8

The Corporate Veil and *Halakhah*: A Still Shrouded Concept

*Michael J. Broyde and Steven H. Resnicoff**

PART I. INTRODUCTION

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. There are various kinds of corporations, and people form them or invest in them for disparate reasons. Despite the significance of corporations, relatively few publications have discussed their halakhic ramifications. None has provided a detailed description of corporate governance or has comprehensively dealt with the many different scenarios that diverse types of corporations present. By contrast, this chapter identifies the relevant aspects of American corporate law and then explores its halakhic

*The authors would like to thank Michael S. Berger, J. David Bleich, David R. Blumenthal, William J. Carney, Eli Clark, Eliezar Eisenberg, Moshe Heinemann, Aaron Levine, Aaron Small, Mark Weber, and John Witte, Jr., for their gracious and generous advice and assistance.

consequences.[1] Indeed, how Jewish law (*halakhah*) 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—plays an important part in resolving countless halakhic questions and a decisive role in some.[2]

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, *halakhah* often recognizes the Jewish Law validity of commercial customs and such customs may be based on prin-

[1]It seems likely that the Jewish law analysis employed in this chapter would apply to corporations in many countries, at least those with Western-style economies. Nevertheless, because this analysis involves the interaction between Jewish law and secular legal theory and reality, it is appropriate to limit the scope of this English piece to the secular system with which the authors are most familiar. 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* R. Menashe Klein, *Mishneh 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*, for example, 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," *Transnational Law* 8:247 (1995).

[2]For example, *halakhah* requires that Jews pay their debts. If a corporation becomes insolvent, must a Jewish shareholder use his personal resources to satisfy an unpaid corporate debt? *Halakhah* requires the giving of charity. If a corporation makes charitable contributions, has a Jewish shareholder fulfilled her personal obligation? If a banking corporation exacts interest when it lends money to Jewish borrowers, has its Jewish shareholder disobeyed *halakhah* and must she return the interest that the corporation collected? If a corporation owns *hametz* on Passover, has its Jewish shareholder committed a transgression? May a Jewish consumer purchase *hametz* that was owned during Passover by a corporation with Jewish shareholders? All of these questions, and many others, are addressed at some length in the book we are preparing for publication.

ciples 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.[3] Consequently, in order to

[3]Consequently, if Jewish law authorities misunderstand secular law, they may reach incorrect conclusions about *halakhah*. 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* $1,000 and, prior to the sabbatical year, *A* gives *B* a $1,000 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 deposit the check now. 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 why 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 later, in Part V of this chapter) that makes this secular law religiously valid; and (3) the check is considered as if it were a cash payment. R. Moshe Feinstein (New York, 1895–1986), *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 agree otherwise, when

effectively evaluate alternative Jewish law theories regarding corporations, it is crucial to identify and examine the facts and circumstances of secular corporate law.

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 assesses the various Jewish law theories.

PART II. THE AMERICAN CORPORATION AND ANALOGOUS COMMERCIAL CONSTRUCTS

Under secular American law, when individuals join together, pursuant to an oral or written agreement, to pursue a commercial venture on an unincorporated basis, they are usually recognized as a general partnership. The partners of a general partnership are deemed to be authorized agents for each other in connection with the conduct of partnership business.[4] Consequently, the partners of a general partnership are jointly and severally liable for partnership debts. Thus, if collection efforts by partnership creditors exhaust partnership assets, the creditors may col-

---

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* Uniform Commercial Code § 3–310(b). 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. *See also* Michael Broyde, *The Pursuit of Justice and Jewish Law* (Yeshiva University Press: New York, 1996), pp. 115–122.

[4]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 rethought. See, for example, Steven H. Resnicoff, The Unlimited Personal Liability of Partners: Bankruptcy Implications for Professional Partners, published in 67th Annual Meeting of the National Conference of Bankruptcy Judges, Orlando, Florida, October 17–20: Educational Program (1993).

lect any deficiency from individual partners. The risk of unlimited personal liability is a severe disincentive for participating in a partnership. In addition, a partnership's existence is precarious. It typically terminates automatically, for example, if any of the partners dies. Moreover, general partnership interests are not easily sold, partly because of the financial risk incurred upon becoming a partner. The corporate form is often used to avoid these problems. Although initially corporations were, at least for the most part, created by special act of a ruler, such as an emperor or pope,[5] corporations may now be easily formed by compliance with applicable state or federal law.[6]

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 halakhic perspective. Second, and more central to the thrust of this chapter, the secular characterization may influence *halakhah* itself, because, as will be more fully explained below, certain specific halakhic 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, distinction between corporations that are formed "for-profit" (known as "business corporations") and corporations that are "not-for-profit" or "nonprofit."[7] The

---

[5]For descriptions of the historical development of corporations, see, for example, Philip I. Blumberg, *The Multinational Challenge to Corporation Law* (Oxford, 1993); Gerald Carl Henderson, "The Position of Foreign Corporations in American Constitutional Law," in *Harvard Studies in Jurisprudence*, vol. 2 (1918).

