹⁵³ As a result of this new understanding of *kiddushin*, the Committee now states the following¹⁵⁴:

We are not now suddenly “changing” the traditional definition of *kiddushin* in order to accommodate same-sex marriage. Reform Judaism departed from that definition at least a century and a half ago when it restructured and reimagined *kiddushin* in accordance with our movement’s fundamental commitment to justice, equity, and egalitarianism. What *has* changed since 1869 – and 1990, and 1996 – is our recognition that same-sex unions, no less than opposite-sex unions, are a form of *marriage*. Given this recognition, it is clear to us that the same commitment to justice, equity, and egalitarianism applies in this case. Same-sex marriages therefore meet the long-standing Reform definition of *kiddushin* as a mutual and egalitarian marital covenant between two Jews.

These words of the Committee demonstrate that the Responsa Committee is a committee that is responsive to the needs and voices of its community. In short of twenty years, the Committee has expanded the definition of *kiddushin* and codified its understanding as an egalitarian commitment between two loving, Jewish adults. Though it appears as though the central part of my work has been answered – drafting a responsum on egalitarian *kiddushin* – I still present my humble opinion on this proposal as my approach differs slightly from that of the Committee’s. Before we proceed to my responsum, we will briefly visit the current approach in the Conservative Movement towards same-sex marriage by the Committee on Jewish Law and Standards (CJLS).

C. Conservative Responsa

The Conservative Movement slowly entered the conversation regarding same-sex marriage. Unlike the Reform Movement that had already accepted openly gay and lesbian men and women into the rabbinate, before they dealt with the question regarding same-sex marriage, the Conservative Movement eventually answered both questions at once. In the 1990s, the Reform Rabbinate began its discussions regarding same-sex

¹⁵³ Washofsky, (2014) pg. 4.

¹⁵⁴ Washofsky, (2014) pg. 5.

marriage and gave its first *heter* to rabbinic officiation at same-sex ceremonies in 1998, followed by a resolution in 2000. During the same period, the Conservative Rabbinat continued to prohibit openly gay men and women from serving in the rabbinat and did not even take up the question in the 1990s.

In the 1990s, the Conservative Rabbinat published a number of responsa as well as an official statement regarding the status of gays and lesbians within the Conservative Movement. Nearly all of the responsa, from Rabbi Joel Roth to Rabbis Mayer Rabinowitz and Kassel Abelson, argued that any one who is openly gay or lesbian should not be allowed to serve in the rabbinat. Furthermore, they raised the possibility of preventing them from teaching and leading the youth of Conservative Congregations.¹⁵⁵ The official statement of the Movement declared the following¹⁵⁶:

- 1) We will not perform commitment ceremonies for gays and lesbians.
- 2) We will not knowingly admit avowed homosexuals to our rabbinical or cantorial schools or to the Rabbinical Assembly or Cantors' Assembly. At the same time, we will not instigate witch hunts against those who are already members or students.
- 3) In any case, in accordance with The Rabbinical Assembly and United Synagogue resolutions, we hereby affirm gays and lesbians are welcome in our congregations, youth groups, camps and schools.

These policies of the Conservative Rabbinat and Movement remained the official policy until 2006. In that year, two major responsa came before the CJLS and changed the course of Conservative Judaism regarding the acceptance of openly gay and lesbian men and women within the Movement. Though both responsa became majority opinions of the CJLS, one responsum, authored by Rabbis Elliot Dorff, Daniel Nevins and Avram Reisner, ended up bringing about the change within the Movement.¹⁵⁷

¹⁵⁵ See responsa of the CJLS, section *Even Ha-ezer* online.

¹⁵⁶ Consensus Statement on Homosexuality, (1992).

¹⁵⁷ The other responsum, authored by Rabbi Joel Roth, while also a majority opinion, voted to maintain the current policy of the Movement that was adopted in 1992. I have

The rabbis begin their discussion by framing their actions within the context of the *halakhic* process. The rabbis believe that they have the right to interpret Jewish Law and provide rulings for their own era and use that belief in order to justify the actions that they take in their responsum. In their own words they state¹⁵⁸:

