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ARTICLE: JEWISH LAW AND MODERN BUSINESS STRUCTURES: THE CORPORATE PARADIGM

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I. Introduction

Many religious systems n1 purport to govern both the financial [*1688] and ritual activities of their adherents at the same time that these adherents are ruled by secular legal systems. This phenomenon raises a variety of fascinating questions regarding the conceptual and practical interrelationships between such overlapping systems. n2 For [*1690] example, Jews are religiously obligated to comply with Jewish law (halakhah) dictates, and in many instances, religious courts may order them to do so. n3 An individual's rights and responsibilities under Jewish law frequently depend on whether the individual is deemed personally to be performing (or failing to perform) a particular action or is deemed personally to be the owner of particular property. In the modern world, however, Jews often participate in disparate business organizations, some of which are secular law creations. n4 Consequently, it becomes crucial to [*1691] determine whether, and to what extent, the use of these secular structures causes Jewish law to treat participants as principals with respect to the organizations' actions or owners of the organizations' property.

This Article explores the Jewish law consequences of the American corporate structure. n5 Corporations are ubiquitous in the American marketplace. They account for a large percentage of the national economy, and both consumers and businesses enter into transactions with corporations on a daily basis. Relatively few publications have discussed the Jewish law significance of corporations, and the few that have are disappointing. None has provided a detailed description of corporate governance or comprehensively dealt with the many different scenarios that diverse types of corporations present.

How Jewish law characterizes a corporation and whether it considers a Jewish shareholder to be responsible for corporate actions, an owner of the corporate assets, or a party to corporate lawsuits, play an important part in resolving countless Jewish law questions n6 and a decisive role in many others. For example, Jewish law requires that Jews pay their debts. n7 If a corporation becomes insolvent, must a Jewish shareholder use his personal resources to satisfy an unpaid corporate debt? Furthermore, Jewish law requires the giving of charity. n8 If a corporation makes charitable [*1692] contributions, has a Jewish shareholder fulfilled her personal obligation? Jewish law also proscribes particular acts. If a corporation nonetheless commits such acts, has its Jewish shareholder transgressed Jewish law? Jewish law

forbids Jews from charging interest (ribit) when lending money to another Jew. n9 If a banking corporation exacts interest when it lends money to Jewish borrowers, has its Jewish shareholder disobeyed Jewish law, and is she obligated to return the interest that the corporation collected? Jewish law prohibits a Jew from owning certain leavened foodstuffs (hametz), hereinafter referred to as "dough," during the holiday of Passover. n10 If a corporation owns dough during Passover, has a Jewish shareholder violated this prohibition? Additionally, Jewish law forbids Jews from enjoying dough that, in violation of Jewish law, was owned by Jews during Passover. n11 May a Jewish consumer purchase dough that was owned during Passover by a corporation with Jewish shareholders? Jewish law enjoins Jews from conducting certain types of businesses with non-kosher foods. n12 If a corporation owns a supermarket that sells non-kosher foods, has a Jewish shareholder violated this ban? Jewish law forbids Jews from deriving benefit from foods that combine meat and milk. n13 May [*1693] Jews own shares in corporations that sell such products? Jewish law outlaws operating a business on certain days (for example on the Sabbath or other Jewish holidays) n14 or in certain ways. For instance, [*1694] in some cases Jewish law limits the extent to which prices can be marked up. n15 Under Jewish law, may Jews acquire or retain shares in corporations that violate these regulations?

When a corporation is involved in a dispute that may lead to civil litigation, it may be essential to determine whether the corporation or its shareholders are the real parties. For example, Jewish law does not ordinarily allow one Jew to sue another in a secular court, unless the plaintiff has first obtained express permission to do so from a rabbinical court. n16 If, however, a corporation is considered an independent legal entity, Jewish law may allow the corporation to sue or be sued in a secular court. Similarly, although Jewish law does not allow one Jew to recover from another for certain types of injuries, it may permit such recovery from an independent corporate entity. The identity of the parties also affects the conduct of a rabbinical court proceeding. In some situations a human being, based on his or her status as an orphan or widow, may be entitled to certain procedural advantages. A corporation, if an artificial legal entity, would not enjoy these benefits. n17 On the other hand, how Jewish law characterizes a corporation may determine whether a corporation, according to Jewish law, could be liable as a bailee (shomer) or tortfeasor (mazik) and whether portions of produce grown by a corporation must be made available to priests or to the poor. If a corporation is an artificial entity, it may not confront these types of liabilities.

The sparse literature on the relationship between corporate ownership and Jewish law obligations reflects the following five principal positions: n18

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1. The "Jewish law (halakhic) entity" approach. This view maintains that Jewish law deems a corporation to be an independent entity that owns its assets and conducts its business. n19 According to this view, shareholders do not own title to the corporate assets and are not in violation of Jewish law when the corporation commits a forbidden act.

2. The "halakhic partnership" approach. There are three versions of this view. n20 The first contends that Jewish law recognizes a corporation as a partnership (shutfut). The shareholders are regarded as partners who own a percentage interest of the corporate assets. A second version maintains that Jewish shareholders are partners only if the corporation has primarily Jewish shareholders. A third alternative describes Jewish shareholders as partners only if they own voting shares.

3. The "halakhic creditor" approach. Some authorities who espouse the second or third versions of the halakhic partnership theory believe that Jewish shareholders who are not partners are, instead, creditors who have loaned money to the corporation or to the corporation's managers. n21 As creditors, such shareholders would not be responsible under Jewish law for the corporation's conduct.

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4. The "purchaser of entitlements" approach. At least one authority suggests that in many instances a Jewish shareholder is merely a purchaser of certain financial benefits vis-a-vis the corporation's future profits. n22

5. The "relationship" approach. Some authorities do not use a single label to describe the abstract relationship between Jewish shareholders, on the one hand, and corporate assets and activities, on the other. Instead, they examine diverse aspects of the relationship and ask whether, as a whole, it constitutes ownership such as to implicate particular Jewish law problems. Exponents of this approach consider, for example, the shareholders' ability and intention to control corporate conduct and to use or sell corporate assets. n23

Secular law and secular commercial models affect Jewish law on at least two levels. On one level, secular commercial institutions may create or involve "facts" that directly resonate in principles indigenous to Jewish law. For example,

Jewish law often recognizes the Jewish law validity of commercial customs, and such customs may be based on principles of secular corporate law. Similarly, Jewish law involves presumptions regarding people's intentions and expectations. These presumptions may be shaped by corporate realities. On another level, Jewish law contains a doctrine, "the law of the land is the law" (*dina de'malkhuta dina*), which validates, for purposes of Jewish law itself, certain secular laws. In fact, *dina de'malkhuta dina* arguably provides a prism through which Jewish law perceives various commercial activities. n24 Consequently, in [*1697] order to effectively evaluate alternative Jewish law theories regarding corporations, it is crucial to identify and examine the facts and circumstances of secular corporate law.

This Article, with its detailed study of how a well-developed religious legal tradition confronts secular law, provides a contrast to most "law and religion" literature. These publications seem largely preoccupied with whether a secular legal system should, [*1698] must, n25 or constitutionally can adjust to religious culture, from the use of peyote in religious rituals n26 to the rejection of blood transfusions, n27 and from Sabbath observance n28 to priest-penitent confidentiality. n29 Scant attention is devoted to a different aspect of the interrelationship between secular and religious legal systems-how religious law responds to developments in the secular legal tradition. n30 Moreover, the broader question as to how flexibly [*1699] religious law reacts or adapts to secular law concepts and institutions, and vice versa, is largely unexplored by secular legal literature. This Article represents an early foray into that field.

Part II describes the principal types of American corporations-and analogous commercial vehicles-and explains the primary secular purposes for, as well as the principal secular ramifications of, employing such forms. Part III provides additional information and inquires into the ways in which secular law characterizes these business vehicles and the relationships they create. Part IV sheds light on the arguably special circumstances surrounding insolvent corporations. In light of Parts II, III, and IV, Part V critically assesses the various Jewish law theories. Finally, Part VI explains how these Jewish law approaches apply in particular scenarios.

II. The American Corporation and Analogous Commercial Constructs

Under secular American law, when individuals join together pursuant to an oral or written agreement to engage in a commercial venture on an unincorporated basis, they are usually recognized as a general partnership. n31 The partners of a general partnership are deemed to be authorized agents for the partnership and/or for each other in connection with the conduct of partnership business. n32 [*1700] They also are personally liable for partnership debts. n33 [*1701] Thus, if collection efforts by partnership creditors exhaust partnership assets, the creditors may collect any deficiency from individual partners. n34 The risk of unlimited personal liability is a severe disincentive for participating in a partnership. n35 In addition, a partnership's existence is precarious; for example, it typically [*1702] terminates automatically if any of the partners dies. n36 Moreover, general partnership interests are not easily sold, partly because of the financial risk incurred upon becoming a partner. n37 The corporate form is often used to avoid these problems. Although initially corporations were, at least for the most part, created by a special act of a ruler, such as an emperor or pope, n38 corporations may now be easily formed by compliance with applicable state n39 or federal law. n40

Understanding what a secular corporation is and how American law characterizes it serves two purposes. First, it facilitates a comparison between this secular view and the Jewish law perspective. Second, and more central to the thrust of this Article, the secular characterization may influence the Jewish law rule itself [*1703] because, as will be more fully explained below, certain specific Jewish law doctrines give legal effect to secular law and secular commercial practice.

A few facts are essential to an appreciation of the modern corporation. There is a basic, although increasingly blurred, n41 distinction between corporations that are formed "for-profit" (known as business corporations) and corporations that are [*1704] "not-for-profit" or "nonprofit." n42 The essential difference between these two categories is that a business corporation has shareholders who are entitled to receive the corporation's distributions of net profits, while a nonprofit corporation does not have shareholders (although it may have voting or nonvoting members) and, in most cases, is forbidden from distributing its net profits. n43

A business corporation is permitted to provide for the issuance of different classes of stock and different series of stock in each class. The types of stock usually vary as to their voting rights (some, in fact, may have no voting rights at all) and as to their economic rights. For example, holders of some stock, such as preferred stock, may be entitled to a specified annual return even if the company shows no profit in a particular year, while the holders of common stock are much more likely to be subject to discretionary decisions of the board. n44 On the other hand, upon a corporation's dissolution, the return to preferred stockholders may be specifically capped, while common stockholders are entitled to the entire residual value of the corporation once corporate debts [*1705] have been paid. In addition, certain stock may be convertible, under specified circumstances and according to a particular schedule, from one form into another. Stock

may be acquired from the corporation when it issues stock or may be purchased from a previous owner of the stock. State and federal law regulate the transfer and sale of stock.

Incorporation offers several principal advantages. n45 First, shareholders or members are not ordinarily personally liable for a corporation's financial obligations. n46 This insulation from personal liability is often referred to as the "corporate veil." n47 The corporate [*1706] veil provides an incentive to start businesses or to participate as members in nonprofits. Similarly, confidence as to the limited extent of personal risk encourages investors to buy stock even when they realize that they do not have the time, expertise, or interest necessary to monitor a business' operations. Consequently, limited liability, which is often a chief reason for incorporation, n48 affords prospective shareholders more attractive business and investment opportunities, while facilitating the raising of capital through the issuance of stock. n49 Second, a corporation enjoys perpetual [*1707] existence. Neither the death of officers, directors, shareholders, or members, nor the transfer of ownership interests from one shareholder to another, terminates the corporation's legal authority to continue its business. n50 Third, stock serves as a relatively liquid investment vehicle. In many instances, public trading in stock provides investors with some degree of assurance regarding a stock's value. The fourth advantage of incorporation is centralized management. n51 Not only does a shareholder have the right to refrain from personally participating in the corporation's decision-making processes, but even if he or she should want to influence the corporation's decisions, there are many restrictions on his or her right and ability to do so. Indeed, the dichotomy between control and beneficial ownership is a central feature of corporate law, n52 and one which, as discussed below, may be of central importance in the way in which Jewish law treats a corporation.

There is no authoritative topology of business corporations. Instead, assorted labels are utilized to refer to corporations that pursue specific activities, possess certain characteristics, or qualify [*1708] for particular tax treatment. n53 For the purposes of this Article, it is useful to identify only a few of these labels.

1. Public corporations. In the United States, the term public corporation was initially used to denote a corporation "created for a political purpose, with political power, to be exercised for purposes connected with the public good in the administration of civil government." n54 Thus, incorporated cities, villages, or towns were public corporations. More recently, however, the term public corporation is increasingly used to refer to a corporation whose shares are publicly traded; n55 this is the way in which this Article employs the term. A public corporation usually has thousands of different shareholders who live throughout the world. Typically, no single individual or institutional shareholder owns an absolute majority of the shares of a public corporation.

2. Close corporations. The term close corporation usually refers to corporations with relatively few shareholders, who are either personally involved in the operation of the corporate business or who are related to those who are, and whose stock is not traded publicly and is subject to significant transfer restrictions. n56 A number of states have specific statutory provisions dealing with close corporations. These statutes usually state that they apply to [*1709] the following: (a) any corporation with no more than a specified, small number of shareholders and whose shares are subject to transfer restrictions, have not been publicly offered, and are not listed on a securities exchange; (b) any corporation that elects to be designated as a close corporation; (c) any corporation that so elects and also meets the statute's definitional criteria of a close corporation; and (d) any corporation that initially elects to be designated as a close corporation, as well as to pre-existing corporations who choose to be considered a close corporation prospectively as long as these pre-existing corporations satisfy certain statutory criteria. n57 Many corporations that possess the characteristics of a close corporation nonetheless do not elect to be so designated n58 and, therefore, are treated by law as general business corporations. Nonetheless, irrespective of the label applied to a corporation by state law, this Article will refer to it as a close corporation as long as it bears the typical characteristics of a close corporation. The mere fact that a corporation is or qualifies as a close corporation does not mean that the corporation is a financially small enterprise, as some close corporations have enormous assets.

Close corporations are almost always formed by small numbers of individuals who are actively and fundamentally involved in the businesses the corporations will pursue. Indeed, in many instances, the expertise, experience, or contacts of these persons are central to a close corporation's success. These persons may choose a corporate format primarily to enjoy limited personal liability. As a consequence, these key individuals or their close family members [*1710] may be the sole shareholders of the close corporation and may establish very restrictive conditions on the transferability of their shares. Thus, close corporations are profoundly different from public corporations in that, (1) their stock is not a highly liquid investment vehicle; and (2) there may, in fact, be no meaningful separation of control from beneficial ownership. As will be discussed in more detail in Parts V and VI, these distinctions between close corporations and public corporations could be of substantial Jewish law significance.

3. Professional corporations. Many states have enacted special statutes to enable professionals to incorporate and, thereby, to enjoy some or all of the advantages of limited liability for corporate debts. Nonetheless, whether, and if so to what extent, particular types of professionals are protected is limited by a number of factors. n59 Individual statutes may either expressly exclude certain professions or provide that even if members of these professions incorporate, they nonetheless remain liable for certain categories of liability, such as those arising from their own malpractice, the malpractice of other professionals who are shareholders, and/or the malpractice of any other professionals under their supervision. n60 Similar restrictions may arise as a result of ethical opinions or other rules promulgated by the state bodies that regulate individual professions. n61

Ownership of stock in professional corporations is virtually [*1711] always limited to the professionals who work or have worked for the corporation. Typically, the stock cannot be transferred to third parties, even if such persons happen to hold the same type of professional license. Consequently, just as with close corporation stock, stock in professional corporations is not a liquid form of investment.

Whether or not there is a meaningful dichotomy between control and beneficial ownership in a particular professional corporation depends on other specific facts about the professional corporation. If there are few shareholders, then one might expect that there would not be a large split between control and beneficial ownership. If, however, the professional corporation is a major law firm with hundreds of shareholders, it can be structured in such a way that the voices of very few shareholders are heard.

4. Analogous structures. Two common business forms bear similarity to corporations: limited partnerships n62 and limited liability companies. n63 These organizations, [*1712] like corporations, are created in accordance with specific state statutes. These statutes confer limited liability upon limited partners and owners of interests in limited liability companies.

III. Secular Characterizations Regarding Corporations

Part III considers how secular law characterizes (1) a corporation, (2) the relationship between a corporation and its shareholders, and (3) the relationship between a corporation's directors and its shareholders.

A. Secular Characterization of a Corporation

In determining how secular law in fact characterizes a corporation, relevant factors might include the following: (1) the words and ideas used by academics, courts, lawyers, and legislatures to describe corporations; and (2) the actual rights or duties of corporations and their respective shareholders under common, statutory, or constitutional law. One of the problems that may arise, however, is that even within a single jurisdiction, n64 corporations may be described and treated inconsistently. Corporations also may be treated in a manner inconsistent with the [*1713] way in which they are described. n65 Moreover, one theory of a [*1714] corporation may be used for some purposes, or in specified circumstances, while a different theory may be used in other contexts. n66 Furthermore, one particular corporation may be subject to various jurisdictions which follow contradictory theories. Despite these different factors, history reflects two principal ways to characterize a corporation: n67 (1) as an independent entity, [*1715] separate and distinct from its shareholders or members (the entity theory); n68 or (2) as the individual shareholders or members acting as a group (the aggregate theory).

In America, the dominant approach is to characterize a corporation as a discrete entity. n69 Legislatures [*1719] frequently define the word "person" to include corporations, and when legislatures are silent, courts routinely construe the statutory, and sometimes even the constitutional, n70 term "person" to include corporations. n71 The entity theory is consistent with the principal corporate characteristics described in Part II: limited liability, n72 [*1720] perpetual existence, and the easy transferability of shares. Similarly, consonant with this characterization, corporations hold property in their own name, they are entitled to sue in their own name n73 (and should be sued in their own name n74), they are entitled to assert federal diversity jurisdiction, n75 they are usually taxed separately from their shareholders, n76 they may be convicted of civil or criminal offenses, n77 and although a person cannot enter into a contract with himself, corporations may contract with their own shareholders. n78 By contrast, shareholders are not deemed to own a divided or undivided interest in particular pieces of corporate assets, n79 they cannot individually exercise control or dominion over [*1721] corporate assets, n80 they cannot bring suit in their names against corporate creditors, n81 they cannot bind the corporation to any undertaking, n82 and they cannot be disqualified as "interested executors" of an estate against which their corporation asserts a claim. n83 Twentieth century statutory developments also apparently indicate acceptance of the entity theory by providing that directors can make decisions based on factors other than the

immediate interests of the stockholders n84 and, as discussed in Part III.C, by substantially depriving shareholders of an opportunity to meaningfully participate in corporate governance. n85

B. Secular Characterization of the Relationship Between a Corporation and its Shareholders

Even though American law regards corporations as separate entities from their shareholders, commentators and courts commonly refer to shareholders as owners of the corporations in [*1722] which they hold their shares. n86 If Jewish law were to perceive shareholders as owners of the corporation, then, even if corporations were regarded as separate entities, Jewish law might still consider corporate shareholders to be owners of the corporate assets. n87 Under Jewish law, for instance, a slave is a discrete individual. Nonetheless, the property that a slave owns belongs to the slave's master. n88 Theoretically, that which belongs to a corporation could be viewed as belonging to the corporation's owners, i.e., the shareholders.

In fact, however, secular law does not really seem to regard shareholders as the owners (ba'alim) of a corporation, as the term ba'alim is used in Jewish law. The English term "owner" is ambiguous n89 and is often used imprecisely. For example, title to property is sometimes held in the name of one person (referred to as its "owner of record" or its "legal owner"), while the benefits of the property are supposed to inure to someone else (referred to as [*1723] its "beneficial" or "equitable owner"). By referring to shareholders as a corporation's owners, secular commentators and courts seem to mean no more than that the corporation is supposed to operate solely to benefit its shareholders. While the assertion that the corporation should advance the shareholders' interests, if true, would still be of Jewish law significance, it might fall far short of the halakhic concept of ownership (ba'alut) germane to particular Jewish law questions. Even more interesting, however, is that the assertion itself seems false, as we explain in Part III.C below.

C. Secular Characterization of the Relationship Between Corporate Directors and Shareholders

Because some Jewish law authorities heavily weigh a shareholder's ability to control a corporation when determining whether the shareholder is an owner of corporate assets, it is essential to explore the degree of control that shareholders enjoy. As a matter of practice, and to a surprising extent as a matter of black letter law, public corporations are largely controlled by their directors, not by their shareholders—especially not by shareholders with small investments. n90 The inability of shareholders to control the corporation is especially important given that conflicts exist between the interests of shareholders and the interests of directors. n91

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Directors are not common law agents of shareholders. n92 The Restatement of Agency provides the following: (1) an agent is subject to the principal's control, n93 (2) a principal has an unlimited right to terminate an agent at any time, n94 and (3) the agency terminates automatically if the principal dies. n95 These three principles also apply to the Jewish law of agency. n96 Neither of these rules apply to the relationship between shareholders and directors. For instance, modern corporate law provides that a corporation's board of directors has original power, not authority delegated to them from shareholders, to manage the corporation. n97 Thus, most decisions may be made directly by the board of directors, and only a few [*1725] require shareholder ratification. n98 Similarly, shareholders are powerless to initiate many critical decisions, such as whether the corporation should amend its articles of incorporation, n99 merge into another company, n100 sell all of its assets, n101 or even dissolve. n102 These issues only can be addressed if the board acts first, which, of course, allows the board power to control a corporation's destiny. Nor can shareholders, at least in public corporations, issue binding instructions to the directors. n103 The majority rule is that directors would breach their duties if they merely accepted orders from shareholders n104 (assuming the unlikely proposition, especially as to public corporations, that a large percentage of shareholders could effectively communicate with directors). n105 Indeed, courts have actually held that boards of directors must make their own informed decisions with respect to certain matters and cannot merely allow the shareholders to vote on them. n106

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Moreover, corporate law does not require that directors do what is in the best interests of a corporation's human shareholders. Daniel Greenwood argues that corporate law creates "fictional shareholders" based on "a set of legally defined interests that are not under the control of any individual or group of individual human beings who could choose to redefine or act in opposition to those interests." n107 Human shareholders are individuals who have a wide variety of interests, not merely financial interests. Directors are not required to discern what the personal interests of the real life shareholders are. Instead, they are required to do no more than use their "business judgment" in promoting the pecuniary interest of profit maximization, the supposed interest of fictional shareholders. n108

Greenwood's criticism, however, does not go far enough. Modern corporate constituency statutes, enacted in more than half of the states, n109 do not even require that directors be bound by the objectives of fictional shareholders. Instead, such statutes speak in [*1727] terms of considering the best interests of the corporation. n110 The Illinois statute, for instance, states that "in considering the best short-term and long-term interests of the corporation," directors and officers may consider the effects that actions may have on "employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors." n111 These types of statutes obviously enable directors to take actions that are inconsistent with shareholders' financial interests, without any consideration of the percentage of shareholders who want short-run or long-run profits. n112 It is not clear that these statutes were even designed to enable directors to promote the interests of fictional long-term shareholders who would be more concerned about the long-run than about the short-run. Thomas Bamonte, who examines the historical development of the Illinois statute, argues that it reflects both a rejection of the shareholder primacy concept altogether and an embracing of a "best interests of the corporation" test that considers a decision's impact on a wide variety of corporate constituencies. n113

Second, not only are shareholders unable to give binding instructions to directors, but a shareholder cannot terminate her relationship with corporate directors in the same way as a principal can end her relationship with an agent. n114 Under the common law, even if a principal enters into an agreement not to terminate the [*1728] agency or characterizes the agency as "irrevocable," she still has the power to terminate it; she merely runs the risk of liability for breach of contract. n115 Partnership law follows the same model. n116 Corporate law is different. Shareholders cannot abolish the board of directors. Corporate statutes, with limited exceptions, n117 provide that the corporation's business must be supervised by a board of directors. n118 Nor can the shareholders initiate a vote to dissolve the corporation. The board of directors must vote to approve dissolution before shareholders may vote. n119 Although dissolution may be accomplished without board action by unanimous written consent of a corporation's shareholders, obtaining such written consent is often virtually impossible, n120 especially as to public corporations where there are numerous shareholders who do not know the other shareholders' names and addresses. Similarly, although under the Revised Model Business Corporation Act shareholders may seek judicial dissolution of the corporation, such relief is available on very limited grounds and, even then, is subject to the court's discretion. n121 Consequently, shareholders, to the [*1729] extent that they remain shareholders, are forced to maintain a relationship with the corporate board of directors.

Nor can shareholders immediately terminate their relationship with particular directors. n122 Directors are appointed or elected for a term, and their removal can only be accomplished pursuant to prescribed procedures. n123 Some states only allow for the removal of a director for cause, especially if the corporation has a staggered board. n124 Although many states authorize removal without cause, they usually require that specific time-consuming and potentially expensive procedures be followed. n125 Furthermore, even if all of the shareholders were to die instantaneously, or to transfer their shares simultaneously, the directors would retain their positions. Ownership of the shares would pass to new persons in accordance with applicable state law, n126 but the directors would remain in control of the corporation.

In addition to the absence of traditional agency principles, the director-shareholder relationship is substantially affected by a variety of statutory provisions that dilute shareholders' power. Directors gain control of commanding blocks of votes through the proxy solicitation; shareholders' ability to insert information or make proposals in this process is fundamentally curtailed. n127 Prolific [*1730] state legislative enactments, marketed as antitakeover legislation, have even more severely attenuated shareholder influence on directors. n128 Among the many types of takeover statutes are "business combination statutes" and "control share acquisition statutes." Business combination statutes place a moratorium on certain transactions between a target company and a shareholder who owns a specified percentage of stock, unless the target company's board of directors approved, in advance, either the transaction or the shareholder's acquisition of the stock. A common form of such a statute provides a moratorium of five years and is triggered by a holding of five percent of the corporation's stock. n129 Control share acquisition statutes, enacted in one form or another by more than half of the states, usually prevent a person acquiring control shares from being able to vote these shares, unless a majority of disinterested shareholders vote to permit her to do so. n130 Additional antitakeover statutes further restrict shareholders' ability to control directors. n131

The reality of the shareholder-director relationship can, but need not be, dramatically different in the context of a close corporation. Close corporations often have only a few shareholders who also serve as corporate directors, officers, or employees. Such shareholders often have significant influence in corporate governance. Thus, the de facto rights of shareholders in close corporations may be very similar to those of partners in a partnership. On the other hand, close

corporations sometimes have minority shareholders who are at odds with those in control and [*1731] who are therefore, relatively powerless. n132

IV. The "Special" Case of Corporations in Financial Distress

A considerable body of law regarding financially troubled corporations further limits the ability of shareholders to exercise control. In some cases, this dilution of shareholder control makes it even less likely that the shareholders will be regarded under Jewish law as owners of the corporate assets. Principally important are laws that (1) impose fiduciary responsibilities on corporate directors to consider the interests of corporate creditors, (2) permit the possible avoidance of certain corporate transfers or incurrences of debt, (3) involve a liquidation procedure pursuant to federal bankruptcy law, and (4) entail a reorganization pursuant to federal bankruptcy law. n133

A. Corporate Directors' Duty to Consider the Interests of Corporate Creditors

The debtor-creditor relationship is essentially adversarial, not fiduciary. n134 Thus, neither a corporation nor its directors typically [*1732] owes fiduciary responsibilities to corporate creditors. n135 For example, corporate directors are ordinarily entitled to subject the corporation to financial risks even if the creditors would prefer more conservative conduct. n136 Creditors, for the most part, are restricted to the rights afforded them by their agreements with the corporation, the right to pursue collection actions, and the right to initiate state or federal insolvency procedures.

A growing number of cases, however, have declared that as a corporation suffers financially and approaches or experiences insolvency, n137 the corporation's directors begin to bear fiduciary responsibilities to corporate creditors. n138 It is uncertain whether [*1733] these cases have, in fact, extended the law or merely applied expansive language to reach the same results that might have evolved under traditional standards. n139 To the extent that corporate directors are deemed to owe fiduciary responsibilities to corporate creditors and are therefore limited in their ability to act in the best interests of corporate shareholders, the relationship between the [*1734] shareholders and the corporate assets is further diluted. As this relationship diminishes, the likelihood that Jewish law will not view shareholders as owners of the corporate assets increases. Nevertheless, one could still argue that the surviving relationship remains sufficiently strong enough to permit Jewish law to recognize shareholders as owners of the corporate property. n140

B. Avoidance Laws

State and federal laws may call for the avoidance of certain transfers or incurrences of debt by a financially failing debtor. n141 These laws are designed to ensure that a debtor facing financial problems does not transfer or commit its assets in a manner that would defeat its creditors' expectations of reasonable corporate conduct. Thus, in many instances, a failing corporation's transfer of assets for less than reasonably equivalent value may be avoided for the benefit of corporate creditors. These rules, however, [*1735] represent relatively minor restrictions on a corporation's ordinary activities. The corporation may still use and consume its assets in the ordinary course of its business and may legally transfer property for reasonably equivalent value. n142 The avoidance laws apply to individual debtors as well as to corporations. n143 The existence of such laws would undoubtedly not prevent a Jewish court from finding that an insolvent individual, and not his creditors, owns his personal assets. Similarly, a Jewish court would presumably find that a debtor corporation, and not its creditors, owns the corporate assets. Consequently, avoidance laws are unlikely to influence a determination as to whether corporate shareholders own a corporation's assets.

C. Federal Bankruptcy Liquidation

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Federal law provides for the following two basic types of bankruptcy proceedings: liquidations and reorganizations. Corporate liquidations are governed by Chapter 7 of the Bankruptcy Code. n144 In a Chapter 7 bankruptcy, a trustee is appointed. n145 All of a corporate debtor's property becomes [*1736] "property of the estate." n146 The trustee's duties include being responsible for collecting and liquidating the property of the estate. n147 The proceeds so obtained are distributed in accordance with the various provisions of the Bankruptcy Code. If a corporation is insolvent such that the value of its liquidated assets is less than the extent of its allowed debt, n148 the corporate shareholders will not receive any part of these proceeds. n149

The trustee cannot be controlled by corporate shareholders. To the extent that the trustee exercises control over the corporate assets, the relationship between the shareholders and those assets will be significantly diminished. On the other hand, the corporate debtor has the right, at any time, to convert the bankruptcy from a Chapter 7 proceeding to a Chapter 11 proceeding. n150 In a Chapter 11 proceeding, the debtor's management may be able to retain control of the

corporate assets. n151 Similarly, in Chapter 11, as explained in the following section, the shareholders generally have the right to meet and vote to make changes regarding corporate governance, such as to remove or replace directors. n152 It is uncertain [*1737] the extent to which the possibility of converting a case is significant in evaluating the relationship between shareholders and corporate assets while the corporation is in Chapter 7.

D. Federal Bankruptcy Reorganization

Even an insolvent corporation can initiate a bankruptcy reorganization proceeding pursuant to Chapter 11 of the Bankruptcy Code. Ordinarily, the debtor corporation continues to operate the business and control the corporate assets. n153 Unless the court orders otherwise, shareholders can still attempt to exercise control over the directors. If a reorganization plan is confirmed, the corporation makes payments to creditors as set forth in the plan. The corporate assets are not sold or distributed to creditors. In such Chapter 11 reorganizations, the relationship between shareholders and corporate assets is not significantly affected. n154

On the other hand, it is possible for a Chapter 11 trustee to be appointed. n155 If appointed, the trustee can take control over the debtor's assets. n156 Nevertheless, the trustee may still proceed to operate the corporation pursuant to a confirmed plan without liquidating the corporate assets. Consequently, even if a Chapter 11 trustee is appointed, the relationship between shareholders and corporate assets is not diminished to the same extent as in a Chapter 7 bankruptcy.

V. Evaluating Halakhic Perspectives of Corporations

Part V examines how corporations should be treated as a matter [*1738] of Jewish law by critically examining the principal approaches. The five chief theories are as follows: (1) the "halakhic entity" approach, (2) the "halakhic partnership" approach, (3) the "halakhic creditor" approach, (4) the "purchaser of entitlements" approach, and (5) the "relationship" approach. Part V.A will consider the first two approaches together because they represent some of the clearest contrasts.