[6]The first state to adopt a flexible, general corporation law was New York, which did so in 1811. By the 1850s, such state laws were common. See Jonathan R. Macey, *Corporation Practice Guide* (Aspen Law and Business), paragraph 1101. Corporations, such as federal banks, may be created pursuant to federal law. See, for example, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 409–12 (1819) (federal creation of Second Bank of the United States was constitutional).

[7]There has been an enormous increase in the extent of commercial activities conducted by nonprofit corporations. See, for example, *The Role of Foundations Today and the Effect of the Tax Reform Act of 1969 Upon Foundations*, U.S. Congress, Senate, Subcommittee on Foundations (1973); Evelyn Alicia Lewis, "When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits," North Carolina Law Review 73:1761 (1995).

essential difference between these two categories is that a business corporation has shareholders who are entitled to receive distributions of and from the corporation's 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.

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, some stock, such as "preferred stock," may be entitled to a specified annual return even if the company shows no profit, while "common stock" is typically entitled to dividends only if there is a net or an operating surplus. On the other hand, upon a corporation's dissolution, the return to preferred stock may be specifically capped, while common stockholders are entitled to the entire residual value of the corporation once corporate debts are 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 laws regulate the transfer and sale of stock.

Incorporation offers several principal advantages. First, shareholders or members are not ordinarily personally liable for a corporation's financial obligations.[8] This insulation from personal liability is often referred to as the "corporate veil." The corporate veil provides an incentive to start businesses or 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, affords prospective shareholders more attractive business and investment

[8]As to general business corporations, see, for example, Henn and Alexander, *Laws of Corporations and other Business Enterprises* § 73 (1983), at 130; Macey, *Corporation Practice Guide* (Aspen Law and Business), paragraph 1114. As to nonprofit corporations, see, for example, Revised Model Nonprofit Corporation Act § 6.12; California Nonprofit Corp. Law, Cal. Corp. Code §§ 5350, 7350; New Jersey Nonprofit Corporation Act, *N.J. Stat. Ann.* 15A:5–25.

opportunities, while facilitating the raising of capital through the issuance of stock.[9]

Second, a corporation enjoys perpetual existence. Neither the death of officers, directors, shareholders or members,[10] nor the transfer of ownership interests from one shareholder to another, terminates the corporation's legal authority to continue its business.

Third, the corporation's 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.

Fourth, as a general rule, a corporation is centrally managed.[11] 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 the right and ability to do so. Indeed, the dichotomy between control and beneficial ownership is a central feature of corporate law[12]—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 typology of business corporations. Instead, assorted labels are utilized to refer to corporations that pursue specific activities, possess certain characteristics, or qualify for particular tax treatment. For purposes of this chapter, it is useful to identify only a few of these labels:

---

[9]See, for example, Demerios G. Kaouris, "Note, Is Delaware Still a Haven for Incorporation?" *Delaware J.Corp.L.* 20:965 (1995); Michael J. Phillips, "Reappraising the Real Entity Theory of the Corporation," Fla. St. U.L.Rev. 21: 1061, 1083 (1994); Frederich G. Kempin, *Historical Introduction to Anglo-American Law in a Nutshell*, (West Publishers: 3d ed. 1990) pp. 278–279.

[10]By contrast, partnerships come to an end when one of the partners dies. See Uniform Partnership Act, § 31(4) (partner's death dissolves the partnership).

[11]The "Kintner Regulations" provide that, in order for a business organization to be treated as a corporation for tax purposes, it must possess three of these four characteristics: (1) limited liability, (2) continuity of "life", (3) free transferability of interests, and (4) centralized management. See Treasury Regulation § 301.7701-2(a) (1995).

[12]See, for example, Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan 1932); (corporations are controlled by their managers and not by the "shareholders," their owners).

1. Public corporations

For purposes of this article, "public corporation" is used in its modern sense to refer to a corporation whose shares are publicly traded—and this is the way in which this chapter 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. A number of states have specific statutory provisions dealing with *close corporations*. These statutes usually state that they apply: (a) to any corporation with no more than a specified, low 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) to any corporation that elects to be designated as a "close corporation"; (c) to any corporation that so elects and also meets the statute's definitional criteria of a "close corporation"; and (d) to 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 so long as these pre-existing corporations satisfy certain statutory criteria. Many corporations that possess the characteristics of a close corporation nonetheless do not elect to be so designated and, therefore, are treated by law as general business corporations. Nonetheless, irrespective of the label applied to a corporation by state law, this chapter will refer to it as a "close corporation" so long as it bears the typical characteristics of close corporations. The mere fact that a corporation is, or qualifies to be, a close corporation does not mean that the corporation is a financially small enterprise; close corporations may have enormous assets.