Dor dor v' doroshav—each generation demands its own interpretations of Jewish law. As the Torah says, “When a matter shall arise that confounds you...you shall go and inquire of the judge who shall be in that day, and they will tell you the law.” (Deut. 17:9) For the CJLS to avoid this issue or to declare that nothing can be done for homosexuals who wish to observe the halakhah would be to abandon the Torah’s mandate. Indeed, were we unable to find compelling guidance in the halakhah for the sexual lives of our contemporary Jews, including those who are gay and lesbian, that would be a terrible defeat for our religious mission. Some may object to our proposal by predicting that gay men will find our limited permission unacceptable. We, however, believe that those motivated to live within the framework of halakhah are necessarily willing to accept limits on personal autonomy—as long as they are feasible—for the sake of pursuing a life of holiness. Others may object that human dignity is a peripheral concern of the halakhah incapable of modifying our ancient sexual ethic. We, however, believe that dignity is a central concern of the Written and Oral Torah and is a well established halakhic principle. We approach this challenging subject with reverence for God, humility, and with respect for the dignity of humans, all of whom are created in the divine image.

From this vantage point, the rabbis shift their attention to contemporary theories of sexual orientation. According to their research, they conclude that in the modern era, it is common for teens and youth to explore their sexuality and experiment with partners of same and mixed sex. Most importantly, they note that it is evident that by early adulthood, some Jewish men and women have discerned that they are homosexual and will not be able to enter a traditional heterosexual marriage. Due to this conclusion, they decide that it is incumbent upon them to employ the *halakhic* process and find an answer to how homosexual Jews can maintain their lifestyle while still remaining in the boundaries of *halakhah*.

Like their Reform colleagues, these rabbis begin their search by returning to the

opted not to discuss that position in this work as the other responsum became normative practice for the Movement.

¹⁵⁸ Dorff, Nevins, and Reisner, (2006) pg. 4.

biblical text. They too take us back to Leviticus 18 and 20 and its prohibitions on male – male sexual intercourse. Unlike the Reform responsa, the authors are quite explicit in how to read the text and understand that these verses do not prohibit all male – male sexual contact. Instead, it prohibits only anal intercourse between men. They support this by citing *B Yevamot* 83b and its discussion of the *androginus*. The Talmud states: [first citing the biblical prohibition] “ ‘Do not lie with a male as one lies with a woman [lit. the lyings of a woman]’ -- Who is a male who has two ‘lyings?’ Conclude: this is an *androginus*.” From this, the rabbis conclude that, according to biblical law “Only with an *androginus* are there two biblically prohibited acts between male lovers. Otherwise, the only act forbidden by these verses is anal intercourse. There is no other way for men to have intercourse that would be considered משכב זכור [the act of men lying with each other]. This source clearly excludes oral sex between men from the category of *ervah* with its severe penalties.”¹⁵⁹

Having dealt with the biblical material, the rabbis transition to the world of Rabbinic Law. The rabbis clearly note that though the biblical material only dealt with male relationships and prohibited anal intercourse, the rabbinic material bans a much wider range of behaviors. For support in this point, they cite the following:

- 1) Whoever copulates with one of the forbidden relations non-genitally, or hugged and kissed [them] or enjoyed skin-to-skin contact -- such a person is lashed, and is suspected of *arayot* [forbidden intercourse]¹⁶⁰
- 2) Such a person is lashed according to the Torah, for it says (Lev. 18:30): “not to engage in any of the abhorrent practices...” and it says (Lev. 18:6): “None of you shall come near... to uncover nakedness,” that is to say: Do not approach those things that lead to prohibited sexual relations¹⁶¹

¹⁵⁹ Dorff, Nevins, and Reisner, (2006) pg. 5.

¹⁶⁰ *Shulhan Arukh, Even ha-Ezer* 20:1.

¹⁶¹ *Mishneh Torah Hilkhos Issurei Biah* 21:1.

These texts only discuss male relations and the rabbis refer us to a *midrash* found within the *Sifra*, that is codified by Rambam, regarding female – female acts of intimacy. The text, as found in *Mishneh Torah Hilchot Issurei Biah 21:8*, is as follows:

Women who rub one against the other—this is forbidden. It is among the acts of Egypt against which we were warned, for it says [Leviticus 18:3]: “You shall not copy the practices of the land of Egypt.” The Sages said [*Sifra, Aharei Mot, parsheta* 9:8]: “What is it that they would do? A man would marry a man, a woman marry a woman, or a woman marry two men.” Even though this practice is prohibited, one does not receive lashes, for there is no specific biblical prohibition and it is not called ‘intercourse’ at all. Therefore, they are not prohibited [from marrying] into the priesthood on account of prostitution and a woman is not prohibited to her husband on account of this... But it is appropriate to give them [rabbinic] lashes for rebelliousness, since they have done a prohibited thing.