A. The Halakhic Entity and Halakhic Partnership Approaches

1. Introduction

Under Jewish law, who is the owner of the property (i.e., the corporate assets) that secular law considers to be owned by a corporation? Before answering, it should be noted that the question implicitly assumes that someone does own these assets. After all, it is counter-intuitive to assume that this property is ownerless. Such an assumption would yield the unsettling consequence that anyone, even someone with no connection at all with the corporation, would be entitled to appear and take the property for herself. n157 All of the Jewish law authorities who address this question adopt the position that the property has an owner.

The most obvious answer to the above question would be that just as secular law recognizes the corporation as the owner of the corporate assets, so does Jewish law. Indeed, this is the conclusion reached by the authorities who adopt the halakhic entity approach. [*1739] Because the shareholders are not the owners of the property, many Jewish law problems, such as those involving dough on Passover and lending on interest, would be avoided. Similarly, because the halakhic entity approach assumes that the corporation is a separate entity, any actions by corporate directors, officers, or employees would not be ascribed to the shareholders, thus avoiding other potential problems. n158 According to this approach, the shareholders, by virtue of owning shares, would presumably be perceived as owning certain rights with respect to the corporation, the independent halakhic entity. n159

Nevertheless, other commentators believe that under Jewish law, only human beings can own or acquire property. n160 According to this opinion, if a corporation were regarded as an artificial legal entity separate and apart from its shareholders, n161 neither the [*1740] corporation nor its shareholders would own the property. Many of these authorities resolve this dilemma by declaring that under Jewish law a corporation is a partnership. n162

According to the halakhic partnership perspective, all or some of the shareholders are partners and, as such, own a percentage interest in all of the corporate assets. n163 Consequently, Jewish shareholders could be found liable for violating Jewish law if the corporation owns dough on Passover, operates on the Sabbath and on other Jewish holidays, charges interest for loans, and so on. According to the halakhic entity approach, which provides that shareholders do not own the corporate assets, these Jewish law problems would not arise.

2. The Analytical Basis of the Halakhic Entity Approach

Of critical importance to those who support the halakhic entity approach is the argument that corporations are qualitatively different from partnerships, such that corporate shareholders should not be deemed to be the owners of the corporation's property. Parts II and III reveal that some of these differences depend on the type of corporation considered—a public corporation or a close corporation—and these subtleties will be recognized when discussing specific hypotheticals in Part VI. Nevertheless, before introducing the analyses of individual proponents of the halakhic entity position, the basic differences between partnerships and public corporations should be summarized.

1. In a Jewish partnership, the partners are agents for each [*1741] other. In a public corporation, the shareholders are not agents for each other.

2. In a Jewish partnership, at least one of the partners has the authority to operate the business. In a corporation, none of the shareholders, as shareholders, are authorized to act on behalf of the corporation. They cannot bind the corporation, gain access to or use its assets, or assert the corporation's rights against third parties. Secular law provides that the corporation is a separate legal entity that owns its own property. It also vests authority for running the corporation in the board of directors. In fact, the shareholders have extremely limited control, legally and practically, directly and indirectly, over a public corporation's short-term and long-term operations. Among other things, the proxy system, antitakeover legislation, and corporate constituency statutes have essentially disenfranchised shareholders, especially those with relatively small holdings.

3. Under secular law, the directors of a corporation are not agents of the shareholders. The shareholders do not have the choice of doing without a board of directors. The shareholders cannot remove individual directors whenever they want; they must follow a statutorily prescribed procedure. Even if shareholders follow the required steps, they may be unable to remove directors unless they have legally sufficient "cause." They cannot give the directors binding instructions; indeed, the directors must exercise their independent judgment and are legally entitled to reject instructions from shareholders. The directors are expected to make their decisions in light of the best interests of the corporation, not in accordance with the best interests of the actual shareholders. Statutes expressly provide that directors can take into consideration the interests of other non-shareholder groups, such as employees and local communities.

4. The officers and employees of a corporation, inasmuch as they are selected and controlled (directly or indirectly) by the [*1742] corporate directors, are also not the shareholders' agents. Instead, they are the agents of the corporate entity.

5. Unlike a Jewish law partnership which automatically terminates on the death of one of the partners, a corporation does not terminate upon the death of one of its shareholders. In fact, a corporation would not automatically terminate even if all of its shareholders died at once.

6. Unlike a Jewish law partnership, in which partners may be personally liable to third parties for a variety of partnership debts, as a general rule corporate shareholders are not personally liable for corporate debts.

When some of a corporation's shareholders, directors, officers, or employees are not Jewish, an additional factor influences some authorities to conclude that a secular corporation is, under Jewish law, a new halakhic entity and not a full-fledged halakhic partnership. Jewish law generally n164 provides that non-Jews cannot effectively act as agents for Jews and vice versa. n165 To the extent that partners are supposed to be agents of one another, Jewish and non-Jewish [*1743] shareholders could not serve as each other's partners. n166 [*1744] Similarly, to the extent that directors, officers, or employees are not Jewish, they could not be deemed under Jewish law to act on behalf of Jewish shareholders. n167

Saul Weingart is one of the first Jewish law commentators to expressly advance the halakhic entity approach. n168 Weingart considers the Jewish law prohibitions against a Jew owning dough during Passover and against a Jew benefitting after Passover from dough that another Jew illegally owned during Passover. n169 He argues that because a corporation as a halakhic entity is not "Jewish," its ownership of dough during Passover does not violate Jewish law, and Jewish shareholders, as well as Jewish consumers, may benefit from the dough after Passover. n170

[*1745]

Weingart supports the halakhic entity position in two ways. First, he attempts to portray it as reasonable by focusing on the dramatic differences between corporations and traditional partnerships. n171 He emphasizes not only the ways in which a shareholder's rights are restricted—by having no right to eat, sell, or destroy the corporation's dough or to use or even to enter the corporation's premises n172—but also the fact that a shareholder enjoys unusual financial protection (namely that corporate creditors have no right to sue a shareholder to collect a corporate debt, even though they

could ordinarily sue the partners of a debtor partnership). n173 In addition, Weingart argues that two widespread practices can be justified only by treating corporations as halakhic entities. n174 He asserts that rejection of the halakhic entity approach would mean that countless Jews would be violating Jewish law. n175

The truth, however, is that the practices that bother Weingart, [*1746] at least as he presents them, do not really seem troublesome. Weingart refers to the following: (1) ownership of "paper" of the "government bank," and (2) ownership of governmental currency ("paper money"). n176 He seems to argue that, but for the halakhic entity approach, one must conclude that anyone owning paper of the government bank owns a percentage of the assets of that bank, and that anyone owning government currency owns a percentage of the government's assets. n177 Consequently, such a person likely violates Jewish law because during Passover the government bank and the government surely are involved in, and profit from, transactions involving dough. n178 The weakness of his argument lies [*1747] in the fact that bank notes and paper currency seem to reflect debts, not ownership interests. Even if these commercial papers create or represent Jewish law liens on the debtor's assets, the liens would not apply to personalty. n179 If the liens did apply to such dough, as long as the dough is not in the lienholder's possession, there would be no Jewish law violation. n180

Weingart is substantially correct in differentiating the characteristics of a corporation from that of a traditional partnership. The difficulty is that he does not adduce adequate authority for the proposition that Jewish law would therefore treat a corporation as a separate halakhic entity.

Others offer more convincing support for the halakhic entity position. n181 For example, at least one decision of the Rabbinical Court of Israel also adopts the halakhic entity approach. n182 A cause of action had been alleged against corporate shareholders, and the court had to decide whether these shareholders or the corporation itself was the "real" defendant. n183 Because the father of several of the shareholders had passed away, they were considered by Jewish law to be minor orphans. n184 Jewish law provides that a court can entertain valid legal arguments on behalf of such orphans even if they or their legal representatives fail to raise the arguments themselves. n185 The majority opinion concluded that the corporation is the real defendant, and therefore, the rule regarding orphans was irrelevant. n186 As to corporations, the court broadly declared, [*1748]

A corporation is considered a legal person according to Jewish law as well. This has Jewish law relevance to such matters as corporate work on the Sabbath, lending on interest, ownership of hametz during Passover, and the like, as the responsibility of these actions does not reside with the owners of the shares. n187

The Israeli Rabbinical Court justified the halakhic entity approach as follows: (1) by demonstrating that the concept of a corporation is indigenous to Jewish law; and (2) by arguing that even if the specific notion of a corporation were initially foreign to Jewish law, that concept can be incorporated into Jewish law through other indigenous Jewish law doctrines. n188

a. Corporate Analogs in Jewish Law

The Israeli Rabbinical Court began by contending that the concept of a corporation is already embodied within traditional Jewish law through the concept of the "public" (tzibur). n189 The court differentiated between a partnership, which is a conglomeration of persons in which each person retains his individuality and possesses a rich and complete form of ownership in partnership property, n190 and the public, which is a separate legal entity in which persons do not retain their individuality (in general) or their individual ownership rights (in particular). n191 The court [*1749] argued that this distinction explains the dissimilar rules applicable to a voluntary sacrifice brought by a partnership and a voluntary sacrifice offered by the public. n192

In addition to referring to other authorities who provide more extensive discussions of the distinction between a partnership and a community, n193 the court cited a few examples. n194 Citing Menachem Zemba, it explained that the distinction is apparent in the rules which apply to the mandatory Passover sacrifice. n195 Such an offering is not allowed to be made if its owner still has dough in his possession. When a group of people bring a Passover sacrifice together, the people in the group do not lose their individuality. Consequently, if any one of the members in the group still has hametz, the sacrifice may not be offered. The Talmud explains Rabbi Yehuda's view that, on the day before Passover, the daily offering of the public also may not be brought if the public has hametz. Nonetheless, according to Zemba, Tosafot states n196 that Rabbi Yehuda agrees that this offering of the public may be brought even if there is an individual among the public that still possesses hametz. n197 The reason for this is that the public is a legal person that is considered as a whole; the fact that an individual [*1750] member of the public has hametz is insignificant. n198

The court explained that a similarity between a partnership and the public is that the public, just as a corporation, enjoys perpetual existence. n199 The Talmud states that "the public never dies." n200 Jewish law requires that an

animal may only be sacrificed while its owner is alive; no atonement may be offered for individuals who have died. n201 On the other hand, the Talmud declares that when a particular atonement is effectuated for the public, n202 this atonement functions to achieve an atonement for the sins of the Jews who participated in the exodus from Egypt, even though that entire generation of Jews has long since died. n203 The current nation of Israel is not considered a separate public. Instead, the public is regarded as an ongoing entity that is more than, and different from, the sum of its individual parts and endures indefinitely. n204

Hayyim David Regensberg, who makes some of these same observations, also argues that this discrete concept of the public is supported by a Mishnah in the fifth chapter of the tractate "Vows" (Nedarim). n205 Jewish law generally permits a Jew, through a vow, to ban another from deriving any benefit from the first's person or property. The Mishnah provides the following: [*1751]

[If an individual says] "I am forbidden to you," the one to whom this is said is forbidden to derive benefit from the person or property of the one who spoke . . . [If a person says] "I am forbidden to you and you are forbidden to me," both are prohibited from deriving benefit from the other. Both are permitted to derive benefit from the things that belonged to those who came up from Babylon. Both are prohibited from deriving benefit from things that belong to the particular city [in which the two people live]. n206

The Talmud explains that the things that belonged to the people that came up from Babylon include the Temple mount, the courts of the Temple, and the well on the road between Babylon and Israel. n207 Rabbi Solomon Yitzhahi (Rashi) explains that the reason why the two people may derive benefit from these things is that the Jews that came up from Babylon when Babylon allowed the Jews in exile to return to Israel "abandoned" these properties "to all Israel." n208 The phrase "all Israel" refers to the people of Israel as a public. Because these properties are owned by the public, no person possesses any individualized ownership interest in them. When a person derives benefit from this property, she does not derive benefit from other Jewish individuals but, instead, only from the public. It is for this reason that the two people mentioned in the Mishnah may continue to benefit from the properties of those that came up from Babylon, despite the vow that was taken.

Regensberg also suggests that Rabbi Yochanan ben Zachai endorses this view of the public as a legal entity in his dispute with Ben Buchri, n209 reported in the fourth Mishnah of the first chapter of tractate Shekalim. n210 Rabbi Yochanan ben Zachai rules that Jews of [*1752] the priestly tribe (Kohanim), just as everyone else, are obligated to contribute money for the purchase of public offerings; Ben Buchri believes that Kohanim are under no such obligation. Rabbi Yochanan ben Zachai explains that the Kohanim believed that if they contributed money to the public funds used to buy offerings, the offerings purchased would be considered, at least in part, to be offerings "brought by a Kohain." But if the offerings were so considered, an inconsistency would arise among Biblical passages. n211 While one verse states that "[e]very flour-offering brought by a Kohain must be completely burned; it shall not be eaten," n212 other verses clearly require that Kohanim eat and not burn three types of flour offerings that are purchased with public funds. n213 The Kohanim therefore argued that the only reason that these three types of flour-offerings were not deemed to have been "brought by a Kohain" was because the Kohain were exempt from contributing to the public fund; therefore, the Kohanim were permitted to eat these offerings.

Regensberg suggests that the Kohanim erroneously believed that, in making financial contributions for public offerings and thereby participating in the offerings that were brought, Jews retained their individuality and acted as partners in a partnership. Consequently, they would retain their identity as Kohanim, and the rules pertaining to the offerings of Kohanim would apply to their portion of the offerings, prohibiting them from eating the flour offerings. Rabbi Yochanan ben Zachai, however, argues that the tzibur is not merely a conglomeration of individuals but, instead, a separate legal entity. Thus, even if the Kohanim contribute funds for the three flour offerings brought by the tzibur, the offerings are [*1753] considered to be those of the tzibur as a whole and can be eaten. n214 Rabbi Moses ben Maimon states that Jewish law is in accordance with Rabbi Yochanan ben Zachai. n215

The Jewish law concept of the public arguably applies at certain sub-national levels as well. For example, the Jewish people are divided into tribes, and it is possible for a particular tribe to possess certain properties or intangible rights which are not owned by individual members of the tribe. Thus, the tribe of Levi is entitled to have its members receive certain contributions of food from other Jews, but no individual Levi has the right to demand any particular contribution. n216

Similarly, there is a concept of the "tribe" of the poor. n217 Each local community establishes a public charity fund n218 in which money is held for the needy. The Talmud indicates that the money so collected is beneficially owned by the poor as a whole (as the tribe of the poor), and that those who collect such funds act on behalf of this

community of the poor. n219 Individual indigents have no standing to litigate matters on behalf of the public charity fund or to demand that the public charity fund make particular distributions. n220 The public charity fund could be characterized as a corporation that owns money for the tribe of the poor. Four hundred years ago, in the days of Rabbi Joseph Tranti (Maharit), the custom was to charge interest when lending monies from a fund, the principal of which was consecrated for charity. Tranti explains this custom by stating that the poor, for whose benefit the [*1754] money is held and used, are not really owners of the money. n221 In this same vein, Rabbi Shimon Greenfeld (Maharshag) wrote that "I am almost ready to say that monies consecrated for the poor may be loaned on interest because they do not have 'known' owners." n222

The Holy Treasury, n223 the conceptual domain that owned and administered assets that were consecrated for use in connection with the Temple or Temple services, arguably constitutes another traditional analog to a corporation. n224 The Temple treasurer n225 participates in the acquisition and sale of the properties, n226 administers them, and represents the interests of the Treasury in any Jewish law litigation. n227 The Treasury and, to the extent that he superintends the property of the Treasury, the Treasurer, are exempt from many laws that govern individuals, including ritual and financial responsibilities. n228 Property that belongs to the Treasury is exempt from these rules because it is not considered to be property that belongs to another person as that phrase appears in the Bible. n229 Although the Talmud refers to these properties as money belonging to "the above" or "to the One who dwells above" [*1755] (i.e., God), n230 Regensberg suggests that this phrase may be intended merely to make it clear that the property does not belong to any individual. n231

Regensberg states that by regarding the Holy Treasury as a halakhic entity, one can better understand the position taken by Tosafot and Rabbi Shimon ben Meir (Rashbam) that the Treasury cannot acquire property by a process known as "acquisitions made by one's yard." n232 Jewish law recognizes that a normal person may ordinarily acquire property in two ways, by his own act or by the act of others. n233 Just as a person may actively pick up and acquire property with parts of his own body, such as his hand, the Sages say that in certain circumstances, one may acquire property that lands in his yard. In a sense, the yard that belongs to him acts as if it were his hand and can grasp otherwise ownerless objects that come within its boundaries. Regensberg reasons that because the Treasury, as an artificial or legal person and not a natural person, cannot act on its own to acquire property, n234 it cannot acquire property that lands in its yard either. Instead, the Treasury can only acquire property which someone else transfers to it. Regensberg thinks that Rabbi Moses ben Nachman (Ramban or Nahmanides), who disagrees and rules that the Treasury may acquire property through its yard, does so because this process operates even if the [*1756] owner of the yard is oblivious to what is happening. n235 Because the process does not require human thought or intention, n236 Nahmanides believes that it can work for an artificial legal entity even though that entity does not possess the faculty of human thought or intention. n237

Reminiscent of the sentiments of many secular theorists, n238 Regensberg argues that the notion of the public as more than merely a combination of individuals is a well-established "sociological reality." n239 The same argument can be used to argue that a partnership, which is also an association of people, constitutes a separate sociological reality. However, Regensberg contends that individuals have the choice of organizing in a way in which they maintain their individuality, as through a partnership, or in a way in which they lose their individuality and become part of a larger, different whole, as through a corporation. n240 Of course, even if one can generally distinguish between the sociological dynamics of public corporations and partnerships, it is difficult to argue that this distinction exists between close corporations and partnerships.

The Israeli Rabbinical Court cites tefisat habayit, loosely translated as a "decendent's estate," as another example of a "legal person" whereby two or more individuals enjoy beneficial rights in property but are not considered its owners. When an individual dies with two or more heirs, the inheritance is said to be held by the decedent's estate until it is divided among the heirs. When an individual owns animals, there is a requirement that some animals be set aside and given to members of the Jewish tribe of Levi. n241 When partners own animals, no animals need to be set aside. While [*1757] an inheritance is owned by the decedent's estate, however, animals must be set aside. The Rabbinical Court maintains that this is because Jewish law treats the property as if it were owned by a special "legal person" rather than by the joint heirs. n242

Although opponents of the halakhic entity approach may not argue with all or even some of the descriptions of the above Jewish law concepts, they do deny that these concepts provide a precedent for recognizing a secular corporation as a separate halakhic entity. None of the above examples involve a voluntary association of individuals to promote their own personal financial gain. Rather, the examples merely represent naturally existing Jewish law institutions. The

critics argue that new institutions cannot be created, especially by the voluntary actions of individuals intending their own personal gain. n243

The cogency of this argument is difficult to evaluate. There are no clear-cut rules as to how exact a paradigm must exist before concluding that the concept of a corporation exists in Jewish law. Perhaps the fact that the classical halakhic legal persons discussed above were not voluntarily created for the purpose of operating a business is insignificant. n244 On the other hand, it is arguable that some of these institutions, such as the charity fund, were voluntarily created. n245 Others, such as the decedent's estate, were typically used for generating private profit. Moreover, although the secular concept of a corporation appears to have arisen in connection with nonprofit institutions, the concept was thereafter [*1758] applied to commercial organizations. n246 To a large extent, the split of authority between proponents of the halakhic entity and halakhic partnership approaches seems to be based on whether or not the transition from nonprofit to profit organizations is perceived to be a natural one.

Opponents of the halakhic entity position also argue that a large number of Jewish law authorities have implicitly rejected it. They point to the substantial body of Jewish law literature discussing whether it is permissible to pay or charge interest when dealing with a banking corporation. They contend that, according to the halakhic entity theory, there should be no problem with levying interest. Nevertheless, many authorities found that there was a problem regarding interest. n247 Still others resolved the interest issue through rather complicated rationalizations. n248 According to the halakhic entity approach, these critics argue, the interest problem should have been a non-issue.

There are at least two partial responses to this criticism. First, there may be an historical explanation for this phenomenon, at least as to early Jewish law literature. As explained in Parts II and III, until relatively recently, secular law provided for a closer relationship between shareholders and their assets. Moreover, although English and American law adopted the corporate entity theory rather early, the aggregate theory retained considerably greater standing in Europe, where these responsa originated, for quite some time. In addition, shareholders of many corporations were not entitled to limited liability. Indeed, even the early responsa allowing investment in banking corporations that charge interest because of the restricted role of corporate shareholders, do not cite the principle of limited liability as a factor.

Second, a careful reading of responsa suggests that some important early authorities may have been advancing a version of [*1759] the halakhic entity theory. n249 Rabbi Isaac Aaron Ettinger, for instance, rules that there is no problem in being a shareholder in a banking corporation that loans on interest. n250 Among other things, Ettinger refers to the end of the Mishnah in Nedarim that was quoted above. The Mishnah provides that if a person vows that his fellow should derive no benefit from him and that he shall derive no benefit from his fellow, they are both prohibited from deriving benefit from things that belong to the city in which they both live. The Talmud explains that this refers to properties such as the public square, the bathhouse, the synagogue, the ark (in which the Torah [*1760] was kept), and the holy books. n251 Rashi explains that the reason for this prohibition is that these properties are deemed to be owned by the citizens of the town in partnership. The Talmud explains that the two people mentioned in the Mishnah could permissibly derive benefit from the property if they would first transfer their ownership of the property to someone else, such as the political leader of the community. n252 Once they no longer owned interests in this property, they could receive a benefit from the property without deriving a benefit from each other. Nonetheless, in addressing this solution, Nahmanides states that transferring the ownership interests in this way is a little like a trick. n253 With respect to the case of the bank, Ettinger states that

all of the loans are made in the name of the bank and if the borrower does not want to pay, the malveh n254 [(i.e., the Jewish shareholder)] cannot assert any complaint; only the bank can bring suit in a Jewish court or in a Gentile court. In addition, the money belongs to the bank and this is better than [the case in Nedarim in which one] transfers his share to the political leader of the community because that [process] involves a bit of a trick, as . . . [Nahmanides] says [*1761] there, unlike our case [of the bank]. n255

The basic point this excerpt makes is that the bank, not the shareholders, owned the money that was lent. But if the bank were a partnership, then the shareholders' individualized interests in the partnership money would be problematic. By stating that the bank scenario was "better than" the solution mentioned in Nedarim, Ettinger implicitly seems to be stating that the bank was a separate legal entity and not merely a partnership. Later on, Ettinger makes a slightly different point when he argues that "[n]ever were any of them [(the shareholders or the bank directors)] made a lender or a borrower. Rather, the bank received the money [from its shareholders] and did business with it on the advice of its managers." n256

Opponents of the halakhic entity theory may also argue that some or all of the individual analogies are inapt in other ways. Thus, some contend that the public is really a partnership, not a corporate body. n257 They point out that,

according to the Talmud, if a legal dispute arose involving assets of the public, none of the members of the public could serve as a judge or witness in the case because of bias. n258 Nevertheless, the merit of this contention is dubious for two reasons. First, bias could exist even if the members of the public are not partners or owners of the public's property; they could be biased simply because they have a beneficial interest in the public's assets. n259 Second, the testimonial disqualification [*1762] seems to have pertained to disputes involving property of the particular community, as to which the community members may have been considered a partnership, and not to property dedicated to the Jewish people as a whole, such as the property of those who came up from Babylon. The concept of the public that arguably embodies the notion of a corporation is that which refers to the Jewish people as a whole, on a tribe by tribe basis or as to the tribe of the poor, not one which refers merely to the people who live in a particular geographical area.

Another argument that critics of the halakhic entity theory employ is that corporate shareholders, if they were to act as a whole, could control the corporation's assets and indeed, could cause the corporation to dissolve and distribute the assets. They sometimes compare corporations to cases in which one could seek release from a vow. Due to the fact that such a person could obtain release from the vow, it is considered, for certain purposes, as if he had already been released. n260 Proponents of the halakhic entity theory might respond in two ways. First, in many instances, even if the shareholders would unanimously agree, they could not immediately dissolve the corporation. n261 Second, they might argue that what could happen if there were unanimous agreement is irrelevant. The Talmudic references to someone obtaining release from a vow are inapt because such a release is, as a practical matter, almost surely within the individual's ability to obtain. By contrast, the agreement of other shareholders is certainly not within an individual's ability to procure. Indeed, merely obtaining the names and addresses of the other shareholders and communicating with them can be prohibitively costly. Of course, as discussed in Part V below, the critics' position is far stronger as to close corporations, especially those that are governed by a sole shareholder who serves as a sole director as well.

[*1763]

b. The Creation of New Halakhic Rules

The Israeli Rabbinical Court observes that some, such as Yitzhak Wasserman, assert that if there is no halakhic precedent for the concept of a corporation, there is no way that this concept can be created through the use of traditional Jewish law rules. n262 The court declares that the assertion is incorrect and argues that, even if there were no precedent for the halakhic entity approach, Jewish law doctrines would allow a court to treat a corporation as a halakhic entity. n263 The court cites the following four doctrines: (1) a rabbinical court may declare property ownerless (hefker beit din hefker), (2) conditions agreed to regarding monetary matters are valid (kol tenai shebimamon kayam), (3) commercial custom is binding (minhag hasohrim), and (4) the law of the secular government is religiously binding (dina de'malkhuta dina). n264

i. A Rabbinical Court May Declare Property Ownerless

Hefker beit din hefker authorizes a rabbinical court (beit din) to deprive a person of ownership of particular property. The Israeli Rabbinical Court asserts that this principle permits a rabbinical court to treat a corporation as a new halakhic entity. n265 The court apparently believes that this authority enables a rabbinical court to strip shareholders of their rights as owners and to transfer such rights to a corporation.

Although there is considerable disagreement as to this principle's precise parameters, n266 it is cited as a justification for promulgation of rabbinic rules affecting ownership. For example, there is a dispute as to whether the Torah recognizes the efficacy of liens. Aryeh Leib HaKohen Heller states that those who assert that liens are Biblically invalid do not distinguish between implicit or [*1764] explicit efforts to create liens. Accordingly, they believe that even though the Torah allows a person to sell her property, it does not allow her to transfer a lien because the Torah does not recognize "a partial transfer of ownership rights." n267 As the Rabbinical Court comments, this view perceives the creation of a lien as a type of unprecedented hybrid, a transfer of ownership rights that does not transfer ownership. n268 Nevertheless, even those who espouse this position admit that, at least as a matter of rabbinical law, liens are effective. The Israeli Rabbinical Court argues that just as a rabbinical court can introduce the concept of a voluntarily transferred lien into Jewish law, it can also introduce the secular concept of a corporation as a distinct entity. n269

Opponents of the halakhic entity approach raise at least two [*1765] objections. First, they argue that even if rabbinic authorities could implement the concept of a corporation into Jewish law, such authorities have not done so yet. n270 Second, critics can contend that the doctrine that allows rabbinical courts to declare property ownerless is not sufficiently robust as to permit introduction of this particular Jewish law innovation, the creation of an artificial halakhic entity. They contend that although the doctrine may permit a rabbinical court to deprive someone of her ownership

rights, it cannot function to create ownership rights for someone or something (corporeal or incorporeal) that Jewish law does not otherwise give. n271 Supporters of the halakhic entity approach can point out that there are authorities on both sides of the issue as to whether rabbinical courts may not only deprive one person of ownership but also create ownership rights for someone else. n272 Except for the halakhic entity theorists themselves, no one seems to say that a rabbinical court can create ownership rights for someone who, under Biblical law, has no way of acquiring property.

ii. Validity of Conditions in Monetary Matters and the Importance of Commercial Custom

Jewish law provides that (1) any condition that is agreed upon with respect to monetary matters is valid under Jewish law; n273 and (2) customs established among merchants acquire Jewish law validity, n274 provided that the practices are not otherwise prohibited by Jewish law. These two precepts are arguably interrelated; commercial customs are sometimes said to be binding because business people implicitly agree to abide by them.

The Mishnah pronounces the validity of commercial customs. [*1766] Thus, the Mishnah states,

What is the rule concerning one who hires workers and orders them to arrive to work early or to stay late? In a location where the custom is to not to come early or stay late, the employer is not allowed to compel them [to do so] All such terms are governed by local custom. n275

The Shulhan Arukh makes it clear that common commercial practices override many Jewish law default rules that would otherwise govern a transaction. n276 Moreover, these customs are valid even if the majority of the business people who establish them are not Jewish. Rabbi Moshe Feinstein explains:

It is clear that these rules which depend on custom . . . need not be customs . . . established by Torah scholars or even by Jews. Even if these customs were established by Gentiles, if the Gentiles are a majority of the inhabitants of the city, Jewish law incorporates the custom. It is as if the parties conditioned their agreement in accordance with the custom of the city. n277

In addition, many authorities rule that such customs are valid under Jewish law even if they were established because the particular conduct in question was required by secular law. n278

[*1767]

Nevertheless, just as authorities dispute whether the rule allowing rabbinical courts to declare property ownerless can introduce new Jewish law concepts, authorities debate whether commercial custom can substantially alter Jewish law. There are various customs as to how to "seal a deal." In some industries, it is said that a handshake is considered binding. These customs are referred to as *situmta*. It is agreed that *situmta* can make a *kinyan*, i.e., transfer title to property. This is true even though, but for the custom, the particular practice would not otherwise constitute a valid form of transferring title according to Jewish law. Thus, *situmta* can be used as a substitute for the normal procedures for achieving a *kinyan*. However, there is a classical controversy among *Rishonim*, Talmudic commentators who lived from 600 to 1000 years ago, as to whether *situmta* is effective to accomplish tasks that cannot normally be transacted according to Jewish law.

Rabbi Asher, Rabbi Shlomo Luria, and others argue that *situmta* can do more than traditional Jewish law forms of effecting a deal. For example, even though Jewish law has no native mechanism for transferring ownership of an item that does not now exist in the world, this approach argues that if the commercial practice of a particular society included a procedure for such transfers, Jewish law in that location would incorporate the practice as valid and enforceable. n279 For instance, no basic Jewish law form of *kinyan* permits someone to sell something that does not yet exist [*1768] or to sell to someone who does not yet exist. n280 Nevertheless, Rabbi Shlomo ben Aderet (Rashba) states, "Great is the power of the community, which triumphs even without a *kinyan*. . . . Even something which is not yet in existence can be sold to someone who does not yet exist [if community practice so provides]." n281

If Aderet is correct and commercial custom can allow transactions to be accomplished that could not otherwise have been achieved under Jewish law, it is possible that the commercial custom of recognizing corporations as distinct entities that can own their own property and conduct their own business, albeit through agents, could also be introduced into Jewish law.

Critics of the halakhic entity theory, however, could raise at least three basic objections. First, they might try to distinguish between the relatively limited novelty of introducing the ability to transact business with a person, or a product, that does not yet exist into Jewish law, and the arguably much greater novelty of introducing the ability to transact busi-

ness with a Jewish law entity which never has and never will "exist." Thus, some authorities [*1769] argue that the creation of a halakhic entity is like allowing property to acquire other property, something which cannot be done. n282

Second, unless commercial custom "gives life" to a corporation and allows it to actually acquire property, and not merely permit financial matters to proceed "as if" the corporation was a separate entity, commercial custom would not avoid many of the Jewish law problems that have been identified, such as the prohibitions against charging interest and owning dough over Passover. By contrast, if rabbinic authorities could and did use the principle allowing them to declare property ownerless to take property from shareholders and put it into the dominion of the corporation as a halakhic entity, these problems would not arise. Although the principle works directly only as to monetary matters, because the shareholders would no longer own the property, the rule allowing rabbinic courts to declare property ownerless would indirectly affect non-monetary Jewish law issues as well.