Close corporations are almost always formed by small numbers of individuals who are actively and importantly 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. Such people may choose a corporate format primarily to enjoy limited personal liability. As a consequence, these key individuals—or their close family members—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 later, these distinctions between close corporations and public corporations could be of substantial halakhic significance.

3. Professional corporations

Many states have enacted special statutes to enable professionals to incorporate and, thereby, 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.[13] 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. Similar restrictions may arise as a result of ethical opinions or other rules promulgated by the state bodies that regulate individual professions.

Ownership of stock in professional corporations is virtually always limited to the professionals who work for the corporation or who 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

[13]Sherri J. Conrad, "Protecting Personal Assets: Does the Professional Corporation Shield Lawyers From Vicarious Liability?" *No. 1 Legal Malpractice Rep.* 5:3 (1996).

other specific facts about the professional corporation. If there are few shareholders, then one might expect that there is no great split between control and beneficial ownership. If, however, the professional corporation is a major law firm with hundreds of shareholders, it may be structured in a way in which the voices of very few shareholders are heard.

4. Analogous structures

Two common business forms bear similarity to corporations: *limited partnerships* and *limited liability companies*. These organizations, like corporations, are created in accordance with specific state statutes that confer limited liability to limited partners and to owners of interests in limited liability companies.

American law characterizes a corporation as a discrete entity.[14] Courts almost always treat corporations as distinct entities. Legislatures frequently define the word "person" to include corporations and, when legislatures are silent, courts routinely construe the statutory, and sometimes even the constitutional,[15] term "person" to include corporations. The entity theory is consistent with the principal corporate characteristics: limited liability,[16] perpetual existence, and the easy transferability

[14]Although a modern subcategory of the aggregate theory has received considerable support among legal academics, see, for example, Michael J. Phillips, "Reappraising the Real Entity Theory of the Corporation," Florida State U.L.Rev. 21:1061, nn. 1–2 (1994) (theory that a corporation is a nexus of individual contracts among the various participants in the corporation), the entity theory continues to be espoused by many social philosophers. Moreover, courts, lawyers, and legislatures, for the most part, continue to characterize and treat corporations consistent with the entity theory.

[15]After a number of opinions apparently based on aggregate theory, the Supreme Court, in *Southern Railway Co.* v. *Greene*, 216 US 400 (1910), clearly adopted the entity theory with respect to the "privileges and immunities" clause of the Fourteenth Amendment of the United States Constitution, declaring "[t]hat a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion."

[16]The concept of limited liability emanates easily from the entity theory. See, for example, Michael J. Phillips, "Reappraising the Real Entity Theory of the Corporation," Florida. State U.L.Rev. 21:1061, 1083 (1994). The text only states

of shares. Similarly, consonant with this characterization, corporations hold property in their own name, they are entitled to sue in their own name[17] (and should be sued in their own name),[18] they are entitled to assert federal diversity jurisdiction, they are (usually), taxed separately from their shareholders;[19] they may be convicted of civil or criminal offenses, and, although a person cannot enter into a contract with himself, corporations may contract with their own shareholders. By contrast, shareholders are not deemed to own a divided or undivided interest in particular pieces of corporate assets, they cannot individually exercise control or dominion over corporate assets, they cannot bring suit in their names against corporate creditors, they cannot bind the corporation to any undertaking, they cannot be disqualified as an "interested executor" of an estate against which their corporation asserts a claim.[20] Twentieth-century statutory developments also apparently indicate acceptance of the entity theory by, among other things, providing that directors can make decisions based on factors other than the immediate interests of the stockholders, and by substantially depriving shareholders of as an ability to meaningfully participate in corporate governance.[21]

---

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. Indeed, the entity theory seems historically to have preceded universal acceptance of the doctrine limiting the liability of individual shareholders.

[17]Fletcher Cyc. Corp. § 25, n. 4.

[18]See, for example, *Goulding* v. *Ag-Re-Co, Inc.*, 233 Ill.App.3d 867, 599 N.E.2d 1094 (1992).

[19]An important exception applies to corporations qualified under Subchapter "S" of the Internal Revenue Code, which are 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. *I.R.C.* § 1366.

[20]For more on the various issues discussed in this paragraph, see Fletcher Cyc. Corp. § 25–30.