At this point, it is quite clear that the rabbis have presented the rabbinic material and noted what behaviors have been deemed prohibited by Rabbinic Law. From the examples cited above, behaviors that include all forms of intimacy between gay and lesbian men and women appear to be prohibited. However, the rabbis cite the category of *arayot* (as discussed in the section on Reform Responsa). Unlike their Reform colleagues, these rabbis do not turn to a moral and ethical evaluation of *arayot* in our day; instead, in trying to hew close to the *halakhic* process as they understand it, inform the reader that only anal intercourse between men falls under the category of *arayot* and this action is considered as a act of *to-eivah*. Though this appears to be the *halalkhic* case and would seem to permit other sexual acts, the rabbis admit the following: “we must acknowledge that the established *halakhah* presents a comprehensive ban upon homosexual intimacy.”¹⁶² That being said, the rabbis note that the Sages believed that by prohibiting such behaviors, gay men and lesbian women would eventually turn to a heterosexual lifestyle. However, given the knowledge of sexual orientation that research has uncovered, they write “To uphold the *halakhah*’s comprehensive ban is to consign a

¹⁶² Dorff, Nevins, Reisner, (2006) pg. 8.

significant class of Jewish women and men to life-long celibacy or communal condemnation. This result is problematic not only for the affected individuals, but also from the vantage of the *halakhah*'s own mandate to safeguard human dignity.”¹⁶³ It is through the *halakhic* concept of human dignity that they find their answer to their question – “can *halakhah* provide a way for gay and lesbian Jews to maintain homosexual relationships while adhering to the norms of *halakhic* Judaism.”

Within the boundaries of the *halakhic* principle of human dignity, the rabbis believe that they have found their answer to the aforementioned question. Like their Reform colleagues of the responsum from 2014/5774, these rabbis cite the concept found in *B Berachot 19b*: “So great is human dignity that it supersedes a negative commandment of the Torah.”¹⁶⁴ Citing this principle of how human dignity can supersede not only rabbinic prohibitions but prohibitions of the Torah as well, the rabbis declare that they have their answer. The rabbis then spend a number of pages citing numerous examples of how this principle is employed by the Sages of generations past. They use these examples to bolster their argument in reaching their conclusion – “the rabbinic restrictions upon gay men and lesbian women that result in a total ban on all sexual expression throughout life are in direct conflict with the ability of these Jews to live in dignity as members of the people of Israel. For this reason, the *halakhic* principle of *gadol k’vod habriot* must be invoked by the CJLS to relieve their intolerable humiliation. We must make open and rigorous efforts to include gay and lesbian Jews in our communities, to provide a proper welcome and a legal framework for the

¹⁶³ Dorff, Nevins, Reisner, (2006) pg. 8.

¹⁶⁴ Dorff, Nevins, Reisner, (2006) pg. 10.

normalization of their status in our congregations.”¹⁶⁵ This conclusion, of continuing the ban of biblical prohibitions (i.e. prohibiting anal intercourse between men) but ending all other rabbinic prohibitions and at the same time, allowing openly gay men and women to become rabbis and cantors is their answer to the question raised at the outset. At the time that they composed this responsum, they wrote that they were unable to rule on the status of same-sex marriage, but the door was now open for gay men and women to become spiritual leaders and have at least some *halakhic* permission for maintaining and/or developing same – sex relationships. Finally, in 2012, these same rabbis revisited their responsum and declared that they were ready to rule on the issue of same-sex relationships.

In the follow-up to their 2006 responsa, Dorff, Nevins and Reisner addressed the question to which they found themselves unready to answer – “what is the status of same-sex relationships? Is it considered *kiddushin*?” According to the rabbis, they were now ready to answer this question as well as provide examples for the ritual that they were about to endorse. In this *halakhic* response, we find that the rabbis provide three reasons why they do not believe that same-sex marriages can fall under the category of *kiddushin* and why they must be considered a category of their own.