Third, critics argue that Rashba is wrong. Thus, Rabbenu Yeheil and others maintain that custom functions only as a substitute method by which title can be transferred, and cannot be more effective under Jewish law than the forms of kinyan recognized by the Talmud. According to this approach, if the concept of a corporation were foreign to Jewish law, use of *situmta*, a new method of accomplishing traditional transactions, could not introduce the corporate concept into Jewish law. n283

iii. "The Law of the Land" Incorporated into Jewish Law

(a) The Jewish Law Validity of Secular Law-As Applied to Jews

The Jewish law doctrine that "the law of the land is the law" [*1770] provides that, in certain circumstances and for particular purposes, secular law is legally effective under Jewish law. In its opinion, the Israeli Rabbinical Court mentions this principle as another way through which secular legal concepts can be incorporated into Jewish law. A survey of the scope of the obligation to obey secular law is well beyond the scope of this Article. However, a brief review of the relevant theories is required. There are three principal perspectives regarding "the law of the land is the law."

1. Rabbi Joseph Karo n284 rules that secular law is binding under Jewish law only to the extent that it directly affects the government's financial interests. Thus, secular laws imposing taxes or tolls would be valid under Jewish law. n285

2. Rabbi Moshe Isserles agrees that secular laws directly affecting the government's financial interests are binding, but adds that secular laws which are enacted for the benefit of the people of the community as a whole are also, as a general matter, effective under Jewish law. n286

3. Rabbi Shabtai HaKohen disagrees with Rabbi Isserles in one respect. He believes that even if secular laws are enacted for the benefit of the community, they are not valid under Jewish law if they are specifically contrary to indigenous Jewish law precepts. n287 There is substantial debate among Jewish law authorities as to which approach to follow. n288 Nevertheless, it seems that most [*1771] modern authorities agree that, at least outside of the State of Israel, Rabbi Isserles' view should be applied. n289

[*1772]

Of course, just as with respect to commercial custom, there is a question as to precisely what "the law of the land is the law" theory can accomplish. Some Jewish law decisions clearly rule that when this doctrine incorporates secular law into Jewish law, the incorporated secular law can accomplish things that previously would have been impossible under Jewish law. n290

For example, there is a Jewish law dispute as to the validity of a secular will. Conventional Jewish law rules do not allow transfer of a decedent's estate by will. Under Jewish law, once a person dies her property automatically transfers to her Jewish law heirs. Thus, the problem with a secular will is not just that no traditional method of transfer would work. The problem is that, according to [*1773] Jewish law, there is no decedent's estate from which to transfer funds. As a matter of Jewish law, all of the decedent's possessions are automatically and immediately transferred to the Jewish law heirs upon the decedent's death. Consequently, for the beneficiaries under the will to take possession of the decedent's property would, under Jewish law, be tantamount to taking property that was owned by the Jewish law heirs and would be prohibited as a form of theft. Nevertheless, there is a plethora of preeminent authorities who rule that this is not theft. n291 Although not all of these authorities explicitly declare that "the law of the land is the law" can accomplish more than an ordinary Jewish law procedure, this proposition is at least implicit in their rulings. n292 On the

other hand, the authorities who disagree either explicitly or implicitly maintain that secular law cannot transfer property in a case where a traditional Jewish law procedure would be ineffective. n293 [*1774]

(b) The Jewish Law Validity of Secular Law-As Applied to Non-Jews

Before leaving this subject regarding the significance of secular law under Jewish law, it is important to note that the three principal approaches to "the law of the land is the law" described above dealt with the Jewish law validity of secular law as it applies directly to Jews. However, Jewish law also takes a position as to the validity of secular law in transactions between non-Jews.

Jewish law provides that non-Jews are bound to observe "the seven laws of Noah," referred to as the "Noahide Code." n294 In part, the Noahide Code requires non-Jews to establish a system of commercial laws. According to most Jewish law authorities, such laws may differ from the rules governing transactions that are conducted only between Jews. n295 Moreover, the majority view is [*1775] that, in a country governed by non-Jews, the secular law consequences of transactions among non-Jews is valid and can generally be relied upon by Jews. n296 For example, assume that A and B are not Jewish, and that A sells B a widget in a transaction that would not be effective under Jewish law n297 but is effective under [*1776] secular law. C, a Jew, can rely on secular law to establish that B owns the widget, and by purchasing it from B, C becomes its owner under Jewish law. Consequently, it seems likely that, as between non-Jews, secular law's view of a corporation as a distinct legal entity might well be effective as a matter of Jewish law. n298 Indeed, one of the Jewish law authorities that vigorously rejects the halakhic entity theory as applied to Jewish shareholders seems implicitly to acknowledge that it would apply to transactions among non-Jews. n299 Nonetheless, it is possible that opponents of the halakhic entity approach would argue that some parameters apply even as to the types of laws that can be created pursuant to the Noahide Code. Creating a theoretical entity, breathing life into it and allowing it to acquire and own property could, according to these critics, be beyond the pale.

iv. Creation of "New" Rules-Ownership and Limited Liability

Virtually all of the Jewish law issues that arise in connection with the characterization of a corporation involve, at least in part, the following two questions: (1) Is a Jewish shareholder an owner of the corporate assets?, and (2) Does the secular doctrine of limited liability apply to immunize Jewish shareholders from being personally liable for corporate debts?

As discussed, the halakhic entity and halakhic partnership approaches inevitably conflict as to the ownership issue. The halakhic partnership proponents, as well as proponents of the other positions considered below, deny that any apt analog to the [*1777] corporation exists in the Talmud. They also deny that any of the above-mentioned doctrines have the power to create this new halakhic entity.

Nevertheless, even critics of the halakhic entity approach have relatively little difficulty in concluding that corporate shareholders are entitled to the benefit of limited liability, n300 at least as to voluntary creditors (i.e., suppliers or purchasers who voluntarily transacted business with the corporation). Halakhic partnership theorists usually state that the partners, inter se, cannot demand from each other that they personally pay the business debts because it is as if the partners had agreed to the limited liability rule as a condition when they formed the partnership. As to third party creditors, some authorities specifically state that limited liability is justified either because any condition agreed to regarding monetary matters is valid or because commercial custom is binding. Such commentators point out that people in the business world realize that corporate shareholders will not be held personally liable, and it is on the basis of this understanding that they do business with corporations. n301 Although a particular plaintiff may in fact not have [*1778] known the law of limited liability, she could and should have found out about it beforehand. Consequently, such a plaintiff is bound as if she had known the custom and had agreed to it. n302 Other authorities argue that because a corporation is a creation of secular law, a person's financial rights when dealing with a corporation are limited to those set forth by the law. n303 Still others seem to assume that the limited liability rule would be valid under Jewish law without even discussing why. n304

The failure by some authorities to articulate precisely which Jewish law doctrine justifies the limited liability rule is problematic for two reasons. First, depending on which doctrine is used, it is possible that the rule would not apply to all possible claims. For instance, consider claims asserted by nonconsensual creditors, such as those that assert tort claims against the corporation. n305 If one believes that the limited liability rule is effective because it is as if those doing business with a corporation agreed to the rule-either because all conditions consented to regarding monetary matters are effective or because commercial custom is binding-then shareholders might not be entitled under Jewish law to limited liability against tort claims, such as a claim asserted by a pedestrian who was struck by the corporation's vehicle and

who never agreed to do any business with the corporation. On the other hand, if one believes that the limited liability rule is effective under Jewish law [*1779] because rabbinical courts can declare property ownerless or "the law of the land is the law," the rule might operate as to tort claims as well. n306

Of course, if an individual shareholder personally committed the tort, he may not enjoy limited liability even as a matter of secular law. n307 Consequently, the only torts at issue are those based on the actions of third persons (such as vicarious liability for the actions of agents or employees), or based on injuries caused by the shareholder's property. Although a comprehensive analysis of Jewish tort law is beyond the purview of this Article, internal Jewish law rules, unlike secular laws, do not generally impose vicarious liability on principals for the tortious acts of their agents, whether the tortious conduct is purposeful or merely negligent. n308 [*1780] Consequently, the only way shareholders could be vicariously liable as a matter of Jewish law is because secular tort law is somehow incorporated into Jewish law. In such cases, it would seem likely that Jewish law would assimilate the secular limited liability rule as well. n309 Thus, as a practical matter, there is a difference between justifying the limited liability rule with the rules that all conditions agreed to regarding monetary matters are valid or that commercial custom is binding, on the one hand, and by justifying it with the rules that a rabbinical court may declare property to be ownerless or "the law of the land is the law," on the other. The difference involves cases in which the corporation's property caused injury, such as when a brick from the corporation's building falls on someone or a farming company's bull gores someone. n310

Second, which doctrine is used to justify the limited liability rule may also affect the Jewish law rule as to consensual creditors in cases where secular law pierces the corporate veil. If the limited liability rule is based on "the law of the land is the law," one might suppose that wherever secular law imposes personal liability, halakhah would impose personal liability. On the other hand, if limited liability is based on the validity of consensual conditions or upon commercial custom, it is as if the shareholders and each consensual creditor agreed to the limited liability rule. What precisely constitutes commercial custom, however, requires a careful sociological analysis of people's expectations. As explained in Part II, the rules for piercing the corporate veil are unclear, and the holdings are inconsistent. Even assuming that specified circumstances are satisfied, courts retain substantial discretion as to [*1781] whether or not to pierce the corporate veil. It may be that the commercial custom, involving the expectations of the people who do business, is that corporate shareholders will enjoy limited liability. The unlikely possibility that a secular court could pierce the corporate veil in a particular case might not meaningfully affect such expectations. n311

Interestingly, an Israeli Rabbinical Court initially expressed doubt as to the limited liability process even as to voluntary creditors. n312 Possibly assuming that a corporation is a halakhic partnership and not a halakhic entity, this court described the rule by saying that shareholders give corporate creditors a lien in the assets of the corporation which serve as collateral without assuming any personal liability for the debt. n313 The court stated that according to at least one interpretation of Rabbenu Asher's commentary, this type of transaction would be invalid according to [*1782] fundamental Jewish law rules. n314 Those rules, according to Rabbenu Asher (Rosh), provide that a person's property can only serve as a guarantor that the person will pay her debt. However, if the person is not obligated to pay a debt, then there is nothing to guarantee, and nothing can be collected from the guarantor.

Asher's view is expressed in connection with the following Talmudic discussion: "Rava states in the name of Rabbi Nahman: 'When a man proposes to a woman stating "Marry me with this mana [i.e., a specified sum of money,] and he leaves her collateral instead of the mana, they are not married, as she has neither the money nor the collateral.'" n315 Under Jewish law, merely by saying "Marry me with this mana," a man does not legally obligate himself to transfer a mana to the woman to whom he is speaking. Asher comments on this passage stating,

This ruling is correct because a person is only allowed to place a lien on his property for money that he owes to another; something for which he is not obligated [(such as paying a mana to the woman mentioned in this passage)] cannot give rise to a valid lien on his property . . . [and the attempted betrothal is legally ineffective]. n316

The Israeli Rabbinical Court did not suggest that Asher's position would require finding the corporate shareholders to be personally liable. On the contrary, it assumed that the corporate shareholders would not be personally liable. It considered ruling that the corporate creditors could not even collect from the corporation itself because if the shareholders were not personally liable, the lien on the assets placed "in" the corporation would not be valid. n317 Nevertheless, the court concluded that even Asher would agree that the lien on the corporation's assets would be valid [*1783] because of commercial custom or "the law of the land is the law." n318

Thus, those authorities that support the halakhic partnership approach apparently must, if they want to rule in accordance with Asher, acknowledge that these doctrines can incorporate new rules into halakhah, even rules that would otherwise be inconsistent with halakhah. n319 But, once halakhic partnership theorists acknowledge that these doc-

trines can introduce new rules into Jewish law, including rules that would otherwise be directly inconsistent with Jewish law, it becomes easier for halakhic entity supporters to argue that these doctrines could similarly incorporate the corporate entity theory into Jewish law.

Halakhic partnership supporters could respond in several ways. First, they could rely on the approach of Nahmanides and Aderet who categorically disagree with Asher, explaining that there are technical reasons why advancing collateral for a debt that is not actually owed fails to effect a valid betrothal. Generally, however, they believe that one may create asset-based liability without incurring a personal obligation. n320 Many if not most Jewish law authorities appear to accept the approach of the Nahmanides and Aderet. n321 Second, they could argue that Rosh himself was only referring to a situation in which the owner of the collateral had not done anything to become financially obligated in any way. Halakhic partnership advocates might be able to differentiate that case from a situation in which corporate shareholders, through the [*1784] corporation, incurred some obligation by acquiring property sold by a corporate creditor. The corporate transaction could arguably be perceived as the creation of actual personal liability coupled with the corporate creditor's agreement that the shareholders need not personally pay for the liability. Of course, they could also, once again, attempt to distinguish the halakhic entity theory as being an allegedly more radical innovation, more fundamentally inconsistent with Jewish law than the limited liability rule. Nevertheless, if one assumes that the limited liability rule is, according to the Asher, inconsistent with traditional Jewish law, it is difficult to find a principled basis upon which to distinguish incorporation of the limited liability rule from assumption of the halakhic entity approach. Asserting that one rule is more radical than the other proves neither the assertion nor that any such asserted discrepancy is significant under Jewish law.

B. The Halakhic Creditor Approach

Not all Jewish law authorities characterize the corporation as either a halakhic entity or a halakhic partnership. Some authorities characterize the relationship between Jewish shareholders, or some types of Jewish shareholders, and the corporation as that of a creditor to a borrower. For instance, Rabbi Moshe Sternbuch believes that Jewish law, even after considering the various doctrines described above, does not recognize a corporation as a halakhic entity. n322 Sternbuch argues that if Jews constitute the essential part of a corporation's shareholders, n323 the corporation could be characterized under Jewish law as a partnership subject to certain conditions, such as limited liability, agreed to by the partners. n324 He contends that Jewish law could "force" the [*1785] transaction to be construed in this manner even though the shareholders really intended only to become stockholders in a secular corporate entity. n325

Sternbuch implies that the shareholders have not really agreed to the conditions he specifies but that Jewish law somehow forces them to be treated as if they had. He much more clearly implies that there is some difference between the rights and duties of shareholders under secular law and the rights and duties of Jewish law partners, even assuming the partners had agreed to the various conditions he describes. n326 This implication renders his version of the halakhic partnership theory somewhat troublesome.

If, however, non-Jews constitute the essential part of the investors, Sternbuch argues that the non-Jewish shareholders have the right to be shareholders of a corporate entity and that Jewish law cannot make them partners in a partnership. n327 Consequently, [*1786] Sternbuch states that if a Jew tries to purchase stock in such a corporation, the money he pays constitutes a loan to the "managers of the corporation." n328 According to Sternbuch, if the enterprise succeeds, it is proper under Jewish law for the Jewish shareholder/lender to take the profits that are distributed to him by the corporate managers. n329 On the other hand, if the corporation fails and the Jewish shareholder/lender has not recovered the principal of the "loan" that he made, then according to Jewish law, the shareholder/lender would really be able to collect the unpaid principal from the corporate managers. n330

There are several noteworthy aspects to this approach. First, it is interesting that even though neither the Jewish shareholder nor the corporate managers intend for there to be a loan, Sternbuch states that Jewish law would treat it as a loan. It is unclear who Sternbuch means when he refers to the corporate managers. Perhaps he means the people who received the Jewish investor's payment for the stock. n331 These managers thought they were acting on behalf of the corporate entity. However, according to Sternbuch, they were not acting on behalf of the corporate entity because Jewish law does not recognize that any such corporate entity exists. Consequently, if these managers were not acting on behalf of the corporate entity, they must be deemed to have acted for themselves. By taking a Jewish investor's money without giving anything in exchange, the corporate managers are deemed under halakhah to have borrowed the money. n332

[*1787]

If the corporate managers are Jews, then according to Sternbuch, if the company fails, it seems that they face possible personal liability, enforceable in a rabbinic court, to repay the amount that was paid to them by the Jewish investors. n333 If the corporation succeeds and the Jewish investors are paid more than their principal, it is possible that the transaction would violate a rabbinic rule against collecting interest. n334

Second, Sternbuch's explanation seems to presuppose that the Jewish shareholders bought their stock from the corporation. It is unclear what Sternbuch's position would be in the very common case in which a Jewish investor purchased shares from an existing shareholder. Consider, for instance, a Jewish investor who purchases shares from a non-Jewish shareholder. The non-Jewish shareholder was not considered a creditor of the corporate managers, and the corporate managers had no personal liability to him. Indeed, according to Sternbuch, it seems that as far as non-Jews are concerned, the corporation is a secular legal entity, and a non-Jewish shareholder has certain rights, as a shareholder, against [*1788] the corporation. n335 When a Jewish investor purchases the non-Jew's shares, none of the purchase money goes to the corporation or to the corporate managers. Consequently, both the corporation and the corporate managers could not be found to have directly borrowed money from the Jewish investor.

Furthermore, even assuming the Jewish investor could acquire the rights previously held by the non-Jewish shareholder, the Jewish investor would not be deemed to have loaned money to anyone because the non-Jewish shareholder had not loaned money to anyone. This seems to leave two possibilities. One is that the Jewish investor actually acquires his predecessor's status as a corporate shareholder, and in this scenario, Sternbuch would approve of the halakhic entity theory. n336 Yet this occurrence is common, and Sternbuch provides no explicit basis for believing that he would approve the halakhic entity theory at all! The other possibility is that the Jewish investor could not acquire the non-Jewish shareholder's rights, and the attempted purchase of shares would be ineffective. Consequently, the money paid to the non-Jewish shareholder would constitute a loan from the Jewish investor to the non-Jewish shareholder who received it. Thus, the Jewish investor would have no claim against the corporation but would have a claim as a creditor against the shareholder from whom he had attempted to buy the shares. Similarly, the non-Jewish shareholder would owe money to the Jewish investor and would really still own the corporate stock under Jewish law.

Another creditor-oriented approach is advanced by Rabbi Yitzhak Yaakov Weiss. Interestingly, Weiss believes that the corporation is a halakhic partnership with respect to Jewish [*1789] shareholders who own voting shares, even if as a practical matter such shareholders have no meaningful ability to influence corporate conduct. As a result, any Jew with voting shares would be deemed to own a percentage of the corporate assets. If the assets consisted of dough, then according to Weiss, the Jewish shareholder would face the prohibition of owning dough on Passover. n337

On the other hand, Weiss rules that a Jew who owns only nonvoting shares, even if the shares are of common stock, is not a partner but rather a lender. n338 Weiss interprets the position of certain other Jewish law authorities as concluding that whenever a Jewish investor owns shares in a secular corporation, the Jewish investor is merely making a loan and not becoming a partner. n339 Weiss says that he made a kind of compromise (k'ayn hechrah) between those who say that a secular corporation is never a partnership and those who say it is always a partnership. n340

Critics of Weiss' position argue that the distinction between voting and nonvoting shares is not defensible. n341 The distinction seems to be based on form, not substance, because a nonvoting shareholder with a large investment in a corporation might, in fact, have a much greater ability to influence a corporation's conduct than a voting shareholder who owns very few shares. Another difficulty with Weiss' approach is that he fails to explain, when [*1790] there is a loan, to whom the loan is made. Would he, for instance, agree with Sternbuch and rule that the loan is made to the corporate managers? Or would Weiss believe that the loan is made to the partnership consisting of the shareholders holding voting stock? As was evident when discussing Sternbuch's position, there could be Jewish law consequences arising from such a loan, and therefore, it is critical to know to whom it is made.

Part V.A.2.a explained that a responsum of Ettinger regarding charging interest could be interpreted as supporting the halakhic entity analysis. Citing a different responsum of Ettinger, Weiss contends that Ettinger follows the creditor approach. n342 Nevertheless, a close reading of that responsum does not provide any specific support for Weiss' interpretation. Although Ettinger states that Jewish shareholders do not own corporate property, he does not say that the Jewish shareholders loaned any money to anyone.

Ettinger considers the case of a corporation, some of whose shareholders are Jewish, that had owned a large supply of beer (a form of hametz) throughout Passover. Specifically, he ponders whether the corporation's Jewish shareholders are allowed to derive benefit from this beer. He answers that the Sages prohibited such products to penalize Jews who failed to fulfill their responsibility to destroy hametz prior to Passover. n343 He reasons that, inasmuch as Jewish shareholders have no right to use, sell, or destroy the corporation's property, they had no halakhic obligation to destroy

the beer in question prior to Passover. Therefore, he writes that the penalty enacted by the Sages would not apply. n344 In addition, he argues that the Jewish shareholders were not obligated to sell their stock prior to Passover. n345 He acknowledges that the value of the beer was linked to the financial interests of the shareholders (in halakhic terms, that the shareholders are aharoi for [*1791] the beer) and that if the beer had been destroyed, the shareholders would suffer a loss. Nevertheless, he states that the Jewish shareholders did not own the beer itself (the *guf hahametz*) because, as he explains, they had no right to consume, sell, or destroy it, and they had no right, as shareholders, to enter or use the corporation's premises. n346 As a result, he declares the case is like that of a Jew who is aharoi for hametz of a non-Jew that is in the possession of the non-Jew, in which case the hametz is not prohibited after Passover.

It is possible to construe this responsum in the same way that Ettinger's responsum regarding the charging of interest was interpreted in Part V.A above, i.e., that the corporation is considered as if it were a separate halakhic entity that owned the hametz. n347 Alternatively, it is possible to construe it in either of the following ways: (1) as supposing that the Jewish shareholder merely purchased a right to a portion of the corporation's profits, similar to the view discussed in Part V.C; or (2) as evaluating the overall relationship of the Jewish shareholder to the dough, similar to some of the views described in Part V.D. n348 Nowhere in the responsum does the Maharyah Ha-Levi state that the Jewish investors loaned money to anyone. If he thought that Jewish investors had loaned their money, it would have been necessary for him to explain to whom the loan was made and to describe the consequences if the borrowers were Jews.

Of course, the halakhic creditor approach shares the problem mentioned above in connection with Sternbuch's halakhic partnership analysis. A Jewish investor does not seem to be lending money to corporate managers. He does not perceive himself as a [*1792] lender, but as an investor. A Jewish investor who purchases corporate shares from a non-Jewish shareholder surely does not perceive himself as lending money to the non-Jewish shareholder. To say that this is what is happening is to push a square peg into a round whole with both hands. In addition, this characterization obviously conflicts with applicable secular law.

C. The Purchaser of Entitlements Approach

Rabbi Moshe Feinstein discusses the Jewish law status of corporations in a number of scattered responsa. In several responsa, he briefly indicates that a corporation is not a new type of entity and refers to it as a partnership. n349 Nevertheless, it seems possible that in at least some of these responsa, he is referring to close corporations. n350 On the other hand, in another responsum, he specifically discusses the widespread practice of purchasing stock in public companies that do business on the Sabbath. He states that

the simple reason that this practice is permissible under Jewish law is that someone who purchases shares of a company but does not really have a meaningful say in the company's business should not be considered even as a *pro rata* owner. Nor does such a purchaser of shares want to be an owner of the business or to purchase any of the business. Instead, he wants to purchase part of the profits and losses that the business will have according to the shares that he buys.

. . . [In fact] it seems more reasonable to say that he does not make any Jewish law acquisition, but only acquires [*1793] [rights to the profits and losses] according to the laws of the land. That, according to the condition on which he made his purchase, a shareholder can vote to elect the president [of the corporation] is . . . [devoid of any practical significance], because, in fact, they [(presumably meaning those who control the corporation)] keep for themselves more than a majority of the shares so that the purchaser cannot effectively influence [the corporation's conduct. n351] Nor does this purchaser desire to influence [the corporation's conduct] and does not intend to acquire such a right. . . . But it certainly is prohibited for one to acquire so much stock that his opinion will be considered [by those who control the corporation] even in non-Jewish factories or businesses[,] . . . [unless] one makes the type of conditional agreement required when a Jew enters into a partnership with a non-Jew as set forth in *Shulhan Arukh, Orah Hayyim, no. 345.* n352

Thus, Feinstein believes that individual investors who are not involved in a corporation's operations, who do not own a sufficiently large percentage of shares as to enable them in fact to control the corporation's business, and who have no intention of obtaining such control, seem to acquire no more than an interest in the corporation's profits. n353 Pursuant to ordinary Jewish law rules, the acquisition of rights in future profits and losses might be difficult or impossible to accomplish because such profits and losses are "things" that "do not exist." n354 This seems to be the reason why Feinstein suggests that the acquisition is pursuant to the principle [*1794] of "the law of the land is the law." Thus, unlike Weiss, Feinstein does not look to the formal distinction between voting and nonvoting stock, but to the substantive distinction between shareholders who can or intend to influence the corporation's conduct and those who merely want to purchase a part of the corporation's profits and losses.

Neither Ettinger's responsum cited by Weiss and discussed above in Part V.B, nor the responsa of Rabbi Shlomo Kluger, Rabbi Azreil Hildesheimer, or Rabbi David Zvi Hoffman, discussed in Part V.D, are necessarily inconsistent with Feinstein's approach. They emphasize that Jewish shareholders do not own the corporate property directly and that all they have is a right to the corporate profits. Although they do not explain the Jewish law process or processes through which these shareholders acquired the right to corporate profits, they could theoretically agree that the right was purchased through "the law of the land is the law." n355

There are, however, several difficulties and ambiguities with respect to Feinstein's approach. Feinstein mentions two relevant factors: the investor's intent to purchase a right to influence corporate conduct and the investor's ability to do so. n356 First, it is uncertain whether both of these factors are necessary before there is a problem requiring "the type of conditional agreement . . . required when a Jew enters into a partnership with a non-Jew as set forth in Shulhan Arukh, Orah Hayim, no. 345" n357 or whether either factor would be sufficient. For example, assume an investor purchased stock with the intent to try to influence corporate conduct-by way of rallying other shareholders and trying to add shareholder resolutions to the proxy materials distributed by management-but was unsuccessful in these efforts. Given that the shareholder owned some stock and tried to change [*1795] corporate conduct, would he be considered a "partner" in the corporation, or must he actually obtain enough power to impact corporate governance?

Incidentally, assuming that the possession of a certain measure of corporate influence is required before someone is regarded as an owner of corporate assets, how much power is enough? Weiss seems to say that a single share of voting stock is sufficient. Feinstein clearly disagrees and says that ownership of a small number of shares is not sufficient. Instead, he says that the problem of ownership arises when one acquires "so much stock that his opinion will be considered [by those who control the corporation]." n358 But what does it mean for an opinion to be considered? What if a minority shareholder attends stockholder meetings and even sits on the board of directors but is always outvoted? Is the mere fact that the minority shareholder voices his view significant?

Not only is it unclear whether meaningful power is absolutely necessary, but, assuming someone has real voting power, it is uncertain whether such power is sufficient to make the shareholder an owner. Assume a particular shareholder has such a sufficiently large holding that she could affect corporate governance but she simply has no interest in doing so. n359 Would Feinstein rule that this [*1796] person is an owner?

Another problem with Feinstein's approach is that, assuming the corporation is not a halakic entity and not all of the shareholders are owners of the corporate property, when investors purchase corporate stock from the corporation, from whom are they acquiring a right to a share of the corporation's profits and losses? Moreover, precisely who does own the corporate property? If there are certain shareholders who own a significant portion of the stock and, individually or jointly, are able to control the corporation, perhaps Feinstein would characterize them as the real partners in this "corporate partnership." But what if no individual, or group of individuals, owns a significant percentage of shares? Who would own the corporate property? If the corporate directors themselves owned some shares and also exercised control through manipulation of the proxy system, would Feinstein characterize the corporation as a partnership comprised of such directors? If so, what degree of ownership interest would each such director possess? n360

[*1797]

An additional difficulty arises because of Feinstein's focus on a person's intent at the time he purchases his shares. Consider a few examples. Assume that there are 100,000 shareholders, each of whom owns 1 share of the corporation's 100,000 total shares of stock. n361 Because none of these shareholders purchased the stock with the intent to take an active role in corporate governance, Feinstein would presumably consider them merely as purchasers of entitlements from the corporation and not as partners who owned any interest in the corporate property. n362 But suppose a new person, A, decided that this corporation was undervalued and wanted to obtain control of it. A then purchases the shares of stock owned by 50,001 of the corporate shareholders and, with this majority interest, is able to elect the corporate directors and direct corporate conduct. n363 According to Feinstein, is A an owner of the corporate assets? But from whom could A have acquired an interest in the corporate property? A merely purchased shares from the existing shareholders and, according to Feinstein's approach, those existing shareholders did not own interests in the corporate property.

Changing the hypothetical a little, assume that A had originally purchased from the corporation 50,001 of the corporation's 100,000 shares of stock with the intention of being actively involved in [*1798] running the corporation, such that Feinstein would deem A to be a partner with an ownership interest in the corporate property. Assume that A then dies and that his stock is inherited by many different people, none of whom has the intent to be active in corporate affairs or has enough shares to be successful in influencing corporate affairs even if she so desired. Are these inheritors

nonetheless considered owners of a pro rata share of A's original ownership interest in the corporate assets because they inherited it? If not, what happens to A's ownership interest?

The difficulty posed by these last examples seems to be based on the traditional concept of linking ownership with the possession of legal title. n364 Thus, in the first case, if the 50,001 individual shareholders owning one share apiece did not own title to the corporate property, someone who simply purchases their rights does not seem to have acquired title at all; there was no one who could have transferred title to that someone. Similarly, in the second case, if a shareholder who does own title passes away, it would seem that the title he owned would be inherited.

Maybe Feinstein believes that a person who acquires a small amount or percentage of corporate stock acquires the following two things: a right to share in the profits and an option, of unlimited duration, to acquire an ownership interest in the corporate property. No technical act would be required for the shareholder to exercise this option. She merely would have to formulate the intent to acquire the relevant ownership interest. n365

This explanation is somewhat troublesome. First, Feinstein does [*1799] not mention anything about an option. Second, neither the purchasers nor the sellers of corporate stock mention such an option when they transfer ownership of the stock. n366 Third, until the new purchaser of the stock decides to exercise the ownership interests attendant to the stock, who, if anyone, enjoys those interests? For example, assume a majority shareholder, who presumably possesses ownership interests commensurate with her shareholdings, sells some of her shares to a new minority shareholder. Does the seller retain the ownership interests attendant to the shares sold until and unless the new minority shareholder exercises his option? Even if this were the case, what if the majority shareholder sells all of his stock to a number of new minority shareholders? In light of the fact that the seller no longer owns any stock, it seems impossible to say that the seller retains the applicable ownership interests. Do these interests exist in limbo until the new shareholders decide that they want to be owners? Does the right to ownership interests attach to the stock and blink on and off based on the holder's desires?

Alternatively, perhaps Feinstein implicitly suggests a new concept of ownership that does not require possession of legal title. Perhaps he believes that control with beneficial interest can constitute a form of ownership. Nonetheless, it remains unclear what the authority is for such a proposition, what degree of control is required, and what degree of beneficial interest is required.

Neither of the above alternative explanations answers who, according to Feinstein, would be the owner of the corporate assets if no shareholder had significant control over the corporation. Nor do these alternatives grapple with the fact that, even if a particular shareholder possesses some ability to influence the corporation, secular law prescribes that the corporate directors, who may be more powerful than the shareholder, are not the shareholder's agents but the agents of the corporate entity.

[*1800]

D. The Relationship Approach

The final approach to corporations reflected in Jewish law literature does not explicitly address what a corporation is, but instead, identifies the unusually attenuated relationship between Jewish shareholders and a particular corporation and relies on the nature of this relationship in reaching specific Jewish law conclusions. Thus, some authorities argue that the fact that a shareholder is not personally liable for a corporation's debt permits the corporation to pay interest on a loan from individual Jews. n367 Similarly, others contend that the prohibition against doing business with forbidden foods poses no problem for Jewish shareholders as long as they are not personally involved in a corporation's business. n368

The relationship approach is yet another way of understanding the responsum of Ettinger discussed in Part V.B, above. After examining all of the restrictions confronting shareholders, Ettinger states that the relationship between the shareholders and the corporation's dough is like that between a Jew and the dough of a non-Jew in the non-Jew's possession, for which a Jew is financially responsible. Perhaps Ettinger is not saying that the two cases are factually identical. Maybe he is merely stating that the extremely limited connection between the Jewish shareholder and the dough owned by the corporation is so attenuated that under Jewish law, it should be treated the same as the dough of a non-Jew in the non-Jew's possession, for which a Jew has a financial interest.

Similarly, when asked about the propriety of owning shares in a corporation that did business with dough over Passover, Shlomo Kluger stated,

The custom of people with shares in . . . corporations . . . is that they just have only a part of the profit or loss. They do [*1801] not have any right to direct or manage the operations of the business [or] the sales and purchases necessary for the business Therefore, . . . [a Jewish shareholder] has no obligation to sell [his shares before Passover]. n369

Thus, without naming the Jewish law doctrine he is relying on, Kluger uses the limited relationship between the shareholder and the corporate dough in ruling that stock ownership is not a problem with respect to Passover. Adopting this same approach, Rabbi Hanoh Dov Padua cites the Ettinger and Kluger responsa. n370

Azriel Hildesheimer, as cited by David Hoffman, permits Jewish shareholders to derive benefit after Passover from dough owned by their corporations during Passover because, in part, the shareholders did not own any part of the dough; and even if they would have asked the directors for dough in return for their shares, the directors could have refused to give any. n371 Hildesheimer does not explain who did own the dough during Passover. But he focuses on the shareholders' inability to demand the dough as a reason for saying that they were not responsible for it. Hoffman, although questioning other arguments raised by Hildesheimer, treats this contention favorably. n372

Thus, Ettinger (at least in his responsum regarding a corporation that owned beer throughout Passover), Kluger, Padua, Hildesheimer, and Hoffman all focus on the relationship between the Jewish shareholder and the corporation's assets, but do not expressly explain either who did own such assets or which precise Jewish law doctrine formed the basis for their rulings.

Ezra Batzri, a contemporary redactor of Jewish law clearly [*1802] familiar with secular corporation theory, writes at length about evaluating the precise relationship between Jewish shareholders and corporate property. n373 His argument echoes that of secular scholars who refer to ownership as a bundle of rights and contends that one might be the owner for certain purposes but not for other purposes. n374 Thus, Batzri argues that although the limited liability rule might seem to prevent a shareholder from being an owner of corporate property, there are a number of legal threads that nonetheless tie shareholders to the property. n375 He argues that the theoretical ability of secular law to pierce the corporate veil and find shareholders personally liable for corporate debts is one such thread. Nonetheless, he specifically refuses to reach any conclusions as to whether the threads linking a shareholder to corporate property are, in fact, sufficiently strong so as to consider the shareholder the Jewish law owner of such property. n376

One might argue that as to a public corporation, where the likelihood of piercing the corporate veil is almost nil, the theoretical possibility of this event is too slender to meaningfully connect shareholders as owners of the corporation. The probability of piercing the corporate shell, however, is much more likely in a close corporation.

VI. Summary and Hypotheticals

This Part examines how the various Jewish law approaches would apply to issues regarding financial liability and issues arising out of ownership of corporate property.

A. Shareholders' Financial Liability for Corporate Debts

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The issue of a shareholder's personal financial liability for [*1803] corporate debts can be separated from the somewhat more complicated issues regarding the status of a corporate shareholder as a possible owner of corporate property. Secular law generally permits the corporate shell to protect shareholders from being personally liable for corporate debts. This is usually true as to all debts of public corporations, close corporations, and nonprofit corporations, and at least as to those liabilities of professional corporations and limited liability companies that are unrelated to the professional malpractice of someone in the business. Similar statutory protection is ordinarily afforded to the limited partners of limited liability partnerships. Virtually all of the Jewish law approaches surveyed in this Article agree, although for different reasons, that this secular doctrine of limited liability is generally valid under Jewish law.

Although a rigorous discussion of the exceptions to this general rule would overstep the bounds of this Article, there are three basic provisos that at least should be mentioned. First, the limited liability doctrine does not protect individual shareholders (or directors, officers, or employees) from liability for their own tortious or illegal conduct. This exception would be unlikely to arise in connection with the many shareholders of a public corporation because it is rare that such shareholders are personally involved in the corporation's business. On the other hand, shareholders are often involved in close corporations and may be found personally liable if, for instance, they are guilty of defrauding corporate creditors. n377

Of course, there may be instances in which secular law would find a shareholder liable for tortious or illegal conduct, although indigenous Jewish law rules would not find the shareholder legally responsible. For example, secular law might find someone vicariously liable for a tort or crime while Jewish law would not. In such cases, there may be a difference of opinion as to whether or not Jewish law will incorporate the secular rules and impose [*1804] financial liability.

Second, in specific lawsuits, secular law may pierce the corporate veil and impose personal liability on corporate shareholders. n378 Such shareholder liability may result from application of general common law principles or, as to professional corporations or limited liability companies, from particularized statutory or regulatory body rules. Whether a particular Jewish law authority would similarly impose such personal liability may depend on the doctrine that the authority uses to incorporate secular law's limited liability rule into Jewish law. Thus, those who justify the limited liability rule based on "the law of the land is the law" might believe that the rule regarding piercing the corporate veil is part and parcel of the law of the land. On the other hand, an authority who justifies limited liability because of commercial custom might, in some cases, disagree. n379

Third, it is possible that some Jewish law authorities would not apply the limited liability rule to certain cases involving a corporation's nonconsensual creditors. If the basis for incorporating the limited liability rule into Jewish law depends on commercial custom, then the rule may be incorporated only as to consensual relationships. On the other hand, if the reason for incorporating the rule is that "the law of the land is the law," the rule could apply even as to non-consensual creditors.

B. Ownership Interests in Corporate Property

The Jewish law literature is not sufficiently developed to determine, in all conceivable scenarios, whether the diverse approaches would regard shareholders as owners of the corporate property. Nonetheless, it is worthwhile to explore at least a few categories of cases.

[*1805]

1. Public Corporations

Cases involving a public corporation such as IBM and AT&T—one whose shares are traded publicly and are probably owned by a large number of shareholders living across the country or world—can be divided into four basic classes.

a. A Nonvoting Shareholder Who Does Not Have a Significant Say in Corporate Governance

A nonvoting shareholder in a public corporation would not be a partner in the corporation and would not be an owner of any part of the corporate assets under the halakhic entity approach, the purchaser of entitlements approach, n380 Weiss' version of the halakhic creditor approach, n381 and probably by those applying the relationship test. Thus, these views would agree that such a Jewish shareholder would generally have no problem with respect to interest charged or paid by the corporation, dough owned by the corporation on Passover, business conducted by the corporation on Jewish holidays or in violation of particularized Jewish law rules, and lawsuits litigated by the corporation in secular courts rather than rabbinical courts. The halakhic creditor approach of Sternbuch would similarly avoid most of these Jewish law issues. n382

Klein would presumably hold that even a nonvoting [*1806] shareholder would be a partner and all of the aforementioned Jewish law issues would have to be examined. Some of them might be resolvable on other grounds. n383

b. A Nonvoting Shareholder Who Does Have a Significant Say in Corporate Governance

The halakhic entity approach and Weiss' halakhic creditor approach would rule that a nonvoting shareholder in a public corporation is not a partner in the corporation and is not an owner of any part of the corporate assets. Sternbuch's halakhic creditor approach would similarly avoid most of these Jewish law issues.

Feinstein's position is considerably less clear. On the one hand, he seems to follow substance and not form. Consequently, he might find that, as long as a nonvoting shareholder has the power to affect corporate conduct, the nonvoting shareholder intended to and did acquire a partnership interest in the corporation. Those applying the relationship test might reach the same conclusion. The problem is that Feinstein's position and/or the position of one or more of the supporters of the relationship test could depend on the precise type of influence the nonvoting shareholder has. Consider examples of three different types of influence. First, a nonvoting shareholder may in some circumstances have specific legal options (spelled out in the documents pursuant to which the shares were issued) in the event of certain corporate

developments. These options might include the power to oust one or more corporate directors through a shareholder vote. This sort of formal, legal power, particularly if the factual conditions have already been satisfied and the options have ripened, may be significant under Jewish law. Second, a nonvoting shareholder could also be a director, officer, or employee of the corporation, and therefore possess certain formal, discretionary authority with respect to the corporation. Of course, [*1807] secular legal principles would limit such a shareholder's right to use this authority for her personal benefit. It is less clear whether this type of influence would be significant under Jewish law. Third, a particular shareholder may informally possess influence because of the nature of the personal relationship that exists between them. Nonetheless, it is possible that this supposed influence would be too flimsy to be meaningful to Feinstein and/or those applying the relationship test. n384 Finally, of course, Klein would apply the halakhic partnership approach.

c. A Voting Shareholder Who Does Not Have a Significant Voice in Corporate Governance

Neither the halakhic entity approach nor the purchaser of entitlements approach would find that the voting shareholder who does not have a significant voice in corporate governance was a partner in the corporation or that he owned any part of the corporate assets. n385 The relationship approach would probably reach the same conclusion. Assuming that not all of the shareholders were Jews, Sternbuch would continue to rule that the Jewish shareholder had only loaned money to the corporate managers. Nonetheless, Weiss would join Klein in applying the halakhic partnership approach, irrespective of how little influence the particular shareholder actually had in corporate governance.

d. A Voting Shareholder Who Does Have a Significant Voice in Corporate Governance

In the case of a voting shareholder with a significant voice in [*1808] corporate governance, the halakhic entity approach would find that the shareholder was not a partner and did not own any part of the corporate property. The halakhic creditor approach of Sternbuch would similarly avoid most of these Jewish law issues. Weiss would join Klein in applying a halakhic partnership analysis.

The views of Feinstein n386 and those following the relationship test are less certain. If significant influence arises from ownership of the shares alone, these authorities would probably rule that the shareholder owned an interest in the corporate assets. As already mentioned, it is difficult to predict how Feinstein would consider less formal types of control.

2. Close Corporations

Close corporations present a much more complicated problem than public corporations. Close corporations are usually formed by a few people who are actively involved in the corporate business. The corporate format is often employed for the purpose of obtaining limited liability. Shareholders in close corporations are much more likely than those in public corporations to (1) own a significant percentage of the corporation's voting stock; (2) serve as a director, officer, and/or employee of the corporation; and (3) have personal and/or familial relationships with a number of other shareholders who own a significant percentage of the corporation's voting stock. On the other hand, it is also possible for individuals to be shareholders without any personal involvement in the business. Sometimes even minors inherit close corporation stock or acquire it by gift. Similarly, it is possible for someone to be a relatively powerless minority shareholder in a close corporation. Indeed, it is possible for there to be no single shareholder or coalition of shareholders that have the power to control the corporate conduct. Thus, these numerous variables make it difficult [*1809] to issue generalizations regarding close corporations.

a. A Nonvoting Shareholder Who Does Not Have a Significant Say in Corporate Governance

Only one authority, a single decision of the Israeli Rabbinical Court, has specifically endorsed the halakhic entity rule in the context of a close corporation. n387 That decision seemed to rule that even a close corporation would, for all apparent purposes, be deemed a separate halakhic entity. n388 According to this approach, if a Jewish baker decided to form a corporation in which he served as the sole shareholder, director, officer, and employee, the corporation could keep dough on the corporation's premises throughout Passover without the baker violating Jewish law. Similarly, this Israeli Rabbinical Court opinion could allow the baker to have his bakery, lend money to Jews, and charge interest, assuming that such lending operations were secularly authorized for the bakery corporation. n389

Such a result, however, seems radical. Indeed, Weiss suggests that it is unthinkable. n390 It is unclear whether others supporting the halakhic entity theory would apply it in the case of a close corporation, even one that is less extreme than the single shareholder, director, officer, employee example involving the bakery. Both Weingart and Regensberg, the only others who expressly endorse the halakhic entity approach, emphasize in great detail the fact that corporate shareholders have no control over or even permission to use the corporation's assets. Indeed, Regensberg

[*1810] even uses sociology to explain the conceptual difference between the dynamics of an association of persons as a partnership and the dynamics of their association as a corporate community. n391 Consequently, neither Weingart nor Regensberg would be logically forced to apply the halakhic entity theory to a close corporation. Nonetheless, either or both might adopt the halakhic entity approach with respect to particular close corporations; they simply provide no guidance as to how they would rule.

But even Weiss' position is arguably unclear. He states that it would be inconceivable for someone to be able to keep dough during Passover simply because he incorporated his business. n392 On the other hand, although Weiss declares a clear distinction between voting and nonvoting shareholders, he does not explicitly state an additional, unequivocal distinction between close corporations and public corporations. In fact, if he had wanted to discriminate between small corporations in which shareholders would always be deemed to be partners and other corporations in which only voting shareholders were partners, he should have described the distinguishing characteristics of these two categories of corporations. For example, he might have focused on the total number of shareholders, on whether the shareholders were all members of one family, on whether the shareholders were all Jews, and on whether the shareholders were all actively involved in the corporate business. But Weiss provides no such rules. Consequently, it may well be that the only distinction he really makes is between voting and nonvoting shares. He could nonetheless condemn the bakery example if the Jewish shareholder owned voting shares.

Sternbuch's approach would presumably still depend on whether or not Jews constitute an essential part of the shareholders. If they are Jewish, then he would agree with Klein that the corporation is to be treated as a partnership. If non-Jews represent the essential part of the shareholders, then he would continue to say [*1811] that the Jewish shareholders had loaned their money to the corporate managers. In the case of a close corporation, however, some of these managers may be Jewish, raising a serious question regarding the payment of interest. n393

Feinstein's position is also uncertain. As mentioned in Part V, in a pair of cases he seems to characterize close corporations as being no different from partnerships. However, the responsa do not indicate precisely why. It is possible that he was only taking this position with respect to a person who not only was going to be a shareholder of the close corporation, but also was going to be actively involved in the corporate business. Consequently, it might be that Feinstein would rule that even a shareholder of a close corporation would merely own a share of the corporate profits and losses if (1) the shareholder is not personally involved in the corporate business, and (2) the shareholder has no significant influence over the corporation's conduct. The conclusion reached by the relationship approach would probably depend on the same two factors.

b. A Nonvoting Shareholder Who Does Have a Significant Say in Corporate Governance

The Israeli Rabbinical Court would still apply the halakhic entity theory, and Klein would still apply the partnership theory to a nonvoting shareholder not significantly involved in corporate governance. Sternbuch's position would presumably still depend on whether or not most of the shareholders are Jewish. It becomes more likely, however, that Weingart, Regensberg, Feinstein, or those following the relationship test would also characterize this shareholder as a partner. However, as discussed in connection with public corporations, the views of particular authorities might be affected by the type of influence this nonvoting shareholder has. If Weiss only distinguishes between voting and nonvoting stock, he would have to find that a nonvoting shareholder, even with a [*1812] significant say in corporate governance, is a creditor who loaned money and not a partner who purchased a partnership interest.

c. A Voting Shareholder Who Does Not Have a Significant Voice in Corporate Governance

The Israeli Rabbinical Court would still apply the halakhic entity theory, and Klein would still apply the partnership theory to a voting shareholder who did not have a significant say in corporate governance. Sternbuch's position presumably still would depend on whether or not most of the shareholders are Jewish.

It is not clear whether Weingart, Regensberg, Feinstein, or those following the relationship test are more likely to treat a voting shareholder without significant influence as a partner or to treat a nonvoting shareholder with significant influence as a partner. Again, it might depend on the type of influence the nonvoting shareholder has. Weiss, however, would treat a voting shareholder as a partner.

d. A Voting Shareholder Who Does Have a Significant Voice in Corporate Governance

The Israeli Rabbinical Court would still apply the halakhic entity theory to a voting shareholder with a significant voice in corporate governance. Klein and Weiss would apply the partnership approach. Nevertheless, this is most likely the case regarding close corporations in which Weingart or Regensberg would disagree with the halakhic entity theory.

It also seems likely that Feinstein and those applying the relationship test would disagree on treating the shareholder as a partner. Sternbuch's position would presumably still depend on whether or not most of the shareholders are Jewish.

3. Professional Corporations and Limited Liability Companies

The pure halakhic entity theory propounded by the Israeli Rabbinical Court would presumably find that a professional [*1813] corporation, whether large or small, would constitute a separate halakhic entity. Similarly, the pure partnership approach of Klein would presumably find that every professional corporation constituted a partnership. What the other Jewish law approaches would conclude would depend on additional circumstances.

If the professional corporation has many shareholders, one would expect that the various Jewish law views would mirror those set forth in Part VI.B.1. If the professional corporation has few shareholders, one would expect the views to parallel those described above in Part VI.B.2.

A factor that arises in connection with professional corporations, however, is that the shareholders are almost always liable for some or all of the corporate debts arising out of the professional malpractice of professionals employed by the corporation. As Batzri might say, this liability represents an additional thread connecting the shareholders to the corporation and might increase the likelihood that some authorities, such as those following the relationship approach, would be more likely to characterize the shareholders as partners.

Limited liability companies are basically designed by secular law to accomplish the same objectives as professional corporations, while permitting treatment as partners for tax purposes. It therefore seems likely that Jewish law views would perceive limited liability companies in much the same way as they would professional corporations. It seems unlikely that the type of tax treatment that is afforded would play much of a role.

4. Nonprofit Corporations

Nonprofit corporations do not have shareholders. They can have voting and nonvoting members. Although nonprofit corporations can engage in commercial activities which produce a profit, this profit cannot be distributed to corporate members. Consequently, there are two obvious ways in which an individual may derive personal benefit from nonprofit corporations: (1) he may be paid as a director, officer, employee, or as an independent [*1814] contractor, or he may cause his friends or relatives to be paid in one or more of these capacities; and (2) he may utilize his influence over the corporation to ensure that corporate funds are used for persons or projects that are dear to his heart.

These types of benefits can be significant. At least one secular commentator has argued that the value of control over a nonprofit corporation should be considered when equitably distributing a family's assets in divorce proceedings. Nevertheless, no Jewish law authority seems to have addressed the significance of this type of benefit, and there seems little basis to predict how they would rule.

VIII. Conclusions

Secular corporation law covers numerous categories of organizations: profit and nonprofit, public and close. The realities of corporate governance may differ greatly even from one corporation to another within a particular category. Some shareholders own voting stock, while others have only nonvoting stock. Some shareholders are personally involved in the corporation's business and others are not. Some shareholders attempt to affect corporate conduct and others do not. Some shareholders have the ability to affect corporate decisions, even if they do not exercise this ability, while others lack even the potential to impact corporate behavior. Some corporations have primarily Jewish shareholders and others do not.

None of the Jewish law theories of a corporation is entirely satisfying or compelling. Perhaps the reason is that these efforts, for the most part, are insufficiently sensitive to the many different types of secular corporations. Assuming, for example, that the halakhic entity approach were correct across the board, it would enable the use of a corporate form to resolve countless Jewish law difficulties. The dilemma is that it might resolve too many problems. It would theoretically enable Boruch the Baker to form a corporation of which he is the sole shareholder, director, and officer. It would also allow the corporation not only to keep dough throughout Passover, but, if he hires non-Jewish bakers and [*1815] salespersons, to sell dough throughout Passover as well as on the Sabbath and other Jewish holidays. Although it is possible that secular law creates the opportunity to use a corporation to circumvent Jewish law, this is an unsettling conclusion. While many of the arguments asserted in favor of the halakhic entity approach focus on notions regarding the attenuated relationship between shareholders and corporate assets, these arguments do not apply to many close corporations where the substantive relationship is much richer and dynamic than the formal relationship. Nevertheless, no

one yet has articulated a consistent set of easily applicable principles that would distinguish between scenarios in which the halakhic entity approach should and should not apply.

While the halakhic entity approach might seem in some instances to permit what should be impermissible under Jewish law, the halakhic partnership approach has the opposite defect. By treating all shareholders as partners—no matter how insignificant their numbers of shares, how inactive they are in corporate affairs, and how unlike their status is to that of traditional partners—the partnership approach prohibits certain forms of conduct, particularly regarding public corporations, which do not appear as if they should be prohibited under Jewish law.

* * * *

Where does Jewish law go from here? Legal systems, including religious legal traditions, must at some point move from the theoretical to the practical and must provide guidance to its adherents and practitioners. How should one who is faithful to Jewish law treat corporations and ownership of corporate stock? n394

In times of yore, the Jewish legal tradition had a sanhedrin, a supreme court, which resolved Jewish law disputes by majority vote. n395 The majority determined what the halakhah actually was, [*1816] and the losers were left to defend the correctness of their Jewish law theory in the study hall, with little practical impact. The institution of the sanhedrin, however, ceased to function over 1500 years ago, and since that time, Jewish law has not had a formal mechanism to definitively resolve halakhic disagreements among its most prominent authorities.

Thus, one might assume that in light of the lack of any formal procedure for resolving disputes, Jewish law disagreements would persist indefinitely. However, such an assumption would be largely inaccurate. In fact, Jewish law authorities have, over time, achieved consensus on a wide range of issues, in part through the publication of their analyses both in responsa literature as well as in Jewish law journals. Indeed, most matters have been and continue to be resolved through such informal processes. n396

Most matters are so resolved, but not all. Certain issues, because of their intense intricacy, the attractiveness of alternative arguments, the apparent absence of clearly applicable precedent, or a combination of these or other factors, remain unresolved; no clear consensus develops. In such circumstances, Jewish law resorts to second-tier rules that govern cases of legal uncertainty. An example of a Jewish law "uncertainty principle" is that while conduct that might possibly (but does not clearly) violate a Torah prohibition is usually proscribed, conduct that might possibly (but does not clearly) violate a rabbinic ban is frequently permitted. Doubt may be raised not only by virtue of certain types of factual uncertainties, but by diverse opinions regarding the legal rule itself. Consequently, in particular scenarios described in Part VI where substantial authority would find that shareholders do not own corporate property, Jewish law, at least with respect to rabbinic [*1817] prohibitions, may yield a lenient ruling.

For example, consider a public corporation with some Jewish shareholders who, although they own voting stock, have no real influence on how the corporation operates. This corporation owned beer during Passover, and the question is whether after Passover, a Jewish consumer is permitted to purchase some of the beer. The prohibition on a Jewish consumer's use of beer that some other Jew may have owned on Passover is rabbinic in nature. Consequently, one may be able to rely on the many views that hold that in this type of situation, the Jewish shareholders would not be considered to have owned the beer during Passover.

However, if there are more than one sufficiently substantial, independent grounds for believing that a prohibition is inapplicable, Jewish law may permit conduct even when a Biblical ban is at stake. n397 Although a generalized discussion of the intricate and unique manner in which Jewish law copes with institutional jurisprudential doubt would exceed the scope of this Article, a few brief comments can be made. In evaluating whether a particular Jewish law proscription applies to a given factual scenario, there may be two or more facts, each of which would render conduct permissible according to some Jewish law authorities. As opposed to some legal systems in which minority views carry virtually no formal weight, Jewish law recognizes that substantial minority views, especially when combined in particular cases or when added to other considerations, may result in a lenient ruling.

In the above example, for instance, consider the Jewish shareholders themselves. Owning beer during Passover would violate Biblical law. Did they violate this law when they failed to divest themselves of their stock prior to Passover? Rabbi David Tzvi Hoffmann considers this issue and resolves it leniently even though he reaches no overall conclusion as to how Jewish law treats a corporation. Instead, he combines no fewer than nine distinctly independent grounds to support his ruling that a Jew need not sell [*1818] his shares in a corporation that owns hametz during Passover when a majority of the owners are non-Jews and the Jewish shareholder has no meaningful say in the man-

agement of the corporation. ⁿ³⁹⁸ Indeed, he comes to this conclusion as a matter of normative Jewish law, even as he is uncertain how to view a corporation.

The question that cannot be answered in theory, can in fact be answered in practice. Such is the mission of a system of law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Closely Held Corporations
Formation
Business & Corporate Law
Corporations
Shareholder's
Transfers of Shares
Business & Corporate Law
Closely Held Corporations
Management Duties & Liabilities

FOOTNOTES:

ⁿ¹ Jewish law, or halakhah, is used herein to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, referred to collectively as the Torah) is the elemental document of Jewish law, and according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 200 before the common era (B.C.E.). The period from the close of the canon until 250 of the common era (C.E.) is referred to as the era of the Tannaim, the redactors of Jewish law. The Tannaim period closed seventy-five years after the editing of the Mishnah by Rabbi Judah the Patriarch. The next five centuries constitute the epoch in which the two Talmuds (Babylonian and Jerusalem) were written and edited by scholars called Amoraim ("those who recount" Jewish law) and Savoraim ("those who ponder" Jewish law). The Savoraim's activity was primarily, but not exclusively, literary and editorial. The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work. The post-Talmudic era is conventionally divided into three periods: (1) the era of the Geonim, scholars who lived in Babylonia until the mid-eleventh century; (2) the era of the Rishonim (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the Aharonim (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to the present era. From the period of the mid- fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo, called the Shulhan Arukh, which serves as the basis for modern Jewish law. The Shulhan Arukh (and the Arba'ah Turim of Rabbi Jacob ben Asher which preceded it) divided Jewish law into four separate areas: (1) Orah Hayyim is devoted to daily, Sabbath, and holiday laws; (2) Even Ha-Ezer addresses family law, including financial aspects; (3) Hoshen Mishpat codifies financial law; and (4) Yoreh Deah contains dietary laws as well as other miscellaneous legal matters. Many significant scholars, who were themselves as important as Rabbi Karo in both status and authority, wrote annotations to his code which made the work and its surrounding comments the most central treatise on Jewish law. The most recent complete edition of the Shulhan Arukh (Vilna 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Besides the law codes and commentaries, for the last 1200 years, Jewish law authorities have addressed specific questions of Jewish law in written responsa (in question and answer form). Collections of such responsa have been published, providing guidance not only to later authorities but also to the entire community. Finally, since the establishment of the State of Israel in 1948, the rabbinical courts of Israel have published their written opinions deciding cases on a variety of matters.

ⁿ² The need to understand each system on its own terms is especially important when one system attempts to affect the other. For example, in 1992, the state of New York changed its domestic relations law in an effort to assist Jewish women involved in civil divorce proceedings. Nevertheless, because of the legislature's apparent unfamiliarity with applicable Jewish law, this effort was not only unhelpful, but, according to some religious authorities, may in fact have been devastatingly counterproductive. Under Jewish law, a married woman cannot effectively remarry unless she receives a religious divorce. She can only receive a religious divorce if her husband gives her a religious divorce decree, a get; a civil divorce is not enough. A woman who, relying solely on a civil divorce, has intercourse with another man is religiously guilty of adultery and any resulting offspring are thus

considered to be illegitimate. Some Jewish men attempted to divorce their wives under civil law but refused to grant them the religious divorce that would free them to remarry. The New York legislature enacted laws that imposed certain penalties on such men if they would not give their wives Jewish divorce decrees. See N.Y. Dom. Rel. Law 236B:5 (McKinney 1986 & Supp. 1997). However meritorious its motives, the New York legislature seems to have been unaware of the way in which Jewish law would respond to these new secular laws. Under Jewish law, if a man gives a divorce decree because of coercive financial penalties, the decree is invalid, and the couple remains married. See Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* 209-38 (1993). Consequently, under Jewish law, where a man grants the divorce decree because of the prospect of the new legislatively enacted penalties, the woman would be no freer to remarry than if her husband had never handed her the Jewish divorce decree. See Chaim Malinowitz, *The 1992 New York Get Bill and its Halachic Ramifications*, 27 *J. Halacha & Contemp. Soc'y* 5 (1994). But see Gedalia Dov Schwartz, *Comments on the New York State "Get Law,"* 27 *J. Halacha & Contemp. Soc'y* 26 (1994) (arguing that the New York law does not invalidate Jewish divorce decrees). Some Jewish authorities go even further and argue that the existence of the New York law, and its implicit threat of financial penalties, may even undermine the Jewish law validity of divorce decrees in New York that seem to be voluntarily given. See J. David Bleich, *The Divorce Problem Following the Civil Legislation (the Get Law) in New York State*, 42 *Ohr HaMizrach* 230 (1994) (arguing implicitly that many Jewish law divorce decrees in New York would be invalid subsequent to the said New York legislation). See generally Chaim Povarsky, *Intervention by Non-Jewish Courts in Jewish Divorces*, *The Jewish Law Rep.*, Aug. 1994, at 1. By contrast, an understanding of the substantive reality of Jewish law arguably enabled a New York court to appropriately treat a Jewish law heter iske arrangement as a loan for the purpose of secular law. Although the Jewish law document purported to create a joint venture, the New York court found that the substance of the transaction under Jewish law was that of a loan and determined that this was the appropriate way for the matter to be treated under secular law. See *Bollag v. Dresdner*, 495 N.Y.S.2d 560 (N.Y. Civ. Ct. 1985). See generally Steven H. Resnicoff, *A Commercial Conundrum: Does Prudence Permit the Jewish "Permissible Venture"?*, 20 *Seton Hall L. Rev.* 77 (1989). A number of provocative questions arise from this New York court's approach. If the Jewish law substance of a transaction is significant for purposes of secular law, query what secular courts should do if there is a split of authority within Jewish law as to such substance. Would a secular court be constitutionally permitted to adjudicate the matter? Would it matter if the parties to a particular secular lawsuit agree as to the proper Jewish law perspective? The present Article examines how Jewish law would view and treat a secular corporation. According to some perspectives, Jewish shareholders are regarded as lenders. See *infra* Part V.B. If a secular court found, as a matter of fact, that the Jewish shareholders regarded themselves as lenders, would that enable it to deny such shareholders the rights to the corporation's residual equity and to restrict them to a non-usurious return on their investment?

n3 See generally J. David Bleich, 4 *Contemporary Halakhic Problems* 3-16 (1995) (providing a description of rabbinical courts); Harvey J. Kirsch, *Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court*, 9 *Osgoode Hall L.J.* 335 (1971); Note, *Rabbinical Courts: Modern Day Solomons*, 6 *Colum. J.L. & Soc. Probs.* 49 (1970).

n4 While some of these formats are of ancient origin, others have only recently been created by statute. The first state statute concerning limited liability companies, for example, was not passed until 1977. See *infra* note 63 and accompanying text. See, e.g., Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 *Bus. Law.* 1 (1995) (observing that although three years before writing his article only eight states had enacted a limited liability company statute, at the time of the article, all United States jurisdictions except Hawaii and Vermont had approved such laws). Limited liability company statutes offer the possibility of partnership tax treatment and corporate limited liability. See, e.g., Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 *Case W. Res. L. Rev.* 387 (1991) (offering a general discussion of limited liability statutes); Robert Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 *Bus. Law.* 375 (1992); Eric Fox, Note, *Piercing the Veil of Limited Liability Companies*, 62 *Geo. Wash. L. Rev.* 1143 (1994).

n5 It seems likely that the Jewish law analysis employed in this Article would apply to corporations in many countries, at least those with Western-style economies. Nevertheless, because this analysis involves the interaction between Jewish law, secular legal theory, and reality, it is appropriate to limit the scope of this seminal English piece to the secular system with which the authors are most familiar.

n6 Of course, some of the issues identified in the text, at least in certain cases, can arguably be resolved on alternative grounds that do not involve how a corporation is characterized.

n7 See Steven H. Resnicoff, *Bankruptcy A Viable Halachic Option?*, 24 J. Halacha & Contemp. Soc'y 5, 5-6 (1992).

n8 See Shulhan Arukh, Yoreh Deah 247:1-2.

n9 See *id.*

n10 See Shulhan Arukh, Orah Hayyim 447:1.

n11 See Shulhan Arukh, Orah Hayyim 448:1.

n12 See Shulhan Arukh, Yoreh Deah 119:1-3.