In the first instance, they cite that *kiddushin* “is an inherently non-egalitarian model of marriage. The original concept from antiquity, when polygamy was permitted, was for a man to designate a woman for himself in a one-way exclusive arrangement. She was exclusively his, but

¹⁶⁵ Dorff, Nevins, Reisner, (2012) pg. 17.

he was not exclusively hers.”¹⁶⁶ While noting this inherent inequality, the rabbis state that they made an effort to work within “the boundaries of the established rituals and texts so that

our weddings can fulfill traditional *halakhic* requirements even as they express our egalitarian values.”¹⁶⁷ Thus, they aim to create not only a new ritual for same – sex marriage, but one that also enables them to create an egalitarian ritual for these couples. Coming directly from the first reason, the rabbis decide to not call same – sex marriage as being *kiddushin* due to the difficulties that arise in the unfortunate event of a divorce.

A consequence of *kiddushin* is that though the woman may ask for a divorce and in some cases the *beit din* may intervene on her behalf to try and force the man to give her a *get*, in the end, it is ultimately his decision. Though the Conservative Movement has developed their own *halakhic* methods to try and solve the problem of the woman who cannot procure a *get*, these rabbis hesitated in placing gay and lesbian Jews in the same precarious situation. Finally, the rabbis turn to the liturgy of the traditional wedding ceremony itself for their last reason against calling same – sex marriage as *kiddushin*.

As we have seen earlier in this work, the traditional liturgy of *kiddushin* describes a marriage that takes place between members of mixed – sex. Furthermore, the liturgy includes the statement against forbidden marriages. Until this point in the Conservative Movement, same – sex marriages would have fallen under the categories of forbidden unions – the *arayot*. For these reasons, as well as those stated above, the rabbis write the following:

¹⁶⁶ Dorff, Nevins, Reisner, (2012) pg. 4.

¹⁶⁷ Dorff, Nevins, Reisner, (2012) pg. 4.

...we have decided to create a new *halakhic* structure for same-sex unions and separations that is fully egalitarian and that avoids the severe liabilities of the get. Our *p'sak din* (legal ruling) in the 2006 responsum was intended to harmonize classical halakhic norms regarding sexuality with contemporary insights about sexual identity and the impact of the status quo ante upon Jews who are gay and lesbian. Just as our *halakhic* conclusion grew out of classical *halakhic* sources, so too should our ceremonies and documents grow out of the sources of Jewish tradition.¹⁶⁸

Unlike their Reform counterparts who ultimately decided that same – sex marriage may be considered *kiddushin* and whose colleagues are free to use the traditional liturgy as they see fit, the Conservative Rabbinat does not have that freedom. Having now used the *halakhah* to decide that same – sex marriage is permissible, the rabbis create a new liturgy and ritual to go along with this ruling.

According to these rabbis, the ritual that they offer is in the form of creating a covenant. Specifically, they call their ceremony and its accompanying document a “Covenant of Loving Partners” or a *b'rit ahuvim/ahuvot*. Like the ceremony created by Adler, theirs indicates the couple taking acquisition of their respective duties and partnership within the covenant. In this way, the Conservative Rabbinat of the early twenty-first century nearly dovetails with the Reform Rabbinat. Both rabbinates both provide a method of same – sex marriage, though only the Reform Rabbinat is willing to go so far as to call it *kiddushin*, granting equal status to both partners in same – sex and mixed – sex ceremonies.

VII. A Proposal for Egalitarian Kiddushin

Egalitarian Kiddushin: A Proposed Responsum for its Adoption for Same – Sex and Mixed – Sex Marriages

שאלה: Is it possible to understand the concept of *kiddushin* as applying to marriage ceremonies of both same – sex and mixed – sex couples in today’s Reform Movement?

תשובה:

¹⁶⁸ Dorff, Nevins, Reisner, (2012) pg. 5.

“And God created man in God’s image, in the image of God, God created him, male and female, God created them” Genesis 1:27

This responsum is my humble attempt to answer a question that has existed since the birth of the Reform Movement. As a Jewish denomination that holds egalitarianism as one of its core principles, how can we continue to not only employ its non-egalitarian meaning for mixed – sex couples, and at the same time, deny an answer in general for same – sex couples? In this responsum, I attempt to answer this question in the manner taught to me by my rabbis and teachers, specifically, Rabbi/Dr. Mark Washofsky, Rabbi/Dr. David Ellenson, Dr. Moshe Benovitz and Dr. Alyssa Gray. Their teachings stress the importance of knowing our sacred texts, as well as the obligation to understand the beautiful fluidity that lies within them. It is only by reading through tradition and grounding our work within its methods, will we find an answer to our most pressing questions.