n13 See Shulhan Arukh, Yoreh Deah 87:1-3. A note on the titles of books in the Jewish legal tradition is needed, if for no other reason than to explain why the single most significant work of Jewish law written in the last 500 years, the Shulhan Arukh, should have a name which translates into English as "The Set Table." Unlike the tradition of most Western law, in which the titles of scholarly publications reflect the topics of the works, the tradition in Jewish legal literature is that a title rarely names the relevant subject. Instead, the title usually consists either of a pun based on the title of an earlier work on which the current writing comments, or of a literary phrase into which the authors' names have been worked (sometimes in reliance on literary license). A few examples demonstrate each phenomenon. Rabbi Jacob ben Asher's classical treatise on Jewish law was entitled "The Four Pillars" (*Arba Turim*) because it classified all of Jewish law into one of four areas. See *supra* note 1. A major commentary on this work that, to a great extent, supersedes the work itself is called "The House of Joseph" (*Beit Yosef*), as it was written by Rabbi Joseph Karo. Once Karo's commentary (i.e., the house) was completed, one could hardly see "The Four Pillars" it was built on. A reply commentary by Rabbi Joel Sirkes, designed to defend "The Four Pillars" from Karo's criticisms, is called "The New House" (*Bayit Hadash*). Sirkes proposed his work (i.e., his new house) as a replacement for Karo's prior house. When Rabbi Karo wrote his own treatise on Jewish law, he called it "The Set Table" (*Shulhan Arukh*), which was based on (i.e., located in) "The House of Joseph." Rabbi Isserles' glosses on "The Set Table," which were really intended vastly to expand "The Set Table," are called "The Tablecloth" because no matter how nice the table is, once the tablecloth is on it, one hardly notices the table. Rabbi David Halevi's commentary on the Shulhan Arukh was named the "Golden Pillars" (*Turai Zahav*) denoting an embellishment on the "legs" of "The Set Table." This type of humorous interaction continues to this day in terms of titles of commentaries on the classical Jewish law work, the Shulhan Arukh. Additionally, there are book titles that are mixed literary puns and biblical verses. For example, Rabbi Shabtai ben Meir HaKohen wrote a very sharp critique on the above mentioned *Turai Zahav* ("Golden Pillars"), which he entitled *Nekudat Hakesef*, "Spots of Silver," which is a veiled misquote of the verse in Song of Songs 1:11 which states "we will add bands of gold to your spots of silver" (*turai zahav al nekudat hakesef*, with the word *turia* "misspelled"). Thus, HaKohen's work is really "The Silver Spots on the Golden Pillars," with the understanding that it is the silver that appears majestic when placed against an all gold background. Other works follow the model of incorporating the name of the scholar into the work. For example, the above mentioned Rabbi Shabtai ben Meir HaKohen's commentary on the Shulhan Arukh itself is entitled *Seftai Kohen*, "The Words of the Kohen" (a literary embellishment of "Shabtai HaKohen," the author's name). Rabbi Moses Feinstein's collection of responsa are called *Iggerot Moshe*, "Letters from Moses." Of course, a few leading works of Jewish law are entitled in a manner *thatezikin*, and the modern Jewish law scholar Eliav Schochatman's classical work on civil procedure in Jewish law is called "Arranging the Case" (*Seder Hadin*), a modern Hebrew synonym for civil procedure.

n14 See Shulhan Arukh, Orah Hayyim 306:1-4, 323:1-4.

n15 See Shulhan Arukh, Hoshen Mishpat 227:1.

n16 See Shulhan Arukh, Hoshen Mishpat 26; see also Michael Broyde, *The Pursuit of Justice and Jewish Law* 41-48 (1996).

n17 See Piskei Din Rabanayim 10:273, at 7 (as reported in Bar Ilan University's CD ROM Judaica Library, version 4.0); Eliav Schochatman, *Seder Hadin* 39 (1988).

n18 Several other approaches have been mentioned in the literature. For example, one commentator rejects the suggestion, apparently made to him, that in light of existing governmental regulation, corporations should be regarded as if they were owned by the government and not by the shareholders. See Menashe Klein, *Mishnah Halakhot* 6:277 (exaggerating the power of shareholders by comparing the corporation in the hands of its shareholders to clay in the hands of a sculptor). This rejection seems generally appropriate in democratic countries where government restriction is relatively mild. Prior to the implementation of economic reforms, however, government regulation in communist block countries was so pervasive as to provide some support for the notion of a corporation as a government-owned entity. See, e.g., Andrei A. Baev, *The Transformation of the Role of the State in Monitoring Large Firms in Russia: From the State's Supervision to the State's Fiduciary Duties*, 8 *Transnat'l Law*. 247 (1995).

n19 See *infra* Part V.A.

n20 See *id.*

n21 See *infra* Part V.B.

n22 See Moshe Feinstein, *Iggerot Moshe*, *Even Ha-Ezer* 1:7; see also *infra* Part V.C.

n23 See *infra* Part V.D.

n24 Consequently, if religious legal authorities misunderstand secular law, they may reach incorrect conclusions about religious law. For example, under Jewish law, certain unsecured debts not paid before the Sabbatical year (according to some authorities, before the beginning of the Sabbatical year and according to others, before the end of the Sabbatical year), cannot thereafter be enforced under Jewish law. Assume A owes B \$ 1000 and prior to the Sabbatical year, A gives B a \$ 1000 check that is dated prior to the Sabbatical year. For some reason B does not deposit the check until after the Sabbatical year. The question arises as to whether B can now deposit the check. At least one prominent Jewish law authority states that when A gives B the check, A "pays" the underlying debt with the check, and therefore, B is permitted to deposit the check even after the Sabbatical year. This authority explains that the reason the giving of the check is deemed to be payment of the underlying debt is that (1) secular law forbids a person from stopping payment on his check, (2) there is a Jewish law principle (which will be discussed in detail in Part V) that makes this secular law religiously valid, and (3) the check is considered a cash payment. See Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 2:15. Actually, however, secular law does not necessarily forbid someone from stopping payment on a check. Although it may be unlawful to fraudulently issue a check with the intention of stopping payment, one may stop payment if unanticipated circumstances develop after a check is issued. In addition, even if payment on a check is not stopped, there may be no money in the drawer's account. It could be that the drawer was mistaken about his or her balance when the check was issued. Alternatively, the drawer could have known that there was no balance but mistakenly believed that money would soon be deposited into the account. Another possibility is that the drawer made no mistake, and there was sufficient money in the account at the time the check was issued. Meanwhile, however, other

checks (perhaps issued by a co-drawer on the account) were presented and paid, thereby depleting the account. Or maybe another of A's creditors obtained a judgment and garnished the balance of A's account before B could present the check. Indeed, secular law recognizes these scenarios and specifically provides that unless the parties otherwise agree, when B takes an ordinary check from A, the underlying debt from B to A is not discharged. Instead, the taking of the check merely suspends the underlying obligation until and unless the check is in fact paid or dishonored. If the check is paid, the underlying debt is at that time discharged. If the check is dishonored, then the underlying debt is no longer suspended but may be enforced. See U.C.C. 3-310(b) (1996). It is quite possible that this Jewish law authority was not apprised of these details of secular law. Had he been aware of them, he may have reached a different conclusion. Cf. Broyde, *supra* note 16, at 115-22.

n25 Such a mandate may result as a matter of constitutional or statutory law on the federal or state level. By enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb (1994), for instance, Congress attempted to provide protection from infringements on religion that might otherwise arise from state or federal actions. As applied to state action, the Supreme Court held RFRA unconstitutional. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Nevertheless, Connecticut and Rhode Island have passed RFRA-like state laws. See Conn. Gen. Stat. 52-571b (West Supp. 1997); R.I. Gen. Laws 42-80.1-1 to 42-80.1-4 (1993). As of mid-February 1998, bills proposing similar statutes were pending in fourteen more states. See <http://nj5.injersey.com/uucec/njrfbill.html>. Moreover, the Eighth Circuit Court of Appeals found RFRA constitutional "as applied to federal law." *Christians v. Crystal Evangelical Free Church (In re Young)*, No. 93-2267, 1998 WL 166642, at *1 (8th Cir. April 13, 1998); see also Legislative Update, *Grassley: Trustees Should Not Recover Tithes*, 31 Bankr. Ct. Dec. (CRR) 7 (Oct. 21, 1997).

n26 See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

n27 See Geraldine Koenke Russel & Donald Wallace, Note, *Jehovah's Witnesses and the Refusal of Blood Transfusions: A Balance of Interests*, 33 Cath. Law. 361 (1990).

n28 Sabbath observance issues often arise in connection with unemployment compensation or workplace accommodations. See, e.g., Brian Bertonneau, Comment, *Estate of Thornton v. Caldor, Inc.: Defining Sabbath Rights in the Workplace*, 15 Hastings Const. L.Q. 513 (1988); Clare Zerangue, Comment, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 La. L. Rev. 1265 (1986).

n29 See Julie Ann Sippel, Comment, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 Cath. U. L. Rev. 1127 (1994).

n30 For instance, consider how rarely, if at all, the following types of questions are addressed by law and religion literature. Does Indian religious law persist in prescribing the use of peyote even if secular law labels such conduct a crime? Do the various religions that forbid voluntary blood transfusions prescribe punishment or predict other adverse consequences for persons who are involuntarily subjected to such procedures? Does Jewish law permit its worshipers to work on the Sabbath when no secular accommodation is possible? Does canon law permit a priest to reveal confessional information when it is subpoenaed in a jurisdiction that has no priest/penitent privilege?

n31 Although there may be some differences between a joint venture and a partnership, they do not affect our analysis. As to the interrelationship between joint ventures and partnerships see Rafiq Al-Shahbaz, Note, *Joint Ventures, ASEAN and the Global High Technology Industry*, 18 J. Marshall L. Rev. 327 (1993).

n32 Many cases and commentators characterize partners as agents for each other as well as for the partnership. See *Carlton v. Alabama Dairy Queen, Inc.*, 529 So. 2d 921, 922-23 (Ala. 1988); *Kelly v. Department of Ins.*, 597 So. 2d 900 (Fla. Dist. Ct. App. 1992); *Kansallis Finance Ltd. v. Fern*, 659 N.E.2d 731 (Mass. 1996);

Baker v. McCue-Moyle Dev. Co., 695 S.W.2d 906, 911 (Mo. Ct. App. 1985); Gramercy Equities Corp. v. Dumont, 531 N.E.2d 629 (N.Y. 1988); Barnes v. Campbell Chain Co., Inc., 267 S.E.2d 388 (N.C. Ct. App. 1980); see also Treas. Reg. 301.7701-2(c)(1) (1996); Deborah A. DeMott, *Our Partners' Keepers? Agency Dimensions of Partnership Relations*, Law & Contemp. Probs., Spring 1995, at 109, 109 ("[e]ach partner is . . . an agent of her fellow partners"). This is consistent with the view that a partnership is an aggregation of individuals. See 1 Alan R. Bromberg & Larry E. Ribstein, *Bromberg and Ribstein on Partnership* 4.01(b)(1) (1996). On the other hand, both the Uniform Partnership Act (UPA) and the Revised Uniform Partnership Act (RUPA) provide that each partner in a general partnership is an agent of the partnership for the purpose of carrying on the partnership's business and do not specify that the partners are agents for one another. See Revised Unif. Partnership Act 301(1) (1994); Unif. Partnership Act 9(1) (1914). Some authorities suggest, therefore, that UPA and RUPA reject the aggregate approach. See *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916 (Minn. 1990) (concluding that under UPA adopted by Minnesota in 1921, partners are agents of the partnership but not agents of each other); 1 Bromberg & Ribstein, *supra*, 4.01(b)(1). In light of the large, transcontinental partnerships, particularly professional partnerships of lawyers and accountants where many or most partners have not even met one another, the appropriateness of this theoretical perspective and the doctrine of unlimited liability should be reevaluated. See, e.g., Steven H. Resnicoff, *The Unlimited Personal Liability of Partners: Bankruptcy Implications for Professional Partners*, in 67th Annual Meeting of the National Conference of Bankruptcy Judges, Orlando, Florida, October 17-20: Educational Program (1993).

n33 See cases cited *supra* note 32. Under UPA, partners were jointly and severally liable as to tort claims against the partnership but only severally liable regarding the contract claims. See Unif. Partnership Act 15. Under RUPA partners are generally jointly and severally liable "for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." Revised Unif. Partnership Act 306(a). In contrast to corporations, partnerships are often regarded as aggregates of the individual partners and not as separate entities. See, e.g., Elisa Feldman, *Comment, Your Partner's Keeper: The Duty of Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 48 SMU L. Rev. 1931, 1936 (1995) (asserting that businessmen generally do not view partnerships as separate entities). Nevertheless, this perspective, particularly under RUPA, is grossly misleading. RUPA, adopted by some states, defines a partnership as an "entity distinct from its partners." Revised Unif. Partnership Act 201. Pursuant to RUPA, for instance, partnerships may hold title to property in their own name, and they may sue and be sued in the partnership name. Similarly, although federal tax law does not impose taxes directly on partnerships, it treats partnerships as entities in several important ways. For example, a partnership may have a tax year that is different from the tax year of all of the partners. See 26 U.S.C.A. 706 (West Supp. 1997) (stating that if it has a valid business purpose, partnership tax year may differ from that of partners; otherwise the partnership must have the same tax year as the partners owning a majority of partnership profits or capital, or, if such partners have different tax years, the partnership must use the calendar year). Moreover, in many states, an attorney representing a partnership is held to owe fiduciary duties to the partnership entity and not to individual partners. See James M. Fischer, *Representing Partnerships: Who Is/Are the Client(s)?*, 26 Pac. L.J. 961, 963 (1995) (analyzing American Bar Association Model Rule 1.13 and Rule 3-600 of the California Rules of Professional Conduct). See generally 1 Bromberg & Ribstein, *supra* note 32, 1.03.

n34 State law may, however, require creditors to exhaust remedies against the partnership before pursuing individual partners. See Revised Unif. Partnership Act 307; 1 Bromberg & Ribstein, *supra* note 32, 1.03; cf. J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 Fla. St. U. L. Rev. 727, 731-32 (1992) (pointing out the apparent inconsistency in RUPA which, although characterizing the partners' liability as joint and several, provides that creditors must first exhaust their remedies against the partnership).

n35 See 2 Alan R. Brumberg & Larry E. Ribstein, *Brumberg and Ribstein on Partnership* 5.08 (1997); Roger E. McEowen, *Planning for the Tax Effects of Liquidating and Reorganizing the Farm and Ranch Corporation*, 68 N.D. L. Rev. 467, 486 (1992) ("Probably the best known and largest disadvantage . . . [of] the partnership form is the unlimited liability of partners for partnership obligations."). A general partnership, however, does offer its own advantages, such as ease of formation. Partnership formation does not require filing documents with a government agency or even signing a written partnership agreement. See Revised Unif. Partnership Act 101(5) & commentary; see also *Potter v. Homestead Preservation Ass'n*, 412 S.E.2d 1 (N.C. 1992). More-

over, even after a partnership is formed, it faces materially fewer procedural and substantive duties than a corporation. See generally 2 Bromberg & Ribstein, *supra*, 5.01-5.14.

n36 This is the rule under the original UPA, which is still the law in most states. See *United States v. Hankins*, 581 F.2d 431, 436 (5th Cir. 1978) (noting that under Mississippi law, partner's death dissolves partnership); Unif. Partnership Act 31(4). However, under RUPA a partner's death causes the partner's "dissociation" from the partnership but does not dissolve the partnership. See Revised Unif. Partnership Act 601.

n37 Similar transferability problems may arise with respect to close corporations because the shareholders of such corporations often enter into agreements that limit transferability of their respective stock.

n38 See Phillip I. Blumberg, *The Multinational Challenge to Corporation Law* (1993); Gerald Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law*, in 2 *Harv. Studies in Jurisprudence* (1918) (describing the historical development of corporations).

n39 In 1811, New York became the first state to adopt a flexible, general corporation law, but by the 1850s, such state laws were common. See *Organization of the Corporation, Corp. Guide* (Aspen Law & Bus.) 1101 (1990).

n40 Corporations, such as federal banks, may be created pursuant to federal law. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409-12 (1819) (holding that the federal creation of Second Bank of the United States was constitutional). Indeed, certain governmental units may constitute corporations if they exercise "corporate powers," even though no particular statute declares them to be corporations. See generally A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543 (1995). See, e.g., *State v. Bates*, 296 S.W. 418 (Mo. 1927), overruled on other grounds by *State ex. rel. Governo v. Kehm*, 850 S.W.2d 100 (1993); William Meade Fletcher Jr. et al., *Fletcher Cyclopedic of the Law of Private Corporations* 25 n.24 (perm ed. rev. vol. 1990).

n41 There has been an enormous increase in the extent of commercial activities conducted by nonprofit corporations. See, e.g., Staff of Senate Sub. Comm. on Foundations, 93d Cong., 1st Sess., *The Role of Foundations Today and the Effect of the Tax Reform Act of 1969 Upon Foundations* (Comm. Print 1973); Evelyn Alicia Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C. L. Rev. 1761 (1995). Last year "Big Bird" and his Sesame Street neighbors grossed \$ 31 million for their creators. "Barney," the purple dinosaur of Barney & Friends, reportedly made as much as \$ 50 million. Both programs have a primarily educational purpose, an admirable aim which qualifies, along with a number of other purposes, as charitable endeavor preferences under tax and other laws. Both programs serve the same basic group of patrons and customers. Both are produced by companies that received initial start-up funding in the form of sizeable gifts donated by grantors principally interested in "purpose accountability" rather than "profit accountability." Both generate most of their profit from ancillary, commercial activities—the licensing and sale of commercial products bearing the likeness of the television characters featured in the programs aired on public television stations. Finally, despite their monetary success, both programs continue to attract grant monies to subsidize their high production costs. Despite these similarities, there is a fundamental difference between the two programs. The producer of Sesame Street, the Children's Television Workshop (CTW), is organized as a "not-for-profit" or "nonprofit" corporation, and is thus prohibited from directly or indirectly distributing profits (generally referred to as the "non-distribution constraint"). In contrast, the producer of Barney & Friends, the Lyons Co. The contrasting organizational statuses are offered here as an example of a fast-growing but relatively recent phenomenon: the blurring of our nation's economic sectors caused by the substantial increase in business activities by nonprofit entities. This development, in turn, has precipitated reassessment of, and consequent changes in, the laws applicable to nonprofits. See Lewis, *supra*, at 1764-66.

n42 Ironically, nonprofit corporations may engage in commercial activities, such as charging for goods and/or services and earning a profit.

n43 Most states have separate statutes for nonprofit corporations. The modern approach, for example as in the Revised Model Nonprofit Corporation Act proposed by the American Bar Association in 1987, distinguishes among three types of nonprofit corporations: (1) religious nonprofits, (2) "public benefit" nonprofits, and (3) "mutual benefit" nonprofits. Neither religious nonprofits nor public benefit nonprofits may distribute their net profits to their members. This prohibition is known as the "distribution constraint." See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale L.J.* 835 (1980); Lewis, *supra* note 41. Mutual benefit nonprofits differ, inasmuch as they may provide benefits to their members, purchase their members' membership rights, and upon dissolution, may distribute their net assets to their members. Due to the fact that mutual benefit nonprofits embody such characteristics, they do not qualify for federal tax exempt status under 26 U.S.C.A. 501(c)(3), which is only provided to nonprofits that are operated "exclusively for religious, charitable, scientific, literary, or educational purposes." 26 U.S.C.A. 501(c)(3) (West Supp. 1997).

n44 Of course, dividends are payable on preferred or common stock only if the board declares such dividends.

n45 Not all of the advantages discussed in the text, such as the free alienability of shares, are available to nonprofit corporations. There are, however, other incidental advantages for both profit and nonprofit corporations. For instance, governmental regulation of securities markets and transactions may afford valuable consumer protection. Similarly, extensive statutory and case law regarding corporations may provide reasonable resolutions to problems that individuals, if they had to negotiate partnerships, might not have adequately foreseen.

n46 As to general business corporations, see Harry G. Henn & John R. Alexander, *Laws of Corporations and Other Business Enterprises* 73, at 130 (1983); *Organization of the Corporation*, *supra* note 39, 1114. As to nonprofit corporations, see Cal. Corp. Code 5350, 7350 (West 1990); N.J. Stat. Ann. 15A:5-25 (West 1984); Revised Model Nonprofit Corp. Act 6.12 (1987). However, there are certain exceptions. For example, although some state statutes permit professionals, such as attorneys, to operate as professional service corporations, these statutes, and/or rules promulgated by applicable regulatory bodies, often provide that these professionals are nonetheless personally liable for the malpractice of other shareholders. See 805 Ill. Comp. Stat. Ann. 10/8 (West 1993); 805 Ill. Comp. Stat. Ann. 305/10 (West 1993); Resnicoff, *supra* note 32.

n47 Early corporations did not conduct commercial transactions themselves. Instead, their members conducted business as individuals and therefore, were personally liable. Even after corporations first began to conduct business transactions themselves, the corporate veil provided only limited protection to shareholders because corporations often had the explicit, or implicit, power to impose "leviations" on shareholders to raise money to pay corporate debts. Using a process similar to subrogation, corporate creditors could directly assert this right to force shareholders to pay corporate debts. See *Salmon v. Hamborough Co.*, 22 Eng. Rep. 753 (H.L. 1671); Blumberg, *supra* note 38, at 9; Henn & Alexander, *supra* note 46, 9, at 19. This decision even influenced some American courts to find that creditors had equitable rights to force the corporation to assess shareholders for satisfaction of corporate debts. See *Briggs v. Penniman*, 8 Cow. 387, 395-96 (N.Y. Sup. Ct. 1826); *Hume v. Winyaw & Wando*, reported in 1 *Carolina L.J.* 217 (1830) (reporting a South Carolina case). Ultimately corporations were deprived of the power to make such levies through explicit charter provisions. See generally Blumberg, *supra* note 38. Modern American corporate law statutes typically include explicit provisions stating that members or shareholders are not personally liable for corporate debts. See, e.g., Revised Model Business Corp. Act 6.22 (b) (1983) ("Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.").

n48 See Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 *Fla. St. U. L. Rev.* 1061, 1083 (1994). But see Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 *J. Corp. L.* 573, 588 (1986). Blumberg asserts that in the early days of corporate law in the United States, the principal purposes of

incorporation were "to achieve perpetuity of existence and ready transferability of shares." *Id.* Of course, this may have been partly due to the difficulty incorporators had at that time in securing a grant of limited shareholder liability.

n49 See Frederick G. Kempin, Jr., *Historical Introduction to Anglo-American Law in a Nutshell* 278-79 (3d ed. 1990); Phillips, *supra* note 48, at 1083; Demerios G. Kaouris, Note, *Is Delaware Still a Haven for Incorporation?*, 20 *Del. J. Corp. L.* 965 (1995). There is considerable debate, however, as to whether, and if so to what extent, corporate shareholders should continue to be entitled to limited liability. See, e.g., Blumberg, *supra* note 48, at 624-26 (stating that limited liability is inappropriate for corporate shareholders of an affiliated entity); Lawrence E. Mitchell, *Close Corporations Reconsidered*, 63 *Tul. L. Rev.* 1143, 1168 (1989) (stating that limited liability is inappropriate for shareholders of close corporations).

n50 By contrast, partnerships generally come to an end when one of the partners dies. See Revised Unif. Partnership Act 601(7)(i) (1994) (stating that partner's death causes his "dissociation" from the partnership); Revised Unif. Partnership Act 603 (1994) (stating that upon partner's dissociation, partnership dissolves and winds up its business); Unif. Partnership Act 31(4) (1914) (stating that partner's death dissolves the partnership).

n51 The "Kintner Regulations" provide that in order for a business organized prior to January 1, 1997 to be treated as a corporation for tax purposes, it must possess three of the following four characteristics: (1) limited liability, (2) "continuity of life," (3) "free transferability of interests," and (4) centralized management. See *Treas. Reg.* 301.7701-2(a) (1977). These regulations arose as a result of *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954). As to businesses organized on or after January 1, 1997, new, simplified regulations apply. See *T.D.* 8697, 1997-2 I.R.B. 11; *Treas. Reg.* 301.7701-1 to 301.7701-3 (1996); *Treas. Reg.* 301.7701-4(b), 4(c), 4(f) (1996). See generally Sheri E. Nott & Richard J. Razook, *Classifications of Entities for Tax Purposes Just "Check the Box,"* 71 *Fla. B.J.* 70 (1997).

n52 See Adolph A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* (1932) (stating that corporations are controlled by their managers and not by the shareholders, their owners).

n53 For example, states may have separate statutes for agricultural corporations, banking corporations, insurance corporations, nonprofit corporations, general business corporations, etc.

n54 Henry Winthrop Ballantine, *Ballantine on Corporations* 9, at 46 (1946).

n55 See Mitchell, *supra* note 49, at 1164 n.82.

n56 It is often said that there is no single satisfactory definition of the term "close corporation." See 1 F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Close Corporations* 1.02, at 7 (3d ed. 1992) (recognizing the difficulty of defining "close corporation" and subsequently stating that "[t]hroughout this treatise . . . the term 'close corporation' means a corporation whose shares are not generally traded in the securities markets"); Carlos D. Israels, *The Close Corporation and the Law*, 33 *Cornell L.Q.* 488, 491 (1948); Mitchell, *supra* note 49, at 1151 n.24 (describing various efforts at defining this term).

n57 See Larry E. Ribstein, *Linking Statutory Forms*, 58 *Law & Contemp. Probs.*, Spring 1995, at 187, 219 n.202.

n58 Empirical evidence indicates that although about ninety percent of all corporations possess the characteristics of close corporations, a very small percentage incorporate pursuant to close corporation laws. See, e.g., 1 O'Neal & Thompson, *supra* note 56, 1.19; Mike Harris, Comment, *Assessing the Utility of Wisconsin's Close Corporation Statute: An Empirical Study*, 1986 *Wis. L. Rev.* 811, 827-28; Tara J. Wortman, Note, *Unlocking*

Lock-In: Limited Liability Companies and the Key to Underutilization of Close Corporation Statutes, 70 N.Y.U. L. Rev. 1362 (1995).

n59 See Sherri J. Conrad, Protecting Personal Assets: Does the Professional Corporation Shield Lawyers From Vicarious Liability?, 5 Legal Malpractice Rep. 3 (1996).

n60 See, e.g., 805 Ill. Comp. Stat. Ann. 10/8 (West 1993) (stating that the Illinois Professional Service Corporation Act does not immunize a professional from personal malpractice liability); 805 Ill. Comp. Stat. Ann. 305/10 (West 1993) (stating that lawyers' ability to practice pursuant to the Illinois Professional Association Act is subject to rules promulgated by the Illinois Supreme Court).

n61 See, e.g., Ill. Sup. Ct. Rule 721(d) (preventing attorneys from totally limiting their liability through use of a professional association or professional corporation).

n62 A limited partnership has at least one "general partner" who manages the business and who bears unlimited personal liability for partnership debts just as any partner would in a general partnership.

n63 A limited liability company (LLC) is a hybrid of a corporation and a partnership. The participants in an LLC are called "members" and they own interests in the company. Many LLC statutes permit the LLC to issue certificates that indicate the interests members possess. LLC members, just as corporate shareholders, enjoy limited personal liability. See Ribstein, *supra* note 4, at 2 n.8 (stating that all LLC statutes expressly provide for such limited liability). Properly planned LLCs can qualify for tax treatment as partnerships because LLCs do not have perpetual existence, and LLC interests are not freely transferable. Interestingly, professional firms, especially accounting firms, lobbied heavily for the enactment of LLC laws, which were perceived as a way for a professional to avoid vicarious liability for the conduct of the colleagues with whom he or she worked. See, e.g., Robert R. Keatinge et al., Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization, 51 Bus. Law. 147, 147-48 (1995); Resnicoff, *supra* note 32. Nevertheless, the same kinds of factors that restrict the ability of professionals to limit their liability by using professional corporations apply to LLCs as well. This issue has been the subject of substantial literature. See, e.g., Sheldon I. Banoff, Use of LLCs by Multi-State Professional Practices, in 2 J. Limited liability companies 2, 66 (1995); Allan G. Donn, Limited Liability Entities for Law Firms, in *The Best Entity for Doing the Deal* 237 (1996); Susan Saab Fortney, Am I My Partner's Keeper? Peer Review in Law Firms, 66 U. Colo. L. Rev. 329 (1995); Robert R. Keatinge & George W. Coleman, The Right Entity May Limit Your Liability, Law Prac. Mgmt., July-Aug. 1995, at 22; Robert R. Keatinge & George W. Coleman, Practice of Law by Limited Liability Companies, Prof. Law. 5 (Symposium Issue 1995); Richard C. Reuben, Added Protection, A.B.A. J., Sept. 1994, at 54; Michael J. Lawrence, Note, The Fortified Law Firm: Limited Liability Business and the Propriety of Lawyer Incorporation, 9 Geo. J. Legal Ethics 207 (1995).

n64 Of course, the concept of a jurisdiction is inapplicable to academic expressions.

n65 An example of an inconsistency between language and effect (reminiscent of the distinction between form and substance) involves federal diversity jurisdiction. Article III of the United States Constitution confers federal jurisdiction upon, among other things, controversies "between Citizens of different States." U.S. Const. art III, 2. In such cases, federal jurisdiction was deemed appropriate to prevent one party (such as a plaintiff) from receiving unfair preference from a home state court, which correspondingly disadvantaged the out-of-state party (such as the defendant). If one party files such a suit in state court, the out-of-state party is allowed to remove the case to federal court. The question arose as to whether this constitutional provision applied to suits in which a person and a corporation were adversaries. The effect of judicial decisions, and ultimately of legislation, is to treat the corporation as an independent entity, even though the language of some of the decisions seems contrary. In addressing this issue, the Supreme Court has taken three different positions. Initially, in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), the Court rejected the entity theory and instead reasoned that the corporate shareholders, and not an independent legal entity, had come into court under the corporate

name. Consequently, it held that there was diversity jurisdiction where the corporate shareholders were from one state and the individual adversary was from another state. In *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844), however, the Court reversed course and treated the corporation as a separate legal "person." The plaintiff, Letson, a New York citizen, sued a railroad in federal district court in South Carolina. The defendant argued that there was not "absolute diversity," as that term was used in the Court's earlier decision, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Strawbridge*, the Supreme Court held that in order to establish federal jurisdiction when one or more sides in a lawsuit consisted of several persons, none of the persons on one side could be a citizen of the same state as any of the persons on the other side. See *id.* at 267. In *Letson*, one of the corporation's shareholders was a banking corporation with two of its shareholders from New York, Letson's own state of citizenship. If the *Letson* court applied Deveaux's theory, there would be no diversity jurisdiction. Indeed, if the theory were applied to corporations, then in light of *Strawbridge*, across the nation. Avoiding this result, the *Letson* court held, A corporation created by a state . . . though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state. . . . [A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person[,] . . . capable of being treated as a citizen of that state, as much as a natural person. *Letson*, 43 U.S. (2 How.) at 555, 557. But, fewer than ten years later in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1853), the Supreme Court altered its position. In *Marshall*, a Virginia citizen sued a railroad. The complaint averred that the defendant was a corporation created by an act of the Maryland legislature but was silent as to the citizenship of the corporate shareholders. Under the *Letson* rationale, it would seem that the shareholders' citizenship would have been irrelevant. But the *Marshall* court found that it was relevant. Yet, to avoid the same problem answered in *Letson* by the entity theory, the Court resorted to a new strategy: it created a conclusive presumption that the shareholders of a corporation were citizens of the state which was the "necessary habitat of the corporation." *Marshall*, 57 U.S. (16 How.) at 328. Of course, this presumption is a fiction because shareholders, especially of large corporations, often reside in various states. Thus, although the Court's words seem to have rejected the entity rule, the effect of its ruling was to treat the corporation as if it were a separate legal entity and to accord it the constitutional rights accorded to citizens. This same result seems to have been memorialized by a statute which provides that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its p

n66 For example, while the corporate entity theory protects a corporation from certain civil liability for "conspiring" with its own agents, it is disregarded, either statutorily or judicially, with respect to other types of civil conspiracies as well as criminal conspiracies. See Douglas G. Smith, Comment, *The Intracorporate Conspiracy Doctrine* and 42 U.S.C.A 1985(3): The Original Intent, 90 *Nw. U. L. Rev.* 1125, 1126 n.3 (1996). Of course, legislative inconsistency can be caused by a variety of factors, including the formation of varying political coalitions on particularized issues, legislative inertia, or legislative oversight.

n67 See David Millon, *Theories of the Corporation*, 1990 *Duke L.J.* 201 (1990). Much of the attention given this subject [i.e. "metaphysical questions" about corporations], both by past theorists and recent commentators, focuses on developments in two dimensions. The first dimension is the distinction between the corporation as an entity, with real existence separate from its shareholders and other participants, and the corporation as a mere aggregation of natural individuals without a separate existence. *Id.* at 201; see also Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 *W. Va. L. Rev.* 173 (1985); Phillips, *supra* note 48; Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 *Tul. L. Rev.* 563 (1987). This debate is of ancient origin. See, e.g., Blumberg, *supra* note 48, at 578 n.9 (noting that some people question whether Roman law viewed a corporation as a separate entity); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *Yale L.J.* 655 (1926) (asserting that debate began in the thirteenth century among churchmen). Although England, and subsequently the United States, adopted the entity theory relatively quickly, legal debate within continental Europe was much more lively. See Arthur W. Machen, Jr., *Corporate Personality*, 24 *Harv. L. Rev.* 253, 254 n.3 (1911) (listing relevant foreign treatises from the nineteenth century).

n68 See generally Blumberg, *supra* note 38. Secular theoreticians distinguish between two types of entity theories. One perceives the corporation as an artificial or fictional entity created by the state and totally dependent upon the state for its existence. See Mitchell, *supra* note 49, at 1160-61. According to this perspective, for

example, a corporation created under state law would not have any rights in situations in which state law did not govern. See, e.g., *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587-88 (1839). The other theory, while acknowledging that the corporation is not human, emphasizes that it is natural for people to form groups and for such groups to have unique interpersonal, social, and economic dynamics. This theory characterizes corporations as "real entities" or "persons." See generally Blumberg, *supra* note 38, at 28 (stating that this theory rests "on German sociological and philosophical roots," citing von Gierke as its "most prominent proponent"); Millon, *supra* note 67, at 211-21 (describing the rise of the natural entity theory in the early twentieth century). Pursuant to this view, a corporation's rights exceeded the boundaries of the state under which it was incorporated. See, e.g., *Southern Ry. Co. v. Greene*, 216 U.S. 400, 416-17 (1910). For purposes of this Article, however, the subtle distinctions between these two perspectives appear relatively insignificant.

n69 Although a modern subcategory of the aggregate theory has received considerable support among legal academics, the entity theory continues to be espoused by many social philosophers. See Phillips, *supra* note 48, at 1061 nn.1-2 (stating theory that a corporation is a nexus of individual contracts among the various participants in the corporation). Moreover, courts, lawyers, and legislatures, for the most part, continue to characterize and treat corporations in a manner consistent with the entity theory. It is, however, sometimes difficult to confidently declare that particular legal treatment is necessarily indicative of one theory or the other. Commentators contend that the entity theory and the aggregate theory may each be used to support contradictory political positions regarding issues such as corporate governance and corporate social responsibility, and that, in fact, such contrary positions were so asserted. See, e.g., Horwitz, *supra* note 67; Millon, *supra* note 67. However, Phillips cites divergent views and states that "general conceptions of the corporation may have been implicit in some scholarly discussions during the 1930-1980 period. Due to the scarcity of explicit theorizing, however, this assertion is conjectural." Phillips, *supra* note 48, at 1070 n.63. Courts usually describe corporations as entities separate from their shareholders. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 634 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."). For other cases, see *Fletcher*, *supra* note 40, 25 n.2. See also Joseph K. Angell & Samuel Ames, *A Treatise on the Law of Private Corporations* Aggregate 1 (reprinted 1972) (stating that a corporation is a "body, created by law, . . . [which] for certain purposes is considered [] a natural person"); *Organization of the Corporation*, *supra* note 39, 1101 ("A corporation is an entity, created by law for carrying on a business, separate and distinct from the person[holding that even if a vessel sails under a neutral flag and title is owned by a neutral corporation, international law allows seizure if the ship is equitably owned by an enemy citizen]. On occasion, state and federal courts pierce the corporate veils of profit and nonprofit corporations and hold individual shareholders responsible for corporate debts and, in so doing, arguably treat corporations as aggregates of individuals instead of as entities. See generally Carsten Alting, *Piercing the Corporate Veil in American and German Law - Liability of Individuals and Entities: A Comparative View*, 2 *Tulsa J. Comp. & Int'l L.* 187, 192 (1995) (crediting I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 *Colum. L. Rev.* 496 (1912), with coining the phrase to "pierce the veil"). There are many uncertainties regarding the history of veil piercing. Compare Phillippe M. Salomon, *Comment, Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 *Temp. L.Q.* 321, 323 (1974) (tracing veil piercing to the early nineteenth century), with Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 *Cornell L. Rev.* 1036 (1991) (arguing that veil piercing is a relatively recent phenomenon). There also are uncertainties regarding the circumstances under which it is done. The standard for piercing a corporate veil varies from jurisdiction to jurisdiction. See, e.g., Stephen B. Presser, *Piercing the Corporate Veil* (1991); David H. Barber, *Piercing the Corporate Veil*, 17 *Williamette L. Rev.* 371 (1981); G. Michael Epperson & Joan M. Canny, *The Capital Shareholder's Ultimate Calamity: Pierced Corporate Veils and Shareholder Liability in the District of Columbia, Maryland, and Virginia*, 37 *Cath. U. L. Rev.* 605 (1988); Roger E. Meiners et al., *Piercing the Veil of Limited Liability*, 4 *Del. J. Corp. L.* 351 (1979); Patricia J. Hartman, *Comment, Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?*, 13 *Pac. L.J.* 1245 (1982); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 *Harv. L. Rev.* 853 (1982). Even within a single jurisdiction, the precise criteria for piercing a corporate veil are not entirely clear. See Mitchell, *supra* note 49, at 1169 ("I will spare the reader an exegesis of the law of piercing the corporate veil because the literature is massiv Piercing Doctrine and Its Application to the Toxic Tort Arena, 5 *Tul. Envtl. L.J.* 605, 617 (1992) ("One reason the corporate veil piercing standard is more uncertain under federal common law than under state common law is that the Supreme Court has not explicitly set a standard in this area.")). The principles that courts articulate are typically ambiguous and

incapable of predictable application. See Wilson McLeod, Shareholders' Liability and Workers' Rights: Piercing the Veil Under Federal Labor Law, 9 Hofstra Lab. L.J. 115, 121 (1991) ("The veil-piercing doctrine is justifiably renowned for its ambiguity and uncertainty. According to one pair of commentators, veil-piercing is '[l]ike lightning' - 'rare, severe, and unprincipled.'" (quoting Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 89 (1985))). Most courts assert that they utilize three factors to determine whether to pierce a corporate veil: (1) control or complete domination of the corporation by one or more of the shareholders, (2) fraud or other wrongdoing committed by use of this control or domination, and (3) injury or loss suffered by the plaintiff as a result of the fraud or wrongdoing. See Phillip I. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* 6.02 (1987). For a number of reasons, including applicable governmental regulation and market scrutiny, it is highly unlikely that the veil of public corporations, which have large numbers of shareholders, would ever be pierced. See Thompson, *supra*, at 1039, 1048 (finding a "total absence" of veil piercing of public corporations). But see Thomas V. Harris, *Washington's Doctrine of Corporate Disregard*, 56 Wash. L. Rev. 253, 254 (1981) (stating, without citing any cases, that "[i]n an appropriate case, Washington's courts will refuse to recognize even the largest publicly-held corporation as being separate from its shareholders, officers, directors, or other entities that have abused it"). Even if a corporation has only a single shareholder, this fact alone does not cause American courts to disregard the corporate entity. See Fletcher, *supra* note 40, 25.1, 41.35; *Organization of the Corporation*, *supra* note 39, 1116; see also *Pipe Fitters Health & Welfare Trust v. Waldo, R., Inc.*, 969 F.2d 718 (8th Cir. 1992); *Benschoter v. Shapiro*, 418 S.E.2d 381 (Ga. Ct. App. 1992). In other countries, however, corporate law may require a certain number of shareholders for incorporation. However, on closer inspection it does not seem that when a court pierces the corporate veil it actually denies that a corporation, or even that the particular corporation, is a separate entity. Instead, it seems to state that although corporations are regarded as separate entities, the shareholders of the corporation, in this case because of equitable considerations, are going to be personally liable to the plaintiffs in this case. After all, although limited liability for shareholders is consistent with the entity theory, it is not a logically ineluctable consequence of it. See, e.g., Robert Emanuel Zimet, Comment, *The Validity of Limited Tort Liability for Shareholders in Close Corporations*, 23 Am. U. L. Rev. 208 (1973). In fact, the entity theory of corporations was commonly articulated long before limited liability became firmly established. See Edwin Merrick Dodd, *American Business Corporations Until 1860* 364-437 (1954); Blumberg, *supra* note 48, at 577 ("Despite widespread confusion on the matter, it is clear that the entity view of the corporation rests essentially on philosophical notions and that this view was firmly established well before acceptance of the principle of limited liability."); Mitchell, *supra* note 49. In addition, the modern partnership is often described as an entity even though its partners are not afforded limited liability. See Rev. Unif. Partnership Act 201, 306 (1994). Moreover, even when a corporation's veil is pierced and shareholders are held personally liable in a particular case, the corporate veil is not disregarded for other purposes. See Fletcher, *supra* note 40, 41.20. It is important to note that in disregarding the corporation as a distinct entity, the courts do so for the purpose of adjudging the rights and liabilities of parties in the case. They have no jurisdiction to do more. The cases do not always say this in express terms, but it is necessarily implicit in all of them. No case implies that a corporation may be disregarded, or regarded as identical with persons or corporations not brought under the jurisdiction, for the purpose of adjudging their rights and liabilities without jurisdiction. *Id.*; see also Alting, *supra*, at 193-94.

n70 After a number of opinions apparently based on the aggregate theory, the Supreme Court, in *Southern Railway Co. v. Greene*, 216 U.S. 400, 412 (1910), clearly adopted the entity theory with respect to the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution. The Court declared, "That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion." *Id.*; see also *Austin v. Michigan Chambers of Commerce*, 494 U.S. 652 (1990) (holding that state restriction on corporate political contributions satisfied compelling state interest test); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (stating that corporations have some First Amendment rights). But see *Hale v. Henkel*, 201 U.S. 43 (1906) (holding that corporations are not entitled to the Fifth Amendment privilege against self-incrimination).

n71 See Schane, *supra* note 67, at 563 n.2 ("The reference work, 34 Words and Phrases 335-38 (West 1956 & Supp. 1986), under the heading 'Person' and subheading 'Private Corporation,' lists nearly a hundred court

cases and several score of state statutes where the word 'person' expressly includes corporations."); see also Milon, *supra* note 67, at 206 (citing cases).

n72 The concept of limited liability emanates easily from the entity theory. See Phillips, *supra* note 48, at 1083. Although some scholars, who support the modern aggregate argument that corporations represent a nexus of contracts among the participants in the corporation, attempt to reconcile the doctrine of limited liability, see *id.*, their efforts are less than totally satisfying, especially with respect to limited liability as to nonconsensual creditors, such as tort victims. The text only states that the entity theory is consistent with the doctrine of limited liability because it would be possible to espouse the entity theory while supporting unlimited shareholder liability. Even if the corporation is a separate entity, the shareholders, when perceived as the corporation's equitable owner, real owner, or indirect controller, still could be ultimately liable for unpaid corporate debts. Indeed, the entity theory was in fact well established in England and in the United States while the limited liability doctrine was still substantially in doubt. See *id.*; see also Blumberg, *supra* note 38, at 19-20; Dodd, *supra* note 69, at 364-437; Blumberg, *supra* note 48; Edwin Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 Harv. L. Rev. 1351 (1948); Mitchell, *supra* note 49. Similarly, although section 201 of the Revised Uniform Partnership Act defines a partnership as an "entity distinct from its partners," it nonetheless states in section 306 that partners are jointly and severally liable for all partnership obligations.

n73 See Fletcher, *supra* note 40, 25 n.4.

n74 See, e.g., *Goulding v. Ag-Re-Co*, 599 N.E.2d 1094 (Ill. Ct. App. 1992).

n75 See *supra* note 65.

n76 An important exception applies to corporations qualified under Subchapter "S" of the Internal Revenue Code, which are not taxed as separate entities. Instead, the shareholders of a Subchapter S corporation are treated as if the corporation's tax year profit had been received directly by them in their individual capacities. See 26 U.S.C.A. 1366 (West Supp. 1997). The Subchapter "S" statutory criteria are designed to afford this treatment only to those corporations that have few shareholders and that, in effect, resemble small general partnerships seeking to avail themselves of the benefits of incorporation.

n77 See *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481 (1909) (holding that corporation could be guilty of a crime requiring intent). This position contrasts with the nineteenth century view that, although corporations were entities, they were not entities that could possess criminal intent. See Blumberg, *supra* note 38, at 5. In addition, a corporation can be found to have sufficient knowledge to be guilty of a crime by adding up the pieces of information possessed by separate corporate agents, even if none of the agents alone possessed the necessary knowledge. See, e.g., Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 Geo. L.J. 1, 47-53 (1984); Phillips, *supra* note 48, at 1079 n.112 (1994) (citing the "collective knowledge doctrine").

n78 See Fletcher, *supra* note 40, 29.

n79 See generally *id.* 31 (stating that shareholders do have "equities" in the property).

n80 Of course, the voting shareholders as a whole can control corporate assets subject to applicable corporate law.

n81 See *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 328 ("In courts of law, an act of incorporation and a corporate name are necessary to enable the representative of a numerous association to sue and be sued.") Note, however, that one or more shareholders may be able to bring a derivative suit in the name

of the corporation. The right to bring such a suit, which is equitable in nature, is nonetheless judicially and statutorily restricted. See generally Mary Elizabeth Matthews, *Derivative Suits and the Similarly Situated Shareholder Requirement*, 8 DePaul Bus. L.J. 1 (1995).

n82 See *Marsh Inv. Corp. v. Langford*, 490 F. Supp. 1320 (E.D. La. 1980), *aff'd*, 652 F.2d 583 (5th Cir. 1981) (*per curiam*); see also Glenn G. Morris, *Personal Liability for Corporate Participants Without Corporate Veil-Piercing: Louisiana Law*, 54 La. L. Rev. 207 (1993).

n83 See Fletcher, *supra* note 40, 28.

n84 See Thomas J. Bamonte, *The Meaning of the "Corporate Constituency" Provision of the Illinois Business Corporation Act*, 27 Loy. U. Chi. L.J. 1 (1995).

n85 Recent developments, for instance, have reaffirmed that corporate directors have inherent, not merely delegated, authority to manage, sometimes by depriving the shareholders of the unfettered right to vote to determine certain matters of vital corporate concern. See Millon, *supra* note 67, at 216.

n86 For a miscellaneous sample of such references see *Gucci v. Gucci Shops, Inc.*, 651 F. Supp. 194 (S.D.N.Y. 1986); Berle & Means, *supra* note 52; Lynne Bolduc, *A Case Without a Client: The Private Securities Litigation Reform Act of 1995*, 43 Fed. Law. 33, 39 (1996); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593, 1668-69, 1683 (1988); Randy K. Johnson, *Choice of Business Entity in Utah*, Utah B.J., Dec. 1995, at 7; Keatinge, *supra* note 63, at 151; Lawrence E. Mitchell, *The Puzzling Paradox of Preferred Stock (and Why We Should Care About It)*, 51 Bus. Law. 443, 446 (1996) (referring to preferred stockholders as owners); Michael D. Belsley, *Comment, The Vatican Merger Defense- Should Two Catholic Hospitals Seeking to Merge Be Considered a Single Entity for Purposes of Antitrust Merger Analysis?*, 90 Nw. U. L. Rev. 720, 776 (1996) ("Stockholders are a corporation's owners."). Corporations are commonly described, in part, by emphasizing the dichotomy between ownership by shareholders and control by corporate management.

n87 One of the principles of Jewish law is that if a person owns a slave, then he automatically owns all of the slave's property. Therefore, even if a corporation were recognized under Jewish law as a separate entity, if shareholders owned the entity, they might be perceived as owning the corporation's property.

n88 See Shulhan Arukh, *Yoreh Deah* 367:22, *Hoshen Mispat* 127:1; see also *Babylonian Talmud*, *Pesahim* 88b.

n89 See Jeanne L. Schroeder, *Some Realism About Legal Surrealism*, 37 Wm. & Mary L. Rev. 455 (1996).

n90 See John H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 Geo. Wash. L. Rev. 1425, 1475 (1991) ("[T]he voice incident to typical individual share ownership [in publicly held corporations] is that of one crying out in a vast wilderness far removed from the corporate metropolis.").

n91 See Manual A. Utset, *Towards a Bargaining Theory of the Firm*, 80 Cornell L. Rev. 540 (1995). Utset states that the managerialistic theory of the firm is that "managers' interest in maximizing their compensation gives them an incentive to choose investment projects that will increase the size of the firm, even if these decisions will not maximize shareholder wealth," *id.* at 542, while pointing out that the agency theory of the firm contends that marketplace forces control managerial behavior. See *id.* Utset, however, advances the "bargaining theory" of the firm which maintains that managers utilize their power not only to advance their interests for greater compensation but also to try to increase their bargaining power for future negotiations with shareholders.

Specifically, managers try to shape the relevant legal and nonlegal institutions affecting their relationship with shareholders, to change shareholder perceptions and preferences, and to use their control over the production and distribution of information to gain strategic advantages. These mechanisms make it more costly for shareholders to remove managers, who can therefore become more entrenched. *Id.* at 546-47. The seminal writings in this area are Berle & Means, *supra* note 52, and Michael J. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976).

n92 This point is persuasively argued by Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees*, Revisited, 69 *S. Cal. L. Rev.* 1021, 1038-45 (1996). Greenwood cites the Restatement (Second) of Agency and makes many of the points made in the following text. See also *Beveridge v. N.Y.E.R.R. Co.*, 19 *N.E.* 489 (N.Y. 1889); *Hoyt v. Tompson's Executors*, 19 *N.Y.* 207, 217 (1859).

n93 See Restatement (Second) of Agency 1, 14 (1958).

n94 See *id.* 118 & cmt. b.

n95 See *id.* 122; see also Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Power of Attorney*, 4 *Elder L.J.* 143 (1996); Steven H. Resnicoff, *Durable Power of Attorney*, *New Jersey Law.*, Aug. 1985, at 35. But see Alexander M. Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law of Agency*, 61 *Ind. L.J.* 115 (1986) (pointing out that courts in some cases have enforced powers of attorney even where the principal is incompetent).

n96 See *Shulhan Arukh*, *Even Ha-Ezer* 141:41.

n97 See *Del. Code Ann. tit. 8, 141(a)* (1991); *People ex. rel. Manice v. Powell*, 94 *N.E.* 634, 637 (N.Y. 1911) ("[T]he powers of the board of directors are in a very important sense original and undelegated."). See generally Greenwood, *supra* note 92.

n98 See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 *A.2d* 173 (Del. 1986).

n99 See *Del. Code Ann. tit. 8, 242* (1991 & Supp. 1996).

n100 See *Del. Code Ann. tit. 8, 251* (1991 & Supp. 1996).

n101 See *Del. Code Ann. tit. 8, 271* (1991).

n102 See *Del. Code Ann. tit. 8, 275* (1991).

n103 Many courts will enforce shareholder agreements binding directors of close corporations. See Greenwood, *supra* note 92, at 1041 (citing *Galler v. Galler*, 203 *N.E.2d* 577 (Ill. 1964)).

n104 See Greenwood, *supra* note 92, at 1041.

n105 See *id.* at 1030-31. Greenwood states, Shareholders are a legal fiction in a very precise sense. The law demands that corporate directors and managers manage the corporation in the interests of the shareholders and the corporation. But by "shareholder interests" the law does not mean the interests-let alone the will-of the actual people who are the beneficial owners of the shares (or, in our increasingly institutional stock market, the people who are the ultimate beneficiaries of the legal entities that own the shares). The actual people are not consulted;

they have only primitive, indirect and ineffective means of letting their perceived interests or actual will be known. *Id.* (footnote omitted).

n106 See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (members of board of directors were held to be personally liable in derivative suit for putting a merger proposal to a shareholder vote without first having the board make its own informed decision); *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*, 532 A.2d 1324 (Del. Ch. 1987).

n107 *Greenwood*, *supra* note 92, at 1024-28.

n108 See *id.* *Greenwood* explains, The consequences for corporate law [of focusing on fictional rather than human shareholders] are also twofold: First, in the eyes of the law and corporate management, shareholders are all the same. As a result, managers are given relatively clear direction without any need to pierce the cacophony of inconsistent demands from conflicted and conflicting individuals. Corporate management is therefore far easier than political management. This simplicity, however, is based on an illusion-the conflicts do not disappear merely because the law presumes that shareholders are above them. Second, the actual owners of the shares are irrelevant to corporate law: Neither the interests nor the desires of the people behind the shares count. Because managers manage on behalf of a fictional principle rather than a human principal, corporations are a strange, driven kind of institution-neither managers nor anyone else has the ultimate authority to stop the institution from acting out its logic to the fullest. *Id.* at 1026-27.

n109 See *Bamonte*, *supra* note 84.

n110 See 805 Ill. Comp. Stat. Ann. 5/8.85 (West 1993).

n111 *Id.*

n112 This would include shareholders who intend to sell within the short-term as well as long-term shareholders who, for any number of reasons, might prefer short-run profits. See William J. Carney, *Does Defining Constituencies Matter?*, 59 U. Cin. L. Rev. 385 (1990).

n113 See *Bamonte*, *supra* note 84, at 6-11. See generally Steven L. Schwarcz, *Rethinking a Corporation's Obligations*, 17 *Cardozo L. Rev.* 647, 665-66 & n.87 (1996).

n114 In fact, directors are free to consider factors other than the real shareholders' best interests. Of course, if a shareholder can find a buyer to purchase her shares, she can terminate her relationship with the directors, but only at the cost of simultaneously terminating her status as a shareholder.

n115 See *Bamonte*, *supra* note 84.

n116 See *Greenwood*, *supra* note 92, at 1042 n.48 (citing Unif. Partnership Act 31 & commentary (1914); Revised Unif. Partnership Act 602, 603 (1994)).

n117 Section 14.30 of the Revised Model Business Corporations Act provides, under specified circumstances, for judicial dissolution of a corporation without the approval of the board. See Revised Model Bus. Corp. Act 14.30 (1984).

n118 See Del. Code Ann. tit. 8, 141(a) (1991) (stating that "the business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors"); Revised Model Bus. Corp. Act 8.01(b) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . ."). Both of these statutes, however, provide for some exceptions if they are enumerated in a corporation's articles of incorporation.

n119 See Greenwood, *supra* note 92, at 1042.

n120 See *id.* As a practical matter, corporate directors themselves usually own some shares of the corporation's stock. Consequently, if they refuse to give their consent, the non-director shareholders cannot satisfy the unanimous consent requirement.

n121 See Revised Model Bus. Corp. Act 14.30.

n122 In addition, one might argue that some shareholders, such as those who voted against the directors or who acquired stock after the directors were already appointed, never meaningfully agreed to enter into a relationship with particular directors.

n123 See Greenwood, *supra* note 92, at 1042-43.

n124 See Del. Code Ann. tit. 8, 141(k)(1) (1991) (stating that directors of a staggered board may not be removed without cause).

n125 See Revised Model Bus. Corp. Act 8.08 (authorizing the removal of a director without cause as long as the corporation's articles of incorporation do not require cause, yet permitting the removal of directors only at a meeting called for that purpose and only if notice of the meeting states that such removal is the, or one of the, purposes of the meeting).

n126 In some instances, ownership might pass under the terms of a testator's last will and testament or under state intestacy laws, while in other cases ownership might pass pursuant to reciprocal contracts entered into by shareholders before their death.

n127 See Matheson & Olson, *supra* note 90, at 1472; Robert J. Klein, Note, The Case of Heightened Scrutiny in Defense of the Shareholders' Franchise Right, 44 Stan. L. Rev. 129, 129 (1991) ("It is not clear that corporate democracy really is at the disposal of stockholders, because management controls the corporate election process, known as the proxy system.").

n128 See Matheson & Olson, *supra* note 90, at 1497 (arguing that shareholders are denied an adequate role in determining whether legislative or board-imposed antitakeover measures are appropriate and that such measures may devalue shareholders' investments).

n129 See *id.* at 1441.

n130 See *id.* at 1442.

n131 See *id.*

n132 The relative powerlessness of a minority shareholder in a close corporation does not necessarily mean that the analogy to a partnership is inappropriate. Minority partners in a partnership may also find themselves to be comparatively helpless against a majority partner. Minority partners, however, typically have significantly more power to cause dissolution of the partnership than minority shareholders enjoy with respect to the corporation.

n133 State law may also allow for the debtor's voluntary assignment of assets for the benefit of creditors or for the involuntary appointment of a receiver. In light of the availability of federal bankruptcy proceedings, which are generally favored by both the debtor and creditor, these state processes are rarely invoked. To the extent that the appointment of a receiver involves control of the assets by someone who cannot be controlled by corporate shareholders, the textual discussion regarding Chapter 7 bankruptcies may apply.

n134 See *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) ("[T]he relationship between a corporation and the holders of its debt securities, even convertible debt securities, is contractual in nature."); Brent Nicholson, *Recent Delaware Case Law Regarding Director's Duties to Bondholders*, 19 Del. J. Corp. L. 573, 575 (1994) ("[I]t is settled Delaware law that directors do not owe bondholders any duty other than compliance with the terms of the bond indenture."); Schwarcz, *supra* note 113, at 655.

n135 See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); see also Schwarcz, *supra* note 113; James E. Spiotto, *Director and Officer Liability: Who Watches the Watchmen?*, in *Derivatives, 1996: Avoiding the Risk and Managing the Litigation* (1996). Pursuant to corporate constituency statutes, see *supra* text accompanying notes 109-13, corporate directors are authorized to consider the interests of third parties such as corporate creditors, but they are not typically required to do so.

n136 See Schwarcz, *supra* note 113.

n137 There are a variety of ways in which to define insolvency. Some tests compare a corporation's debts with the liquidation value of its assets, others consider a corporation's liquidity, while still others evaluate a corporation's value as an ongoing concern. It is quite possible that a corporation that is technically insolvent under one or more definitions of insolvency may be financially healthy, such as a situation in which it possesses valuable but illiquid intangible assets that will ensure its future profitability.

n138 See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 787 (Del. Ch. 1992) ("neither party seriously disputes that when the insolvency exception does arise, it creates fiduciary duties for directors for the benefit of creditors"); 1 James D. Cox et al., *Corporations* 10.18 (1995) ("There is a developing body of law that suggests directors do owe a fiduciary duty to creditors when the corporation is insolvent or is approaching insolvency."); Spiotto, *supra* note 135. See generally Nicholson, *supra* note 134, at 580-82 (surveying the development of Delaware law). At least one case has found such fiduciary duties to exist as soon as the corporation enters the "vicinity" of insolvency. See *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991), reprinted in 17 Del J. Corp. L. 1099 (1992). Disparate theories are offered to justify the directors' fiduciary duties to creditors. Many cases and commentators argue that when a corporation becomes insolvent, the corporation's assets constitute a "trust fund" for corporate creditors, and the corporate directors manage the fund as fiduciaries for such creditors. See *Automatic Canteen Co. of Am. v. Wharton*, 358 F.2d 587, 590 (2d Cir. 1966); *Bank Leumi-Le-Israel, B.M. v. Sunbelt Indus., Inc.*, 485 F. Supp. 556, 559 (S.D. Ga. 1980) ("In the case of an insolvent corporation, the directors and officers stand as trustees of corporate properties for the benefit of creditors first and stockholders second."); see also Eric J. Gouvin, *Resolving the Subsidiary Director's Dilemma*, 47 *Hastings L.J.* 287, 307-08 (1996) ("Several cases hold that directors must manage an insolvent corporation's assets as if they were in trust for creditors."); Henry T.C. Hu, *Hedging Expectations: "Derivative Reality" and the Law and Finance of The Corporate Objective*, 73 *Tex. L. Rev.* 985 (1995); Laura Lin, *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors*, 46 *Vand. L. Rev.* 1485, 1524 n.92 (1993) ("The courts have reasoned that, upon insolvency, the directors become 'trustees' for the

creditors and hold corporate assets as a 'trust fund' for the benefit of these investors."). But see Norwood P. Beveridge, Jr., Does a Corporation's Board of Directors Owe a Fiduciary Duty to its Creditors?, 25 St. Mary's L.J. 589 (1994) (criticizing the "trust fund" doctrine). Another approach focuses on the purported "realities" regarding the respective interests of shareholders and creditors. As a corporation becomes insolvent, the shareholders effectively, albeit not theoretically, lose their interests and begin to resemble the holders of subordinated debt. According to this reasoning, the creditors are the ones most likely to benefit from any business success or lose from any business failure that the corporation then encounters. See Janet M. Meiburger, Column: Last in Line, Directors of Insolvent Corporations Owe Fiduciary Duties to Creditors, 15 Am. Bankr. Inst. J. 38 (1996); Schwarcz, *supra* note 113, at 655.

n139 See Lin, *supra* note 138, at 1512 ("There is, however, an important yet ill-defined exception to the legal primacy of shareholder interests. Several courts have held that once the corporation becomes insolvent, directors owe a fiduciary duty to creditors.").

n140 For example, depending on the "realities" of corporate governance in a particular case, all or some of the shareholders still may be able to exercise substantial control over the use of the corporate assets. If the assets are used to generate profits in excess of corporate debt, such profits may inure to the benefit of the shareholders, not to the creditors. Similarly, if the assets appreciate in value so that there is a net surplus over the corporation's debt, such surplus will benefit the shareholders. Note that the mere fact that the corporate directors owe some fiduciary duty to corporate creditors is unlikely to cause Jewish law to recognize the creditors as owners of the corporate assets. After all, the corporation can continue to use its assets, while the creditors cannot. The creditors are given no greater right to execute on the assets, and even if the value of the assets increases greatly, the creditors will be restricted to the right to receive payment of their claims.

n141 See, e.g., 11 U.S.C. 548 (1994); Unif. Fraudulent Transfer Act (1984); Unif. Fraudulent Conveyance Act (1918). See generally Steven H. Resnicoff, Fraudulent Transfers, in *Advanced Commercial Finance and Creditors Rights in Illinois* (1993); Gerald K. Smith & Frank R. Kennedy, Fraudulent Transfers and Obligations: Issues of Current Interest, 43 S.C. L. Rev. 709 (1992); John E. Sullivan III, Future Creditors and Fraudulent Transfers: When a Claimant Doesn't Have a Claim, When a Transfer Isn't a Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner, 22 Del. J. Corp. L. 955 (1997).

n142 These avoidance rules do not make the corporation's creditors owners of the corporate property. First, the avoidance laws apply only to any corporate property that is improperly transferred. Second, even improperly transferred property is not brought within the creditors' control. In a bankruptcy context, such property is returned to the debtor's estate. In a state proceeding, the property is merely treated as if it still belonged to the debtor and becomes subject to a creditor's collection activities, just as any other property owned by the debtor.

n143 See 11 U.S.C. 101(6), 101(9), 548 (1994) (defining a debtor as a "person liable on a claim" and defining "person" as including, *inter alia*, an individual and a corporation); Unif. Fraudulent Transfer Act 1(6), 1(9) (defining a debtor as a "person liable on a claim" and defining "person" as including, *inter alia*, an individual and a corporation); Unif. Fraudulent Conveyance Act 4-6 (referencing conveyances by "persons").

n144 See 11 U.S.C. 701-766 (1994).

n145 "Promptly after the order for relief," an interim trustee is appointed. See *id.* 701(a). A "permanent" trustee may be elected by creditors pursuant to 702. See *id.* 702.

n146 11 U.S.C. 541 (1994).

n147 See *id.* 704(1).