We begin our search for an answer to the concept of egalitarian *kiddushin* by researching what we mean by *kiddushin*. When we look at Torah to give us an answer, we find that there is no concept of *kiddushin* within the Torah. Instead, we find that the Torah instructs us on ways that a man may go and “take a wife,” but there is no actual concept of what we now know as *kiddushin*. What is important within the Torah regarding marriage, is the first occurrence of the legal precedent that informs us that both a man and a woman’s consent are necessary for a marriage to proceed.

In Gen. 24:58, we are given the following verse: “They [Rebecca’s family] called Rebecca and said to her, ‘Will you go with this man?’ And she said, ‘I will.’” From this we learn, according to Rashi’s commentary on this verse, “a woman’s consent is needed for a marriage.”

From our earliest sacred texts, we learn that a woman is not merely a passive figure within a marriage. Her consent is necessary before the process can even take place. However, this process that is now known as *kiddushin*, did not exist in the era of our ancestors. Instead, we must turn to the rabbinic texts, to the world in which *kiddushin* was born.

The first instance of the use of the word or root *q-d-s* is found in *mKid* 2:1 as follows:

A man betroths [a woman to him] either by himself or through the use of his agent. A woman is betrothed either by herself or through her agent. A man betroths his daughter while she is a minor either by himself or through his agent. The man says to the woman: “Be betrothed to me with this date, be betrothed to me with this.” If one of them has the value of a *perutah*, she is betrothed and if not, she is not betrothed...

The above reference shows us that something caused the Sages to change the term used to describe the act of acquiring one’s wife from *q-n-h*, which is how it appears in *mKid* 1:1 to the root of *q-d-s*. What we do not know from *mKid* 2:1, is why the Sages changed the root that they used and to only employ *q-d-s* from *mKid* 2:1 onward. For that answer, we must look to the Babylonian Talmud to begin to understand the changes in the Jewish marriage ceremony.

In the Babylonian Talmud, we need look no further than *B Kiddushin* 2b for our answer to the changes in the text. We find the following important details:

...[If the term acquired is preferred] then let [the Mishnah] there [2:1] state “a man may acquire.” At the beginning [in the Mishnah], the Tanna uses the language of the Torah, and in the end, the Tanna uses the language of the rabbis. And what is there to the language of the rabbis? For [the man] makes her [the woman] forbidden to everyone like *hekdes* [consecrated property].

...Or if you prefer, say [that the Mishnah chose to phrase it in this manner because] if it had taught “a man may acquire,” I might have thought [that the woman would be acquired] against her will, [therefore], it teaches a woman is acquired, [implying] with her consent, yes [she may be acquired], without her consent, no [she may not be acquired].

These references from our Sages tell us about the following important changes

within the marriage process. First, once a woman is betrothed, she becomes forbidden to any and all men but her husband. Second, that a woman can only be acquired so long as she has given consent to the marriage. Again, though a woman is passive in one sense, that is she is acquired and does not do the acquiring, her consent, like our matriarch Rebecca's, must be given for the betrothal and marriage process to proceed. Beyond this information, two more important pieces can be gleaned from these early rabbinic texts – a possibility for a woman to speak during the betrothal portion of the ceremony and the necessity of consent of the Rabbis.

In the first instance, we find the following rabbinic statement from *B Kiddushin* 5b:

if he gave [money] and spoke to her, it is obvious that this is *kiddushin*. If he gave and she spoke, it is like the case of her giving and her speaking, and this is not *kiddushin*.

...if he gave [money] and she spoke, it is doubtful, and we suspect [it may be *kiddushin* from the] Rabbinic [point of view as opposed to it being a matter of Torah Law].

According to this statement, it is possible for a woman to speak after the man gives her the object for betrothal. Though she is not giving, the possibility that she could speak raises the idea that she may be able to be a more active participant within the betrothal or *kiddushin* phase of the marriage ceremony. However, we need to be careful not to read too much into this text, as the woman still could not say a phrase such as “you are my husband.” Instead, she must say something along the lines of “I am your wife.”

It is also necessary to look at *B Kiddushin* 2a as follows:

A woman is acquired. Why is it here [*mKid* 1:1] that a woman is “acquired” and there [*mKid* 2:1] *the man betroths (m'kadesh)*? This is because the term money is used [for acquiring a woman]. And from where do we learn that money [is a valid form of *kiddushin*]? This is learned from “taking” – from “taking” from the field of Efron, for it is written “when a man will take a woman” [Deut. 24:1] and written there [Gen. 23:13] “I have given money of the field, “take” it from me.” And therefore, “taking” [*l-q-h*] is referred to as acquisition [*q-n-h*].¹⁶⁹

¹⁶⁹ *B Kiddushin* 2a.

As we note that it is an important part of our Reform heritage to understand and interpret laws with an eye on our society, so too is it clear that our Sages employed similar methods.¹⁷⁰ Thus, we cannot simply see this passage from the *Bavli* as restricting our ability to see marriage as a two – way egalitarian process. True, in their day, they only saw the wife’s sexual rights passing into the husband’s sexual domain. In our day, we no longer believe that to be true. For Reform Jews, egalitarianism indicates our understanding that bride and groom are obligated to the idea of sexual *hekdes* – that is, fidelity is required on both partners and each partner acquires the other’s sexual rights. As Reform Jews, we are within our rights to see our laws changing and adapting for the models of our day and age. We continue then with this reinterpretation as we look at *B Yevamot and Gittin*.

In the tractates of *B Yevamot* and *Gittin*, specifically pages 90b in the former and 33a and 73a in the latter, state the following “...Whoever betroths [a woman via marriage according to Rabbinic Law], betroths her subject to the consent of the rabbis...” In context, this phrase is not explained in too much detail. What we can glean from it is that the couple is granting their consent to the rabbi as officiant. Furthermore, the couple is recognizing and empowering the officiant to perform the marriage based upon how the rabbi understands marriage according to Rabbinic Law. Such an understanding of this legal principle becomes crucial as we now turn to our Codes.

From our Codes, I have chosen the following statements from the *SeMaG*, *Shulchan Aruch*, and the *Shut Tzemach Tzedek*. In reference order, these citations are as follows:

¹⁷⁰ For example, there are striking similarities between Assyria and Biblical law as well as between Roman and Jewish law and the status of women in these societies.

The words that the man will say when he betroths, it is necessary that they are matters that [conveys the notion] that he is acquiring the woman and not that he is acquiring himself to her [i.e. becoming her husband]...A woman is not betrothed unless she desires it...and one who betroths a woman against her will is not betrothed...

...[in the words of the Ramah] One who says to a woman that he will give to her due to/out of love and fondness, it is suspected of being considered *kiddushin* for perhaps he said that he will give [a ring] to her for there will be love and fondness between them, and this is as if he said to her “you are known to me,” or “you are mine alone”... if he uses a formula that does not necessarily mean *kiddushin* and she understands that it *was* for the purpose of *kiddushin*, then the *kiddushin* is valid...If one does not recite the blessing of betrothal (*erusin*) at the time of *kiddushin*, then one does not recite it during *nissuin*.

...According to the explanation of Rashi, since it is said at the time of *kiddushin* that one is betrothed (*mikudesh*) ‘*k’dat Moshe v’Yisrael*’, therefore, the Rabbis have the authority to annul [the marriage] since one became betrothed according to the custom in accordance with their [rabbinic] law...¹⁷¹

In the effort to understand *kiddushin* as egalitarian, these texts help us to see another layer of fluidity within Rabbinic Law. First and foremost, we find reinforcement of the notion that a woman can only be acquired after she provides her consent to the marriage. Furthermore, the words stated during the process of *kiddushin* does not need to be the phrase of *harai at mikudeshet li* but could be anything, even a statement of “love,” so long as the woman understands that what is occurring is an act of betrothal or *kiddushin*. I believe that this *halakhic* statement gives us precedence to allow for liturgical innovation during the marriage ceremony for both mixed – sex couples as well as same – sex couples. It is also possible that we may be able to read the statement of “if one forgot to recite the blessing of *erusin*,” as also allowing us to omit it entirely from those ceremonies in which the couples, specifically same – sex, may feel uncomfortable