n148 Not all claims that are valid outside of bankruptcy are allowed by the Bankruptcy Code. See U.S.C. 502 (1994). If a claim is not allowed by the Bankruptcy Code, the holder of the claim is not entitled to receive any distribution from the property of the estate based on such claim.

n149 See 11 U.S.C. 727(a) (1994).

n150 See 11 U.S.C. 706(a) (1994).

n151 In Chapter 11, the debtor is designated the "debtor in possession," see 11 U.S.C. 1101(1) (1994), and generally exercises control over the debtor's assets until and unless a trustee is appointed. See 11 U.S.C. 1106, 1107 (1994). In Chapter 7, trustees are promptly appointed and elected. See 11 U.S.C. 701-702 (1994). In Chapter 11, trustees are appointed by the court only if certain statutory criteria are satisfied. See 11 U.S.C. 1104 (1994).

n152 See Thomas G. Kelch, Shareholder Control Rights in Bankruptcy: Disassembling the Withering Mirage of Corporate Democracy, 52 Md. L. Rev. 264 (1993); Harvey R. Miller, Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations, 23 Seton Hall L. Rev. 1467 (1993); see also *infra* text accompanying notes 153-54.

n153 See 11 U.S.C. 1101, 1107.

n154 Of course, in some Chapter 11 reorganizations the pre-bankruptcy shareholders, as a class, lose their stock. When this happens, such shareholders certainly cannot be considered owners of the corporate assets. Nevertheless, if the corporation reorganizes, new stock will be issued to new shareholders, and it will be necessary to determine whether these new shareholders own the corporate assets.

n155 See 11 U.S.C. 1104.

n156 See 11 U.S.C. 1106.

n157 At least some authorities suggest that this would be the result. See Menashe Klein, Mishnah Halakhot 6:277. Nonetheless, it seems possible that the principle "the law of the land is the law" could conceivably operate to forbid third parties from taking corporate property even if legal title to the property were not necessarily vested in any particular legal person. An alternative approach might be that because no attempted transfer of property to the corporation would be valid under Jewish law, title to such property would remain vested in the original owners of the property, the purported transferors. In addition, consider the view of Rabbi Moshe Feinstein, discussed *infra* Part V.C, wherein he disagrees with the entire approach of determining ownership of the corporate assets by focussing on who owns title.

n158 See generally *supra* notes 45-46, 79-83 and accompanying text; *infra* Part V.A.2.

n159 This assumes that the shareholders are not perceived as the owners of the corporation. One of the principles of Jewish law is that if a person owns a slave, then he automatically owns all of the slave's property. See Shulhan Arukh, Yoreh Deah 367:22, Hoshen Mishpat 127:1; Babylonian Talmud, Pesahim 88b. Therefore, even if a corporation were recognized under Jewish law as a separate entity, if shareholders owned the entity, they might be perceived as owning the corporation's property. The possibility of a halakhic problem if shareholders are regarded as owners of the corporate entity does not seem to have been raised by any of the authorities who have addressed this issue. See, e.g., Moshe Sternbuch, Moadim Uzmanim 3:269 n.1 ("If the acquisition [of

shares] occurred according to the conceptualization of the non-Jews, a Jewish shareholder would certainly not violate the prohibition against keeping hametz on Passover because all he would own are shares of stock.").

n160 "In Jewish law, corporations and organizations lack capacity to hold property as 'legal persons.' Property must be held by individuals, otherwise it is ownerless." J. David Bleich, 4 Contemporary Halakhic Problems 388 (1995); see also Menashe Klein, Mishnah Halakhot 6:277, at 169-70 (stating that only human beings may acquire property); Moshe Sternbuch, Moadim Uzmanim 3:269 n.1 (stating that the existence of a company does not prevent the shareholders from being the owners of the corporate property); Yitzhak Elhanan Wasserman, Interest from Loans to Banks, Noam 3:195-203 (5720).

n161 The corporation would also be considered separate and apart from the other human beings representing various corporate constituencies.

n162 See Soloman Ganzfried, Kitzur Shulhan Arukh 65:28; Menashe Klein, Mishnah Halakhot 6:277; see also Moshe Sternbuch, Moadim Uzmanim 3:269 (stating that a corporation is a partnership unless all or most of the shareholders are non-Jews).

n163 See *infra* Part V.B for a discussion as to whether a shareholder's rights or status under Jewish law depends on whether she possesses voting or nonvoting shares.

n164 However, some Jewish law authorities rule that in deciding whether a particular act or failure to act is permissible, halakhah is "strict" and assumes that non-Jews could act as agents for Jews. See Yeheil Mekheil Epstein, Arukh HaShulhan, Hoshen Mishpat 188:1 (citing the views of Rashi and Tosafot). In addition, some authorities argue that even though minhag hasohrim and dina de'malchuta dina are not powerful enough to import the secular corporate entity theory into Jewish law, they may be sufficient to enable non-Jews to serve as halakhically valid agents for Jews. See Wasserman, *supra* note 160, 3:195-203; Yitzhak Yaakov Weiss, Minhat Yitzhak 3:1. As explained in Part III.C, *infra*, secular law does not treat shareholders as agents of one another. Nor does secular law treat corporate directors, officers, or employees as agents of the actual shareholders. Consequently, irrespective of the possible potency of these doctrines, neither the validity of commercial custom (minhag hasohrim) nor the effectiveness of secular law (dina de'malchuta dina) in fact operates to make such non-Jews the agents of Jewish shareholders.

n165 See Shulhan Arukh, Hoshen Mishpat 158:1.

n166 Interestingly, the Jewish law of partnership seems to presuppose that each partner must be capable of being the agent for the other. As Isaac Herzog, the former Chief Rabbi of Israel, points out, Maimonides codifies the rules governing partnership under the joint title of sheluhin ve-shuttafin, "Agents and Partners". [sic] This coupling of partnership with agency suggest that partnership is logically associated with agency, or, in other words, that when two or more people enter into a partnership-agreement each has become the agent of the other partner or of the other partners. Isaac Herzog, 2 The Main Institutions of Jewish Law 155 (1967); see also Israel H. Levinthal, The Jewish Law of Agency, in Studies in Jewish Jurisprudence 1, 17 (Edward M. Gershfield ed., 1971) ("A partner is also an agent, but his agency is of a special and peculiar character. Maimonides, for instance, felt the closeness of the legal relationship to such an extent that he joins the laws of both of these subjects under one heading-Hilkot Sheluhin ve shutafin."). Indeed, Levinthal argues that the Babylonian Talmud, at Kiddushin 41a, "hints that partnership is a special form of agency." *Id.* at 17 n.22. Consequently, it seems that unless individuals are eligible under Jewish law to serve as agents for one another, they cannot form a Jewish law partnership. Once a partnership is formed, however, the parties may agree to restrict the extent to which one partner may in fact act as the agent of another. Even if Jewish law does not permit a non-Jew and a Jew to become full-fledged partners, it could permit them to become co-owners of property, assuming that both the non-Jew and the Jew took the necessary steps to acquire ownership interests in the property. Secular law similarly recognizes the possibility that persons could jointly own property without being partners. See *TUA v. Carriere*, 117 U.S. 201 (1886) (noting that under Louisiana law, the death of one partner dissolves the partnership, and the

surviving partner and the decedent's heirs become joint owners); Unif. Partnership Act 202(c) (1914) ("(1) Joint tenancy, tenancy in common . . . does not by itself establish a partnership, even if the co-owners share profits made by the use of the property."); John C. Ale, *Substantive Partnership Law: Special Problems of General and Limited Partnerships*, CA86 A.L.I.-A.B.A. 1, 11 (1996) ("Co- ownership of property by itself does not make the co-owners partners [under either the Uniform Partnership Law or the Revised Uniform Partnership Law], even if they should make profits from the property."). Under secular law, however, where co-owners jointly operate a business and share profits and losses, the co-owners are recognized both as agents for each other and as partners. Under Jewish law, because such individuals are not agents for each other, they would not be partners but would remain co-owners. However, Jewish law would allow the co-owners to contractually create rights and responsibilities regarding the use of the property and the distribution of any resultant profits and losses; they simply could not act as agents for each other.

n167 There is a view that a non-Jewish daily worker could act on behalf of a Jewish employer in a manner similar to that of an agent. See Ephraim Navon, Mahne Ephraim, *Hilkhot Shluhin V'Shutfin*, no. 11. Corporate employees might qualify as daily workers. Nevertheless, if the people who hired these employees were not themselves agents for Jewish shareholders, the employees probably would not be considered daily workers of the Jewish shareholders. It seems unlikely that corporate directors would fall into the class of daily workers.

n168 See Saul Weingart, *Corporations and Hametz*, in *Yad Shaul* 35-49 (1954) (applying it apparently with respect to an Austrian or German corporation). As will be discussed in Part V.D, *infra*, earlier halakhic authorities also stressed the uniqueness of the relationship between corporations and shareholders. Nevertheless, these authorities did not explicitly recognize corporations as separate legal entities.

n169 See Weingart, *supra* note 168. See generally Shulhan Arukh, *Orah Hayyim* 442:1, 448:1. The fact that a business is a corporation may affect the applicability of these prohibitions irrespective of whether the corporation is considered an independent halakhic entity. This issue will be further developed *infra* Part V.A.2.

n170 See Weingart, *supra* note 168. Weingart believes that it is nonetheless appropriate to conduct oneself in accordance with the other theories if doing so would not be too inconvenient. Consequently, he suggests that if it is not too difficult, Jewish shareholders should, prior to Passover, sell their shares in companies that possess hametz. Nonetheless, if they do not do so, he rules that they may rely on the halakhic entity theory. See *id.*

n171 See *id.*

n172 These shareholders, just as any other consumers, could enter corporate premises as customers.

n173 See Weingart, *supra* note 168.

n174 See *id.*

n175 See *id.* Weingart's last point is questionable. That rejecting the halakhic entity approach is unthinkable simply because it would mean that numerous Jews are in violation of the Jewish law is not logically persuasive. Even though it would be lamentable if many Jews were found to be transgressing religious strictures, it could be that the practices he points to are improper. The prohibition against benefitting from dough that was illegally owned by a Jew during Passover (*hametz she'avar alav ha-Pesach*) is of rabbinic origin. One halakhic principle is that any rabbinic rule that most of the community cannot conform to is intrinsically invalid. Perhaps Weingart's implicit argument is that one must endorse the halakhic entity theory because otherwise the entire rabbinic ban on *hametz she'avar alav ha-Pesach* would be invalidated. Nevertheless, he does not make this argument explicitly. Alternatively, and more happily, these practices may be justified on other Jewish law grounds. Indeed, it could be that the halakhic entity approach is even unnecessary to justify stock ownership in the corporation Weingart considers. Although Weingart rejects the "relationship test" discussed in Part V.D, his dismissal of that

test may be unwarranted. Similarly, other approaches not addressed by Weingart, such as the purchaser of entitlements approach examined in Part V.C, may be correct.

n176 See Weingart, *supra* note 168. The transliteration of the word Weingart uses is "paper gelt." The German word "gelt" is used for "money."

n177 See *id.* The truth is that Weingart's currency argument is unclear. Thus, he says that "every citizen in the country has a share of the property that belongs to the government and the paper money ('papiergelt') is itself a document attesting to his share." *Id.* His reference to "every citizen" suggests that his argument is based on some political theory as to the relationship between the government and its citizens. It is possible that Moshe Sternbuch interpreted Weingart as making this argument. See Moshe Sternbuch, *Moadim Uzmanim* 3:269 n.1 (arguing that the right Weingart referred to was not transferrable). Nevertheless, it does not seem reasonable to suggest that paper currency attests to any rights based on political theory. After all, non-citizens may possess paper currency while some citizens-who, for instance, may live abroad-may not. Consequently, as stated in the text, it seems that Weingart's argument is based on the fact that currency represents a debt from the government to the holder of the currency based, perhaps, on the assumption that the holder could present the currency to the government and demand some payment therefor. This right would seem to be transferrable by transferring ownership of the currency to someone else. This seems to be the way in which Yitzhak Yaakov Weiss interpreted Weingart. See Yitzhak Yaakov Weiss, *Minhat Yitzchok* 3:1. Incidentally, it is worth noting that many, perhaps most, countries are no longer legally obligated to pay anything in exchange for their currency. In such countries, Weingart's argument seems to be completely undermined.

n178 Similar problems would theoretically arise in connection with investments by Jews in United States bonds. Since the 1930s, the United States government has been a significant purchaser and seller of wheat. Inasmuch as the Jewish calendar is designed to have Passover occur during the harvests season, it is reasonable to assume that the United States may well own or benefit from wheat during Passover.

n179 See generally Shulhan Arukh, *Hoshen Mishpat* 39, 40.

n180 See Shulhan Arukh, *Orah Hayyim* 440:4.

n181 As discussed in the text, the Israeli Rabbinical Court and Rabbi Regensberg are among those who explicitly adopt this approach, and several other authorities, such as Isaac Aaron Ettinger and Moshe Shick (*Maharam Shick*), may have implicitly endorsed it. See *infra* Part V.A.2.a.

n182 See *Piskei Din Rabanayim*, *supra* note 17, 10:273, 7. But see *id.* 3:354; *infra* note 312 and accompanying text (assuming an arguably different approach to corporations).

n183 See *Piskei Din Rabanayin*, *supra* note 17, 10:273, 7.

n184 See *id.*

n185 See *id.*

n186 See *id.*

n187 *Id.*

n188 See id.

n189 See id.

n190 One could contend that the concept of ownership enjoyed by partners in a partnership differs qualitatively from the ownership of a sole owner of property. This is arguably reflected by the fact that the Talmud frequently discusses whether the same rules apply both to property held by partners and property held solely by one individual. See Babylonian Talmud, Hullin 135a; cf. Yaakov Ettlinger, *Binyan Tzyyon*, no. 65 (stating the prohibition against charging interest applies to a partnership of a Jew and a non-Jew).

n191 See *Piskei Din Rabanayin*, supra note 17, 10:273, 7; see also Shemaya Eliezer Dekhovsky, *Naot De-sha* 40-56; Moshe Ameil, *Responsa Darkei Moshe- Derekh HaKodesh* 1:5 (10-11); Yitzhak Bari, *Ha-Torah V'hamedina* 11-13:461; Menachem Zemba, *Zera Avraham* 4:21-24; Hayyim David Regensberg, *Mishmeret Hayyim* 134-37 (1966).

n192 See *Piskei Din Rabanayin*, supra note 17, 10:273, 7. For example, when a partnership brings this sacrifice, a process known as *smikhah* is required in which the owners of the animal press down on its head before it is slaughtered. This step is not required with respect to a communal offering.

n193 See Menachem Zemba, *Zera Avraham*, no. 4:21-24; Moshe Amiel, *Darkei Moshe-Derekh HaKodesh* 1:5 (10, 11); see also Regensberg, supra note 191, at 135-37.

n194 See *Piskei Din Rabanayin*, supra note 17, 10:273, 7. The author of the ruling wrote that he had expounded elsewhere on the qualitative distinction between *tzibur* and partnership.

n195 See id. Rabbi Hayyim David Regensberg makes the same argument. See Regensberg, supra note 191, at 135-37.

n196 See *Tosafot*, Babylonian Talmud, *Menahot* 78b, s.v. *oh*.

n197 See Zemba, supra note 193.

n198 Zemba construes the Rambam, *Mishnah Torah*, *Temurah*, ch. 1:1, as disagreeing with *Tosafot* because the Rambam states that members of the *tzibur* (community) constitute a partnership with respect to public sacrifices such that, by a particular improper action or intention, an individual could disqualify the *tzibur*'s offering. Nevertheless, Zemba and the Israeli Rabbinical Court argue that this aspect of partnership is present in every *tzibur*, but that it does not negate the overall concept of *tzibur* as a separate and distinct legal entity. See Zemba, supra note 193; *Piskei Din Rabanayim*, supra note 17, 10:273, 7.

n199 See *Piskei Din Rabanayim*, supra note 17, 10:273, 7.

n200 In Hebrew it is *Ain tzibur maitim*. See Babylonian Talmud, *Temurah* 15b & commentary by *Tosafot* s.v. *ka*.

n201 See Babylonian Talmud, *Temurah* 15a.

n202 The process through which this atonement is achieved is referred to as the *egla arufa*.

n203 See Babylonian Talmud, Temurah 15b; see also Encyclopedia Talmudit 10:435-38.

n204 See id.

n205 See Babylonian Talmud, Nedarim 46b.

n206 Id.

n207 See Babylonian Talmud, Nedarim 48a.

n208 Id.

n209 See Regensberg, supra note 191, at 134-37; see also Moshe Ameil, Darkei Moshe-Derekh HaKodesh, vol. II, at 308.

n210 In the Talmud, this Mishnah is cited in tractate Shekalim 3b as the third halakhah in the first chapter.

n211 See David Frankel, Korban Ha-Eida, on Jerusalem Talmud, Shekalim 3b.

n212 Leviticus 6:16.

n213 These three offerings are as follows: (1) the Omer, consisting of barley; (2) the two loaves of wheat bread offered on the holiday of Pentecost (Shavuot); and (3) the "Show Bread," consisting of twelve loaves of bread brought each week.

n214 Ben Buchri disagrees but nonetheless opines that if the Kohanim contribute with a full heart, they may totally abandon their personal ownership of the funds they contribute, such that the offerings purchased with the funds would not at all be considered to belong to them. See Regensberg, supra note 191, at 134-37.

n215 See Rambam, Mishnah Torah, Shekalim 1:7.

n216 See Rambam, Mishnah Torah, Maaser 6:15-17 (discussing when such money must be returned).

n217 In Hebrew it is shevet aniyim.

n218 In Hebrew it is a havurat tzedakah.

n219 See Babylonian Talmud, Bava Kama 36b.

n220 See Rambam, Mishnah Torah, Matanot Aniyim 8:5.

n221 See Moshe Natan Lemberg, Ribit B'Halva'ah Bankit, Noam 2:241.

n222 Id. Although Greenfeld states that the problem is that there are no "known" owners, it seems, in context, that he means not only that the owners are not known but that there exist no specific owners. Note that al-

though the Maharshag refers to these monies as hekdesch aniyim, he does not mean the concept of hekdesch referred to earlier in this text.

n223 The Holy Treasury is known as hekdesch.

n224 This is analogous to treatment of a bishop as a corporation sole in early English law. Bishops were deemed to own church property in a corporate capacity.

n225 The treasurer is known as the gizbar.

n226 See Hekdesch, Encyclopedia Talmudit 10:435-38.

n227 See Aaron Kirschenbaum, Legal Persons, in Principles of Jewish Law cols. 160-63 (Menachem Elon ed., 1986).

n228 See Hekdesch, Encyclopedia Talmudit 10:399-431. For example, hekdesch was exempt from (1) obligations to provide certain properties to the poor, to the priests, or to the members of the tribe of Levi (such as the mitzvot of leket, shickcha, peah, terumot, and maasrot); (2) ritual rules (such as the prohibition against owning dough on Passover); and (3) limitations on financial transactions (such as prohibitions against lending on interest and overcharging).

n229 This phrase is transliterated as shel re'eihu.

n230 This phrase is transliterated as mamon govoha.

n231 See Regensberg, supra note 191, at 136. Regensberg also suggests that because the property of hekdesch is dedicated for particular holy purposes, individuals are not permitted to derive personal benefit from it. He indicates that the expression mamon govoha, which may be translated as "money pertaining to that which is lofty," is intended to describe the elevated purpose to which the property is consecrated. See id.

n232 The Hebrew expression is kinyan hatzer.

n233 A person may inherit property by operation of Jewish law without any action by himself or another.

n234 See Regensberg, supra note 191, at 136. Obviously, Jewish law does allow hekdesch, as a legal person, to act through its agents such as gizbar. However, Regensberg would presumably say that the ability to act through an agent is itself an innovation (a hidush) and according to Tosafot and Rashbam, cannot be extended further to kinyan hatzer.

n235 See id.

n236 The Hebrew expression is daat.

n237 See Regensberg, supra note 191.

n238 See Boudewijn Bouckaert, Corporate Personality: Myth, Fiction or Reality, 25 Israel L. Rev. 156, 170-72 (1991); Millon, supra note 67, at 211-21.

n239 Regensberg, *supra* note 191, at 136-37.

n240 See *id.*

n241 The animals set aside are referred to as *maaser behaima*.

n242 See *Piskei Din Rabanayim*, *supra* note 17, 10:273, 7.

n243 See Menashe Klein, *Mishnah Halakhot* 6:277; Moshe Sternbuch, *Moadim Uzmanim* 3:269 n.1; Simcha Meron, *The Creation Known as a "Corporation" in Jewish Law*, *Sinai* 59:228 (5726); Wasserman, *supra* note 160, 3:195-203; cf. J. David Bleich, *3 Contemporary Halakhic Problems* 388 (1989).

n244 Some of them, such as *havurat tzedakah*, were voluntarily created even if not for the purpose of conducting a business.

n245 Critics of the halakhic entity approach might argue that even a *havurat tzedakah* is not a "voluntary" endeavor because there is a communal obligation to create such an institution.

n246 See Regensberg, *supra* note 191, at 135.

n247 See Tzvi Pesah Frank, *Har Tzvi*, *Yoreh Deah* 126.

n248 For a discussion of a variety of such solutions see Yitzhak Blau, *Brit Yehuda* 7:25.

n249 A number of responsa that permit Jews to hold shares in corporations that charge interest on loans describe the attenuated relationship between Jewish shareholders and the corporation's issuance of a loan and, basically, the Jewish shareholder's lack of control over corporate conduct. They do not specifically explain why these factors are significant as a matter of Jewish law. Although Moshe Shick, in *Maharam Shick*, *Yoreh Deah*, no. 158, writes at length, his view is also a bit unclear. It is possible that he also implies the halakhic entity theory. *Maharam Shick* discusses whether there is a problem of collecting interest for those who invest in a company that lends money on interest. Shick states that each bit of money contributed by Jewish and Gentile investors is dedicated, *meshubad*, to the company. Although he uses the word *shutfut*, which is customarily used to mean partnership, the responsum makes it clear that the case involves a corporation. The prohibition against lending with interest refers to the lending of "your money" (*kaspekhah*). Shick argues that money that is also *meshubad* is not called *kaspekhah*. However, on the surface, this contention is troubling. If a Jewish investor makes his money *meshubad* to himself and to a Gentile investor, the money should be no less his money (*kaspechah*) than if he had made it *meshubad* only to a Gentile. Yet it does not seem that a Jew prevents his money from being *kaspechah* when he makes it *meshubad* to a Gentile. Realty belonging to a Jew that is *meshubad* to a Gentile still belongs to the Jew. For example, if the Jew sells the property, the sale is valid. Consequently, if the property in *Maharam Shick's* case is not considered *kaspekhah* of the Jew, there must be something more at play than a mere lien (*shibud*) in favor of a Gentile. *Maharam Shick's* interpretation is that each bit of the money invested is *meshubad* no longer belongs to the individual investors. If so, to whom does it belong? Perhaps it belongs to the company as a distinct halakhic entity.

n250 See Isaac Aaron Ettinger, *Maharyah Ha-Levi* 1:54.

n251 See *Babylonian Talmud*, *Nedarim* 48a.

n252 The political leader is known as the Nasi. Although the Talmud only explicitly mentions transferring these interests to the Nasi, Jewish law authorities make it clear that the Talmud only mentioned the Nasi as an example; a person could confidently transfer his interest to the Nasi without fear that the Nasi would prohibit him from using his share in the community property. Jewish law commentators indicate that a transfer to anyone else would also work in a similar fashion. See, e.g., Yeheil Mekheil Epstein, *Arukh HaShulhan*, *Yoreh Deah* 224:7.

n253 A person who formally transfers his interest in this type of property to the community's political leader does not expect any change in his ability to utilize the property. Prior to the transfer, he was entitled to use the property because of his partnership interest. After the transfer, he intends to use it based on the political leader's own partnership interest in the property. The transferor is fully confident, and justifiably so, that the political leader of the community would ordinarily permit the transferor to use the property.

n254 Interestingly, the Jewish term *malveh* literally means "lender."

n255 Isaac Aaron Ettinger, *Maharyah Ha-Levi* 1:54. In the case of the bank, the Jewish shareholder really does not have the power to control collection of the loan.

n256 *Id.*

n257 At least one commentator argues that the public was treated as a partnership in the Talmud but was transformed, in post-Talmudic literature, into a corporate body. See Kirschenbaum, *supra* note 227, at col. 161.

n258 See *id.*; see also *Shulhan Arukh*, *Hoshen Mishpat* 37.

n259 The language of the Rambam, for instance, suggests that the disqualification is not based on the concept of ownership but founded on the principle that members of the public could personally benefit from self-serving testimony. See Rambam, *Mishnah Torah*, *Aidut* 15:1 ("A person may not testify if his testimony will benefit him because it is as if he were to testify about himself.").

n260 See Hafara, *Encyclopedia Talmudit* 10:121, 123.

n261 See generally Greenwood, *supra* note 92.

n262 See Wasserman, *supra* note 160, 3:195, 195-203.

n263 See *Piskei Din Rabanayim*, *supra* note 17, 10:273, 7.

n264 See *id.*

n265 See *id.*

n266 See *Hefker Beit Din Hefker*, *Encyclopedia Talmudit* 10:95.

n267 Aryeh Leib HaKohen Heller, *Kitzot Ha-Hoshen* 39:1. Interestingly, the point made in the text might also have been phrased that the Torah does not allow a transfer of partial ownership rights. Nevertheless, the translation in the text is true to the original Hebrew.

n268 See *Piskei Din Rabanayim*, supra note 17, 10:273, 7.

n269 The Israeli Rabbinical Court asserts that a rabbinical court has the power to invoke *hefker beit din hefker* to rule that a corporation is a distinct halakhic entity. Nevertheless, perhaps because it adduces alternative grounds for the halakhic entity theory, the court does not elaborate on the practical consequences of the *hefker beit din hefker* approach. It does not seem that *hefker beit din hefker*, if used on a case by case basis, would resolve all of the relevant halakhic problems. It is not likely that all of these matters would involve litigation or a *beit din's* ruling. Moreover, even if there were such a ruling, it likely would be prospective, not retroactive. Consequently, conduct prior to the ruling, before recognition of the corporation as a separate halakhic entity, would remain problematic. On the other hand, the court might have believed that it could invoke its power pursuant to the doctrine of *hefker beit din hefker* to promulgate a general decree that would recognize all corporations as independent halakhic entities. The difficulty with this argument is that it is unclear whether a particular Israeli rabbinical court panel would be entitled to enact such a decree, thereby binding other Israeli rabbinical courts. Even if it could do so under Israeli law, it is unclear whether it could take such action as a matter of halakhah. Moreover, the Israeli rabbinical court is not at all authorized by Jewish law to issue decrees that would be binding outside of its immediate jurisdiction, and therefore, any such decree would not resolve halakhic issues in the United States or in other parts of the world.

n270 See Meron, supra note 243, 59:228.

n271 See Moshe Sternbuch, *Moadim Uzmanim* 3:269; Menashe Klein, *Mishnah Halakhot* 6:277; Wasserman, supra note 160, 3:195.

n272 See *Principles of Jewish Law*, cols. 507-15, 686-90 (Menachem Elon ed., 1986).

n273 See generally *id.* at cols. 880-987.

n274 See *id.*

n275 *Babylonian Talmud*, *Bava Metzia* 83a.

n276 See *Shulhan Arukh*, *Hoshen Mishpat* 331:1; see also *Jerusalem Talmud*, *Bava Metzia* 27b (statement of Rav Hoshea, "Custom supersedes halakhah"); Joseph Kolon, *Maharik*, no. 102; Shlomo Shwadron, *Ma-harashdam*, no. 108.

n277 Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 1:72; see also Yeheil Mekheil Epstein, *Arukh HaShulhan*, *Hoshen Mishpat* 73:20. See generally Resnicoff, supra note 7, at 10-14.

n278 See Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 1:72; David Chazan, *Nidiv Lev*, no. 12; Eliyahu Chazan, *Nidiv Lev*, no. 13; Isaac Aaron Ettinger, *Maharyah Ha-Levi* 2:111; Avraham Dov Baer Shapiro, *D'var Avraham* 1:1; Israel Landau, *Beit Yisroel*, no. 172; Yitzhak Blau, *Piskei Choshen, Dinei Halva'ah*, ch. 2, halakhah 29 n.82. For example, Yosef Iggeret, *Divrei Yosef* states, One cannot cast doubt upon the validity of this custom on the basis that it became established through a decree of the King that required people to so act. Since people always act this way, even though they do so only because of the King's decree, we still properly

say that everyone who does business without specifying otherwise does business according to the custom. Yosef Iggeret, Divrei Yosef, no. 21.

n279 See Asher ben Yeheil, Responsa of the Rosh 13:20; Maharam Me'Rutenberg, in Mordechai, on Babylonian Talmud, Shabbat 472; Shlomo Luria, Maharshal 36; see also Jacob Lorberbaum, Netivot; Biurim on Shulhan Arukh, Hoshen Mishpat 201:1 (appearing to agree).

n280 Jewish law distinguishes between different categories of things "that do not yet exist." Perhaps the greatest dispute concerns a person's ability to agree to sell property that exists but that he does not possess. The origin of this controversy is found in a difference of opinion between the Sages (a term used to refer collectively to a number of rabbis) and Rabbi Meir regarding the case of a man who attempts to take all the legal steps necessary to marry a woman at a time before it is legally permissible for them to be wed. "Suppose a man says to a woman, 'Be wedded to me after . . . your husband dies.' . . . [Then the woman's husband dies. The Sages rule:] she is not wed. Rabbi Meir rules: she is wed." Babylonian Talmud, Kiddushin 63a. According to Jewish law, the formation of a Jewish marriage requires a man to acquire ownership interests in his intended and the woman to agree to transfer herself to him. Consequently, the Talmud interprets the debate between the Sages and Rabbi Meir as founded on the basic issue as to whether a person has the power to effectuate a deal involving property not yet in existence or not yet in his possession. The Talmud applies and extends this argument to the sale of a field that the seller has not yet acquired, to "what my trap shall ensnare," to "what I shall inherit," and to the fruit that will grow on a particular tree in the future. See Babylonian Talmud, Bava Metzia 16b, 33b. In each of these cases, the Sages rule that the agreement is not legally effective or binding.

n281 Shlomo ben Aderet, Teshuvot Ha-Rashba, 1:546.

n282 See Menashe Klein, Mishnah Halakhot 6:277.

n283 Rabbenu Yeheil is cited in Mordekhai, on Babylonian Talmud, Shabbat 472. A similar approach can be found in David ibn Zimra, Radvaz 1:278 and is accepted as correct by Aryeh Leib HaKohen Heller, Kitzot Ha-Hoshen on Shulhan Arukh, Hoshen Mishpat 201:1.

n284 Rabbi Joseph Karo is known as "the Author" (ha-Mehaber) because of his authorship of the Shulhan Arukh.

n285 See Shulhan Arukh, Hoshen Mishpat 369:6, 11.

n286 See id. Rabbi Moses Isserles is known as the "Rama."

n287 See Shabtai HaKohen (Shakh) on Shulhan Arukh, Hoshen Mishpat 73:39. For example, according to Shakh, secular law can require that one return lost property in a case where Jewish law permits but does not mandate that it be returned. However, secular law cannot permit one to keep a lost object that Jewish law requires to be returned.

n288 See Yaakov Breish, Helkat Yaakov 3:160; Shmuel Shilo, Dina De'Malkhuta Dina 145-60 (1974) (listing authorities adopting either the approach of Shakh or Mehaber).

n289 This was the approach of Moshe Feinstein. See Moshe Feinstein, Iggerot Moshe, Hoshen Mishpat 2:62; Yosef Eliyahu Henkin, Teshuvot Ibra 2:176; see also Shilo, supra note 288, at 157 (asserting that most Jewish law authorities adopt the Rama's view and listing many of these authorities). A contemporary rabbi, Menashe Klein, questions whether dina de'malkhuta dina applies in the United States. He states, [The applicability

of the principle of] *dina de'malkhuta dina* in our times, when there is no king but rather what is called democracy needs further clarification. As I already explained the position cited in the name of Rivash quoting Rashba, one does not accept *dina de'malkhuta dina* except where the law originates with the king. But in a case where the law originates in courts, and the judges have discretion to rule as they think proper, or to invent new laws as they see proper, there is no *dina de'malkhuta dina*, as there is no law of the king. . . . This is even more true since we have here [in the United States] an institution called a "jury" where the government takes drunks from the market who have never studied law and who establish the law based on a majority vote. Indeed, even the government sometimes creates law and the Supreme Court contradicts it. Certainly in such a system there is no *dina de'malkhuta dina* according to Rivash and Rashba. Menashe Klein, *Mishnah Halakhot* 6:227. Despite Klein's views, it is important to note that most authorities have held that *dina de'malkhuta dina* does not apply only to laws issued by a king. See *id.* Moreover, a number of preeminent Jewish law authorities have specifically held that *dina de'malkhuta dina* applies within the United States and have not found any problems caused by the democratic form of government, the judiciary, the jury system, or the possibility of judicial review. See Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 2:62; Yosef Eliyahu Henkin, *Teshuvot Ibra* 2:176. Indeed, once one acknowledges that *dina de'malkhuta dina* applies to non-monarchical governments, it is unclear why these other factors would, as a general matter, be problematic as a matter of Jewish law. For example, juries (and sometimes judges) perform a fact-finding role that is a necessary element in the application of law. A Noahide system of law could surely invest juries (and judges) with this responsibility without impairing the legitimacy of *dina de'malkhuta dina*. At least as to civil law, where there is no formal notion of jury nullification, juries are not supposed to create law. Nor is there any apparent Jewish law deficiency in the secular system for interpreting the law. Even if a king were to promulgate written laws, he would undoubtedly delegate the daily responsibility of judging cases to others, and such judges would have to interpret the law. An argument might be made that in the American system, a jury is sometimes required not only to find facts but to make decisions regarding "mixed questions of law and fact." Although a comprehensive analysis of the jury function is beyond the scope of this Article, the question of jury interpretation is also not significant as a matter of Jewish law. A secular system must delegate the interpretative function to someone, and it is not fatal under Jewish law even if the secular system were to delegate some aspect of this function to juries. Although Rabbi Klein obviously questions the jurors' ability to make any reasonable decisions, he has not demonstrated that this criticism is significant under Jewish law. In any event, even if there were some irregularity in the secular procedure for applying the law, and even if this would deny Jewish law validity to the outcome of a secular case, it would not prevent *dina de'malkhuta dina* from rendering the substantive rules of secular law valid as a matter of Jewish law. For example, disputes between Jews, even when *dina de'malkhuta dina* applies, are supposed to be litigated in Jewish courts that would decide the dispute in accordance with secular law rules. In such instances, the Jewish courts themselves would serve as the fact-finders. Judges are also required to determine whether legislative acts are consistent with legally superseding documents such as treaties, constitutions, or even certain other legislative acts. There seems to be no reason why a secular legal system division of power between legislative and judicial branches should impair *dina de'malkhuta dina*.

n290 See Aryeh Leib HaKohen Heller, *Kitzot Ha-Hoshen*; Jacob Lorberbaum, *Netivot on Shulhan Arukh*, *Hoshen Mishpat* 201:1.

n291 See Moshe Feinstein, *Iggerot Moshe*, *Even Ha-Ezer* 1:104, 105; Shlomo Shwadron, *Maharsham* 224; Yaakov Ettlinger, *Binyan Tziyon* 24; Ezekiel Ledvalla, *Sefer Ikkarei Ha-Dat*, *Orah Hayyim* 21; Aaron Parchi, *Perah Mateh Aharon* 1:60. Isaac Herzog also maintains that these wills are at least *post facto* valid. See Isaac Herzog, *Techukah Le-Yisrael Al Pi Ha-Torah* vol. 2, ch. 5 (1989).

n292 *Situmta* is the Talmudic term for a secular convention of the transfer of title that is incorporated into Jewish law by common commercial practice. For more on *situmta*, see *Shulhan Arukh*, *Hoshen Mishpat* 201, Aryeh Leib HaKohen Heller, *Kitzot Ha-Hoshen*, and Jacob Lorberbaum, *Netivot* who discuss whether this is a Biblical or rabbinic form of acquisition. See also *Principles of Jewish Law*, *supra* note 272, cols. 916-20.

n293 See Aryeh Grossnass, *Lev Aryeh* 1:53; Isadore Grunfeld, *The Jewish Law of Inheritance* (1987); Feivel Cohen, *Kuntres Midor L'dor: Laws of the Torah Relating to the Writing of a Will and the Distribution of One's Estate* (1982). Of course, the textual discussion does not address the appropriateness of bequeathing one's

assets to people who are not the proper heirs according to Jewish law. Even if such a transfer is post facto valid, halakhah may deem the transfer to be unethical. Indeed, Jewish law authorities disagree as to how much of a person's assets should be left to individuals other than the heirs prescribed by Jewish law. While some believe that only a de minimus amount should be distributed in this way, others are considerably more lenient. See generally Ezra Batzri, *Dinei Mamonot* 3:140-98; Judah Dick, *Jewish Law and the Conventional Last Will and Testament*, 2 *J. Halacha & Contemp. Soc'y* 5 (1982); Rabbi Hershel Schachter, Letter to the Editor, 29 *Tradition* no. 1 (1995); Arthur M. Silver, *May One Disinherit Family in Favor of Charity?*, 28 *Tradition* no. 3, 79 (1994).

n294 Interestingly, there are currently individuals who state that they believe themselves to be obligated to observe the Noahide Code. Indeed, some Noahide communities exist. See *Ex-Christians Drawn to Noah's Law*, *San Jose Mercury News*, January 26, 1991, at 11D. In part, the article states, Some are former Christian clergymen who no longer consider themselves Christians. They use many Jewish practices, but don't convert to Judaism. About 250 of them met in Athens, Tenn., recently, reports *Ecumenical Press Service*. James D. Tabor, member of an advisory council, says members tend to be "disenfranchised former Christians" who "do not denounce belief in Jesus" but that "most they would say is that he was a great teacher." Tabor says members want to identify with the "ethical monotheism" of Judaism without converting to it. He says that they uphold the "laws of Noah," such as those against idolatry, blasphemy, bloodshed, sexual sins and theft. *Id.* Such communities seek rabbinic guidance. See Dan George, *Tennessee Church Studies Judaism*, *Sun-Sentinel*, May 31, 1991, at 5E (discussing involvement of local Orthodox rabbi). At the time this Article was written, there was at least one site on the world wide web dedicated to Noahide law.

n295 See Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 2:62; see also Broyde, *supra* note 16, at 83-99. It is true that Moshe Isserles, in *Responsa of Rama* 10, and, Moshe Sofer, in *Hatam Sofer*, *Likutim* 14, believe that Nahmanides (commenting on *Genesis* 34:13) interprets the Noahide commandment regarding laws (*dinim*) as incorporating Jewish commercial rules into the Noahide Code. Nevertheless, an overwhelming number of authorities believe that the Noahide commandment provides non-Jews with the flexibility to adopt different commercial laws. See, e.g., *Rambam*, *Mishnah Torah*, *Melachim* 10:10; commentary of Abraham Isaiah Karelitz, *Chazon Ish ad loc*; *Isser Zalman Meltzer*, *Even Ha-Azel Hovel U-Mazek* 8:5; *Yom Tov Ishbili*, *Teshuvot Ha-Ritva*, no. 14 (quoted by *Beit Yosef on Tur*, *Hoshen Mishpat* 66:18); *Tosafot*, *Babylonian Talmud*, *Eruvin* 62a (s.v. "ben Noah"); *Yeheil Mekheil Epstein*, *Arukh Ha-Shulhan He-Atid*, *Melahim* 79:15; *Naftali Tzvi Berlin*, *He-Amek She'alah* 2:3; *Abraham Isaac Kook*, *Etz Hadar* 38, 184; *Zvi Pesah Frank*, *Har Tzvi Orah Hayyim*, vol. II, *Kuntres Milei di-Berakhot* 2:1; *Ovadia Yosef*, *Yehaveh Daat* 4:65; *Yitzhak Yaakov Weiss*, *Minhat Yitzhak* 4:52:3. For a more complete analysis of this issue see *Nahum Rakover*, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 *Cardozo L. Rev.* 1073, app. I & II at 1098-1118 (1991).

n296 Secular rules enacted pursuant to the Noahide Code may be enforceable by a Jewish litigant against another Jewish litigant, but only if the latter has no substantial connection to Jewish law and would not wish to be governed by Jewish law. Thus, *Sternbuch*, in *Teshuvot Ve-Hanhagot*, vol. 1, no. 795 (rev. ed.), suggests the possibility that a litigant, who does not generally observe Jewish law and who would not adhere to Jewish financial law when it would be to his detriment, may not be entitled to insist on Jewish law's rules when they would inure to his benefit. In some areas of law, a non-observant Jew has the same status as a Gentile. *Sternbuch* states that it is not clear whether this rule applies to commercial transactions in which it would operate to the non-observant Jew's detriment. For more on this issue see *Yehudah Amihai*, *A Gentile Who Summons a Jew to Beit Din*, *Tehumin* 12:259-265 (1991). Thus, even authorities who would not ordinarily apply *dina de'malkhuta dina* to enforce secular law against religiously observant Jews enforce secular law against non-observant Jews.

n297 For example, the sale might be void or voidable as violative of the Jewish law prohibition against price gouging. See *Aaron Levine*, *Free Enterprise and Jewish Law* 99-110 (1992).

n298 An example illustrates the significance of this issue. Assume that corporation A's shareholders are not Jewish. Assume further that corporation A's director is, under applicable secular corporate law, authorized to sell certain corporate property. Nevertheless, shareholders holding fifty-four percent of the corporate stock have contacted the director and told him that they do not want him to sell the property. May a Jew purchase the property

and, under Jewish law, acquire ownership thereby? If secular corporation law is valid as an exercise of Noahide law, the answer is yes.

n299 See Moshe Sternbuch, *Moadim Uzmanim* 3:269.

n300 This, of course, assumes that the shareholders have not wrongfully siphoned off the corporation's assets. See, e.g., Menashe Klein, *Mishnah Halahot* 6:277. In addition, some commentators may be reluctant to provide limited liability for close corporations. For example, in discussing the leniency of allowing a borrower to pay interest to a corporation based on the fact that the corporation has limited liability, Rabbi Blau states, In addition, it seems that even those who rule leniently do so only with respect to public corporations where the loan proceeds are invested in the name of the company. But as to private companies (as is common today where a husband and wife or a father and son establish a company for income tax purposes and they own all of the stock), I am unsure if it is possible to include them in this leniency. For if you would do so, even a private individual might file bankruptcy and, according to secular law, even if he subsequently acquires assets, he would not have to pay his debts. Yaakov Blau, *Brit Yehuda* 7:25 (66).

n301 See Menashe Klein, *Mishnah Halakhot* 6:277; Moshe Sternbuch, *Moadim Uzmanim* 3:269 n.1; Ezra Batzri, *Dinei Mamanot*, vol. 3, at 315.

n302 See id; see also Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 1:72.

n303 See Yitzhak Blau, *Brit Yehuda* 7:25-26; Yitzhak Blau, *Pitkhei Hoshen*, *Shutfut* 1:76.

n304 See Yitzhak Yaakov Weiss, *Minhat Yitzhak* 3:1; Moshe Sternbuch, *Moadim Uzmanim* 3:269; Saul Weingart, *Corporations and Chametz*, in *Yad Shaul* (1954) (written in 1938). Many authorities disagree over whether the limited liability principle avoids the prohibition against the charging or paying of interest on loans involving corporations in which Jews own stock. Virtually all of the authorities at least implicitly assume that there is such limited liability. The debate focuses only on the effect limited liability has on the prohibition against charging or paying interest.

n305 Of course, even some tort victims, such as those who assert claims for injuries arising out of product defects, might be considered to have voluntarily entered into transactions with the corporation.

n306 But see Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 2:62 (suggesting that *dina de'malkhuta dina* does not apply to damages caused by one's animals as well as to certain other types of laws).

n307 See, e.g., *Van Dam Egg Co. v. Allendale Farms, Inc.*, 489 A.2d 1209 (N.J. Super. Ct. App. Div. 1985) (holding that sole shareholder and president of corporation could be personally liable for inducing supplier to deliver on credit by purposefully misrepresenting corporation's ability to pay for the goods). See generally Fletcher, *supra* note 40, 11.35 (Supp. 1996) (describing rules regarding personal liability of corporate officers, directors, and agents for torts they committed or in which they participated).

n308 Where the act to be performed by a purported agent would violate Jewish law, the primary explanation for the fact that the principal is not liable is a Talmudic dictum to the effect that if the Master's words (the words of the Almighty) contradict a pupil's words (the words of a mere mortal, in this case the supposed principal), the Master's words should be heeded. See *Babylonian Talmud*, *Kiddushin* 42b; see also Yeheil Mekheil Epstein, *Arukh HaShulhan*, *Hoshen Mishpat* 182:9-13. Consequently, no purported agent is deemed to be acting for the pupil, the supposed principal, in violation of Jewish law. Instead, the purported agent is deemed to be acting for himself. Because of this logic, the agency is valid where the agent did not realize that the action violated Jewish law or where the agent was forced to comply with the principal's directions. See generally Israel Herbert Levin-

thal, *The Jewish Law of Agency*, in *Studies in Jewish Jurisprudence* 51-58 (Edward M. Gersheld ed., 1971). Similarly, Jewish law provides that if an agent acts negligently, the principal is not responsible because he can assert, "I only appointed you to act for my benefit and not for my harm." See Shulhan Arukh, Hoshen Mishpat 182:3; Yeheil Mekheil Epstein, *Arukh HaShulhan*, Hoshen Mishpat 182:17. See generally Steven F. Friedell, *Some Observations on the Talmudic Law of Torts*, 15 *Rutgers L.J.* 897 (1984); Hayyim S. Hefetz, *Vicarious Liability in Jewish Law*, 6 *Dine Israel* 49 (1975).

n309 Of course, it is theoretically possible to justify the incorporation of vicarious tort liability on a basis that would not necessarily warrant assumption of the limited liability rule.

n310 Perhaps a more interesting question would involve the seepage of a corporation's property, such as toxic wastes, onto adjacent land or into adjacent water supplies.

n311 However, adding another level of analysis, one might argue that the reasons why a court pierces the corporate veil may be relevant. See *supra* note 69 for the relevant standards. Creditors' expectations may depend on the fact that they are dealing with a corporation. If a court pierces the corporate veil because the corporation did not conduct itself as a corporation, the creditors' expectations were arguably based on a misunderstanding of the reality and, therefore, should not be used to limit their ability to recover from the shareholders personally.

n312 See *Piskei Din Rabanayim*, *supra* note 17, 3:354.

n313 See *id.* The court's position as to the halakhic entity approach is unclear. Had the court adopted the halakhic entity rule, it might have explained that the corporation became personally liable for its debts, and that the right to sue it and collect from its property was not at all in the nature of collateral (a *mashkhon*) for the debts of the shareholders. Indeed, according to the halakhic entity approach, the shareholders, as shareholders, are simply not part of any transaction between the corporation and corporate creditors. However, even if the court were inclined to support the halakhic entity rule, it might have thought the concept of personal liability, according to the *Rosh a sine qua non* to create a lien on property, was simply inapplicable to a halakhic entity—that it was meaningless to talk about the personal liability of a corporation. But see Ezra Batzri, *Dinei Mamonot*, vol. 3, at 316 (arguing that this Israeli Rabbinical Court apparently did not believe that the corporate entity theory was part of indigenous Jewish law).

n314 See *Piskei Din Rabanayim*, *supra* note 17, 3:354.

n315 *Babylonian Talmud*, *Kiddushin* 8a-8b.

n316 Asher ben Yeheil, *Babylonian Talmud*, *Kiddushin* 1:10.

n317 See *Piskei Din Rabanayim*, *supra* note 17, 3:354.

n318 See *id.*

n319 As discussed above, Shakh would apparently not agree that *dina de'malkhuta dina* could introduce a commercial rule inconsistent with halakhah. Perhaps, the Shakh would not impose the same limits on the principle of *minhag hasohrim*. Alternatively, Shakh may disagree with *Rosh* and construe the Talmudic passage in accordance with the views of *Ramban* and *Rashba*.

n320 See the comment on *Babylonian Talmud*, *Kiddushin* 8a.

n321 See Shulhan Arukh, Even Ha-Ezer 29:6; comment of Moshe Breish, Helkat Mehohek; comment of Shmuel M-Purdah, Beit Shmuel; comment of David HaLevi, Taz ad loc. This is also endorsed by Beit Yosef, commenting on Tur, Even Ha'ezer 29. Aryeh Leib HaKohen Heller, Avnei Meluim seems to accept this approach, too. See commentary on Shulhan Arukh, Even Ha-Ezer 29:10.

n322 See Moshe Sternbuch, Moadim Uzmanim 3:269 n.1.

n323 Sternbuch does not clarify whether the essential part of a corporation's shareholders is based on the percentage of investors who are Jewish or on the percentage of shares owned by Jews. Nor does he provide guidance as to how to approach this question when there are different classes of shares.

n324 See Moshe Sternbuch, Moadim Uzmanim 3:269 n.1. The validity of the limited liability condition against third parties is discussed supra Part V.A.2.b.iv.

n325 See Moshe Sternbuch, Moadim Uzmanim 3:269 n.1. It is unclear whether Sternbuch would contend that Jewish law would infer such agreement if some of the Jewish shareholders were not religiously observant and would not ordinarily want to be bound by Jewish law.

n326 Sternbuch does not identify what these differences are. He states, If a company of Gentiles or of a majority of Gentiles issues stock, they [the Gentiles] intend to act only in accordance with the secular law, to create an entity whose name is "company" and who will be the sole owner as we explained before[,] and it is not possible to force them [the Gentiles] to other transfers even if there is not much of a practical difference. Moshe Sternbuch, Moadim Uzmanim 3:269 n.1.

n327 See id. Weiss argues that Sternbuch is inconsistent. Weiss reasons that if Jewish law would treat a corporation as a partnership when the shareholders are all Jews, then it would treat it that way even if most of the shareholders are not Jews. See Yitzhak Yaakov Weiss, Minhat Yitzhak 3:1. One might question Sternbuch's approach from the opposite direction as well. If non-Jewish investors are entitled to be treated as corporate shareholders when they constitute the essential part of the shareholders, exactly why do these non-Jews lack this right, according to Sternbuch, when they do not constitute the essential part of the shareholders? Moreover, Sternbuch is not explicit as to how the rule applies when there is a shift, such that Jews or non-Jews initially constituted the essential part of the body of shareholders but no longer do so.

n328 Moshe Sternbuch, Moadim Uzmanim 3:269 n.1. Sternbuch refers to the corporation's menahalim.

n329 See id.

n330 See id. Interestingly, although most authorities agree that corporate shareholders would have limited liability for corporate debts, Sternbuch's analysis results in corporate managers being personally liable for debts they never thought they were incurring.

n331 This seems to be the case because it allows for the explanation set forth in the text. Sternbuch himself provides no indication as to whom he means when he uses the word "menahalim."

n332 Taz, in his commentary to Shulhan Arukh, Yoreh Deah 150, makes a similar argument. The Taz deals with a case in which A, B, and C are Jews. A, thinking that B is his agent, gives money to B so that B can deliver the money to C, thereby consummating a loan from A to C pursuant to which C has agreed to pay interest (ribit). In fact, however, Jewish law does not allow B to serve as A's agent for the purpose of consummating the loan from A to C because such a loan, involving ribit, would violate Jewish law. Consequently, the Taz says that

under Jewish law, when A handed the money to B, A made a loan to B even though neither A nor B intended such a loan. As Jewish law prevents B from having taken the money as A's agent, B must be treated as if he took the money for himself.

n333 If the limited liability rule applied, there are Jewish law authorities who would argue that there would be no prohibition on the charging of interest on loans. However, if, as Sternbuch suggests, it is a loan from the Jewish investor to the corporate managers and the corporate managers would not be entitled to limited liability, the question of charging interest is certainly relevant.

n334 Rabbinic rules regarding the charging and paying of interest are too complex to consider in depth in this Article. See generally Yisrdel Reisman, *The Laws of Ribbis* (1995); Yeheil Grunhaus, *The Laws of Usury and Their Significance in Our Times*, 2 *J. Halacha & Contemp. Soc'y* 48-59 (1982). Cf. Resnicoff, *supra* note 2.

n335 For instance, assume that a predominant portion of the shareholders are non-Jews. Even Sternbuch seems to assume that in such a situation the non-Jews, as to themselves, have the ability to create a corporate entity. This seems implicitly to be based on the rules regarding Noahide laws. See *supra* Part V.A.2.b.iii.(b).

n336 Approval of the halakhic entity theory in this context could be a result of both construing the Noahide laws as capable of creating rights and relationships that could not exist under Jewish law and transferring such rights and relationships to Jewish purchasers.

n337 See Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:26, 3:1.

n338 See *id.* Query how Weiss would characterize the status of a person who owns voting stock but who, because of a control share acquisition statute described in Part III.C *supra*, is not entitled to vote such shares for a number of years.

n339 Weiss says that this is the view of Ettinger (citing his responsum 2:124), Rabbi Moshe Shick, and Rabbi Hanoh Dov Padua. See Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:26.

n340 Interestingly, Weiss seems to cite Ettinger as one of those who thinks that a corporation is never a partnership. Although Ettinger does not discuss whether the Jewish shareholders in the cases before him had any voting rights, it seems that Weiss assumes that they did. Otherwise, Weiss could have argued that Ettinger could have agreed with him.

n341 See Moshe Sternbuch, *Moadim Uzmanim* 3:269; Israeli Rabbinical Court, *Piskei Din Rabanayim*, *supra* note 17, 10:273; Hanoh Dov Padua, *Kheishev Ha-Ephod* 2:52.

n342 See Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:26 (citing Isaac Aaron Ettinger, *Maharyah Ha-Levi* 2:124).

n343 See Isaac Aaron Ettinger, *Maharyah Ha-Levi* 2:124.

n344 See *id.*

n345 See *id.*

n346 See *id.*

n347 According to this interpretation, when Ettinger says the case is "like" that of a Jew who is financially responsible for the dough of a Gentile in the possession of the non-Jew, what does he mean? He might mean that it is similar to that situation because, although the corporation is not a "Gentile," it is a Jewish law entity, and it is not a Jew.

n348 According to this approach, when Ettinger says that the case is "like" that of a Jew who is financially responsible for a non-Jew's dough in the possession of the non-Jew, he is comparing the two situations qualitatively and not equating them.

n349 See Moshe Feinstein, *Iggerot Moshe*, Hoshen Mishpat 2:15; *Orah Hayyim* 1:90, 4:54.

n350 This possibility is not equally true with respect to all of his responsa. In one case, Moshe Feinstein, *Iggerot Moshe*, Hoshen Mishpat 2:15, he states that a corporation is not "a new creation by itself," as was suggested in *Darkhei Teshuva* 160:15. But *Darkhei Teshuva* seems to be dealing with large corporations and not small, close corporations.

n351 If Feinstein is referring to a public company, it is unlikely that the original investors retain an actual majority of stock. Because of the proxy system and the diffusion of stock ownership among countless people who do not know each other and who, in many cases, have relatively minor holdings, much less than an absolute majority of stock is required to control the corporation.

n352 Moshe Feinstein, *Iggerot Moshe*, *Even Ha-Ezer* 1:7.

n353 See *id.*

n354 *Shulhan Arukh*, Hoshen Mishpat 209:1-3.

n355 See Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:126. Weiss states that according to Ettinger, the Jewish shareholders made a loan. Weiss does not say to whom the loan was made and whether such a loan would raise questions regarding the charging or collecting of interest.

n356 See *supra* text accompanying notes 349-52.

n357 Moshe Feinstein, *Iggerot Moshe*, *Even Ha-Ezer* 1:7.

n358 *Id.*

n359 Rabbi Lintz reports views expressed by Rabbis David and Reuven Feinstein, sons of Rabbi Moshe Feinstein. Lintz does not assert that David and Reuven Feinstein are explaining their father's perspective. It is interesting to note that David and Reuven Feinstein may disagree about the very factors discussed in the accompanying text. While David Feinstein seems to suggest that some threshold amount of potential control is enough to cause someone to be an owner, Reuven Feinstein seems to argue that potential control may be insufficient if the shareholder has no interest in exercising it. When asked . . . [about whether a partner or corporate shareholder violates the prohibition against dealing in non-kosher foods if the partnership or corporation deals in such foods,] David Feinstein posited that the determining factor is whether or not the investor is involved in the running of the business. He made no distinction between the various investment structures such as partnerships, limited partnerships, or corporate stock. According to . . . [David] Feinstein, if an investor owns a substantial

enough amount of stock of a corporation to involve himself in the voting or management of the company, even if he is a minority shareholder, he is subject to the prohibition of trading in non-kosher products. He added that the same criteria apply to determining whether a stockholder may retain his ownership of a company which owns chametz on Pesach Reuven Feinstein added that in his view the intention of the stockholder is a determining factor in the question. If, for instance, a shareholder with only one share intends to get involved in dictating policy of the company by speaking at shareholder meetings or contacting other shareholders, then even that limited amount of ownership would be prohibited. On the other hand, if a person's intention is just to profit from short term market moves, then even a large block purchase would be permissible . . . [Reuven] Feinstein said it was questionable whether a small percentage of a company which is intended to be held for a long time (e.g., for a retirement plan) is permissible. George Lintz, *May A Jew Purchase Stock in McDonald's? (And Related Questions)*, 24 *J. Halacha & Contemp. Soc'y* 69 (1992) (footnote omitted).

n360 Even in the preceding case discussed in the text, in which a few shareholders owned significant percentages of corporate stock and were considered partners who owned interests in the corporate assets, it is unclear how their respective proportional interests would be determined.

n361 The numbers used in the example are selected arbitrarily. If Feinstein were to restrict his position to companies with more shares and shareholders, the numbers could be adapted. The theoretical problem remains the same.

n362 Feinstein might believe that it is possible even for someone who purchases a single share to acquire a small ownership interest in the corporate property if he intends to make the acquisition. Nonetheless, at the very least, Feinstein implicitly suggests that when someone makes a small investment, we assume that his only intent was to buy a right to the corporation's profits.

n363 A similar question could be asked about a person who acquires a significant percentage of corporate shares but who does so in small increments. If, when making initial acquisitions, the person did not intend to acquire a role in corporate governance, Feinstein presumably would not have considered him an owner at that time. When he finally acquires enough shares to influence corporate conduct, does he suddenly become an owner of corporate property, and if so, what degree of an ownership interest does he acquire?

n364 It is the emphasis on who owns "legal title" that seems to have led some of those who reject the halakhic entity theory to adopt the halakhic partnership approach. See, e.g., Menashe Klein, *Mishnah Halakhot* 6:277. Contemporary halakhic authority J. David Bleich also argues that whoever possesses "legal title" to property is the property's owner. Letter from J. David Bleich, Professor of Law at Cardozo School of Law and Rosh Yeshiva at Yeshiva University to Steven H. Resnicoff, Professor of Law at DePaul University (on file with the authors).

n365 Rabbi Moshe Heinemann suggests that this is Feinstein's position. See written notations on an earlier draft of this Article by Rabbi Moshe Heinemann, Rosh Yeshiva at Baltimore's Ner Israel Rabbinical (on file with the authors).

n366 Without relevant discussion between the parties, it is difficult to discern precisely what creates this option. Secular law certainly does not recognize that sales of stock involve such options.

n367 See Shimon Greenfeld, *Maharshag* 5; Moshe Feinstein, *Iggerot Moshe*, *Yoreh Deah* 2:62-63; see also Broyde, *supra* note 16, at 115-19.

n368 See generally Lintz, *supra* note 359.

n369 Shlomo Kluger, Ha-Alef Lekhah Shlomo, Orah Hayyim, no. 238. It is not clear from this responsum whether shareholders had absolutely no voting rights or whether they had voting rights, but as a practical matter, these rights did not afford shareholders any meaningful ability to control the corporation's conduct.

n370 See Hanoh Dov Padua, Heishev Ha-Ephod 2:52.

n371 See David Tzvi Hoffman, Melamed Lehoil 1:91.

n372 See *id.*

n373 See Ezra Batzri, Dinei Mamanot, vol. 2, at 314-21.

n374 See generally J.E. Penner, The "Bundle of Rights" Picture of Property, 43 UCLA L. Rev. 711 (1996).

n375 See Ezra Batzri, Dinei Mamanot, vol. 2, at 314-21.

n376 See *id.*

n377 Thus, an employee of an insolvent corporation may be found personally liable for fraud if, when ordering goods on credit for the corporation, she knowingly misrepresented the corporation's ability to pay for the goods.

n378 See *supra* note 69.

n379 See *supra* Part V.A.2.b.ii.

n380 However, as noted in Part V.C, it is unclear what Feinstein's position would be if a particular shareholder had acquired his shares by inheritance from a shareholder who Feinstein would have considered an owner of an interest in corporate property.

n381 Of course, Weiss does not explicitly state whether his analysis would change if the nonvoting shareholder had the right to convert his shares to voting shares. It is possible that until and unless the nonvoting shares were converted, Weiss would still consider the shareholder to be a creditor, just as he presumably regards those who purchase convertible bonds from a corporation.

n382 Because it is not realistic to believe that all of the shareholders of a public corporation are Jews, Sternbuch would follow his halakhic creditor approach and maintain that the Jewish shareholders had merely loaned money to the corporate managers.

n383 See Menashe Klein, Mishnah Halakhot 6:277. For example, to the extent that the corporation pays interest on money it borrows from Jews, the limited liability doctrine would, according to some authorities, avoid the ban against taking interest. See *supra* note 300.

n384 The difficulty in applying Feinstein's approach is that it departs from formal notions of possession of title and emphasizes substance. Nevertheless, he does not articulate rules for evaluating the substance of particular cases.

n385 As noted in Part V.C, Feinstein's position is unclear as to someone who inherited shares from a voting shareholder who had influence in corporate government.

n386 As discussed in Part V.C, it is unclear how Feinstein would rule in the case of a shareholder with a significant percentage of voting shares if these shares were purchased from shareholders who did not have an ownership interest in the corporation's property.

n387 See *Piskei Din Rabanayim*, supra note 17, 10:273, 7.

n388 See *id.*

n389 If this lending activity were not within the parameter of permitted corporate activities, the loans would be considered ultra vires. Because such conduct is not permitted, secular law might regard the loans as having been made by the baker personally. If the halakhic entity theory agrees with this characterization, then despite the Jewish law entity theory, the baker would be liable under Jewish law for violating the prohibition against charging or paying interest.

n390 See Yitzhak Yaakov Weiss, *Minhat Yitzhak* 3:1.

n391 See Regensberg, supra note 191.

n392 See Yitzhak Yaakov Weiss, *Minhat Yitzhak* 3:1.

n393 See Part V.A.

n394 A leitmotif is whether, and in what way, this Article can contribute to the Jewish law process.

n395 Moreover, the sanhedrin was empowered to promulgate decrees that could alter rabbinic law. As the Israeli Rabbinic Court and others believe, such decrees might have been able to recognize corporations as distinct halakhic entities. In today's world, there are few, if any, rabbinic leaders who enjoy unquestioned authority to issue binding decrees on any wide scale basis.

n396 The authors hope that the analysis and information provided by this Article may modestly assist Jewish law authorities in reaching a greater consensus as to the halakhic status of Jewish shareholders.

n397 For a discussion of some of the rules pursuant to which various independent grounds can be combined to permit a lenient ruling see *Shulhan Arukh*, *Yoreh Deah* 110.

n398 See David Tzvi Hoffmann, *Melamed Lehoil* 1:91. This responsum recounts that Rabbi Hildesheimer and his students engaged in an intricate discussion of this issue in the Berlin Beit Midrash and developed these many different rationales.