¹⁷¹ In a discussion with Rabbi Mark Washofsky, present Chair of the CCAR Responsa Committee, he believes that this is a powerful statement of the rabbis. By codifying this statement in Rabbinic Law, the rabbis are telling us two things. First, the concept of *kiddushin* is subject to the understanding of the rabbis. Second, any couple that has decided to have a rabbi officiate their marriage is consenting to the notion that the rabbis are participants in this process. Since the couple is agreeing to the rabbi as officiant, then they are acknowledging that the rabbi has the right to define what their marriage is and by extension, that the rabbi has the right to annul the marriage.

with its recital. Due to these pieces of information, we have begun to find openness within the text for changing the liturgy, but the statement that it should not be stated by the man that he is “becoming her husband,” provides us some *halakhic* difficulty. For this final answer and to resolve the issue for same – sex couples, we must turn now to the latest era – the corpus of Reform and Conservative Responsa.

When we look to Reform Responsa, from the earliest documents in the 19th century to those of the early twenty-first century, one of the highest ideals of Reform Judaism is that men and women are equal partners. Furthermore, since the 19th century, there have been rabbinic opinions stating that a woman may speak during the ceremony, as well as give a ring to her husband.¹⁷² Later, in the early twenty-first century, Rabbi Mark Washofsky writes¹⁷³:

Halakhah, we should note, was sensitive to this situation and sought in various ways to redress the imbalance between husband and wife. The rabbis instituted the document known as the *ketubah*, which specified the wife’s financial claims on her husband in the event their marriage came to an end so that ‘it would not be easy for him to divorce her.’...Rabbinic law has for a full millennium prohibited a husband from divorcing a wife without her consent, and it does allow the wife to sue for divorce, that is, to ask the authorities to pressure her husband into divorcing her. These remedies demonstrate that the Rabbis were aware of the injustice done to Jewish wives under the law, and they strove mightily to rectify the system’s most egregious efforts.

From these precedents, we find that Reform Judaism has been seeking ways within the *halakhic* and *metahalakhic* system to redress the inherent inequality that lies within the process of *kiddushin*. It is not only the case with mixed – sex couples that we find this legal imbalance, but we also find the *halakhah* lacking for same – sex couples. We continue wading through the sea of liberal responsa for our answer to this part of the question.

¹⁷² For example, David Einhorn proposed at a rabbinic conference in Philadelphia in 1869, that marriage should be act of equals and the woman should be an active participant in the ceremony.

¹⁷³ (2001) pg. 154.

In a responsum of the Committee on Jewish Law and Standards (of the Conservative Movement; CJLS), we find our answer for how same – sex couples may enter into rabbinic sanctioned intimate relationships. According to the responsum, “the rabbinic restrictions upon gay men and lesbian women that result in a total ban on all sexual expression throughout life are in direct conflict with the ability of these Jews to live in dignity as members of the people of Israel. For this reason, the halakhic principle of *gadol k’vod habriot* must be invoked by the CJLS to relieve their intolerable humiliation.”¹⁷⁴ This *halakhic* decision informs us that gay and lesbian Jews may engage in intimate relationships and create sacred partnerships because of a *halakhic* principle – that of *gadol k’vod habriot*. This principle and rabbinic enactment provides a path for gay and lesbian couples to enter fully into our discussion, as we now have clear *halakhic* precedence for its acceptance within *halakhah*. Our last hurdle is to finally conclude that egalitarian *kiddushin* applies to couples of both same and mixed - sexes.

I therefore, humbly, submit that we can understand *kiddushin* today as being an egalitarian action for both same – sex and mixed – sex couples. The sexual domains that our Sages understood no longer apply in an age when we see all sexes as being equal to one another and that our understanding of Jewish Marriage is a couple entering into a sacred union and that sexual fidelity applies to both partners. Since Reform Judaism holds each partner as obligated to follow the rules of marital fidelity, the partners acquire the shared sexual and intimate space of the marriage and the statements that each partner makes during *kiddushin* demonstrates their willing acceptance of these demands. Furthermore, same – sex couples should be afforded complete equality and their unions

¹⁷⁴ Dorff, Nevins, Reisner, (2006) pg. 17.

should be considered as *kiddushin*. This idea is not only a guiding principle of our Movement, but we have clear *halakhic* precedence for relieving their suffering within the application of the principle *gadol k'vod habriot*. For all these reasons, we should see *kiddushin* today, when the officiant is a Reform Rabbi, as an egalitarian and sacred covenant that is freely entered by both partners, regardless of sexual orientation.

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