[21]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 "owner" is ambiguous and is often used with imprecision. 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 prop-

PART III. EVALUATING HALAKHIC PERSPECTIVES OF CORPORATIONS

This part examines how corporations should be treated as a matter of Jewish law by critically examining the principal approaches. The five chief theories are: (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 A will consider the first two approaches together, because they represent some of the clearest contrasts.

Part A. The *Halakhic* Entity and *Halakhic* Partnership Approaches

1. Introduction

Under Jewish law, who is the owner of the property that secular law considers to be owned by a corporation (*i.e.*, "the corporate assets")? Before answering, it should be noted that the question implicitly assumes that *someone* does own these assets. After all, it is counterintuitive 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 come along and take the property for herself. All of the Jewish law authorities that address this question adopt the position that the property has an owner.

The most obvious answer to this 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. 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

---

erty are supposed to inure to someone else (referred to as 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 this 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.

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.[22] According to this approach, the shareholders, by virtue of their owning shares, would presumably be perceived as owning certain rights with respect to the corporation, the independent *halakhic* entity.[23]

Nevertheless, other commentators believe that, as a general rule, under Jewish Law only human beings can own or acquire property.[24] According to this opinion, if a corporation were regarded as an artificial legal entity separate and apart from its shareholders,[25] neither the corporation nor its shareholders would own the property. Many of these

---

[22]See, generally Part II of this chapter, as well as Part III:A:2, generally.

[23]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, for example, *Shulkhan Arukh* (R. Joseph Caro, Safed, 1488–1575), *Yoreh Deah* 367:22, and *Hoshen Mishpat* 127:1; B.T., *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, for example, R. Moshe Sternbuch , *Moadim U'Zemanim* 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").

[24]"In Jewish law, corporations and organization lack capacity to hold property as 'legal persons.' Property must be held by individuals, otherwise it is ownerless." See R. J. David Bleich, *Contemporary Halakhic Problems*, p. 388. See also R. Menashe Klein, *Mishnah Halakhot* 6:277, pp. 169–170 (only human beings may acquire property); R. Moshe Sternbuch (Israel, contemporary), *Moadim Uzmanim* 3:269, n. 1 (the existence of a company does not prevent the shareholders from being the owners of the corporate property); R. Yitzhak Wasserman, "Interest from Loans to Banks," Noam 3:195–203 (5720).

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

authorities resolve this dilemma by declaring that under Jewish Law a corporation is a partnership.[26]

According to the *halakhic* partnership perspective, all—or some[27]—of the shareholders are partners and, as such, own a percentage interest in all of the corporate assets. Consequently, Jewish shareholders could be found liable for violating Jewish Law if the corporation owns dough on Passover, operates on the Shabbat 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 the owners of the corporation's property. Parts II and III of this chapter reveal that some of these differences depend on the type of corporation considered (particularly as to whether the organization being considered is a public corporation or a close corporation). Nevertheless, before introducing the analyses of individuals 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 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, is authorized to act on behalf of the corporation. They cannot bind the corporation, gain access to or use

---

[26]See, for example, R. Solomon b. Joseph Hirsch Ganzfried (Hungary, 1804–1886), *Kitzur Shulkhan Arukh* 65:28; R. Menashe Klein, *Mishnah Halakhot* 6:277. See also R. Moshe Sternbuch, *Moadim Uzmanim* 3:269 (a partnership unless all or most of the shareholders are non-Jews).

[27]See, Part III:B below for a discussion as to whether a shareholder's rights or status under Jewish law depends on whether he or she possesses voting or nonvoting shares.

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 invests 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 for the best interests of the corporation, not in accordance with the best interests of the actual, flesh-and-blood 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 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, corporate shareholders, as a general rule, 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 *halakhic* partnership. Jewish partnership law arguably presupposes that the partners may act as agents for each other. Jewish law, however, generally[28] provides that non-Jews cannot effectively act as agents for Jews, and vice versa.[29] Similarly, to the extent that directors, officers, or employees are gentiles, they could not be deemed under Jewish law to act on behalf of Jewish shareholders.[30]

---

[28]Some Jewish law authorities, however, 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 R. Yeheil Mekheil Epstein (Belorussia, 1829–1908), *Arukh HaShulkhan, 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 halakhicly valid agents for Jews. See R. Yitzhak Wassermann, "Interest from Loans to Banks," *Noam* 3:195–203 (5720); R. Yitzhak Yaakov Weiss (Israel, contemporary), *Minhat Yitzhak* 3:1. As explained in our longer work, secular law does not treat shareholders as "agents" of one other. Nor does secular law treat corporate directors, officers or employees as "agents" of the flesh-and-blood 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.

[29]*Shulkhan Arukh, Hoshen Mishpat* 158:1.

[30]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, for example, R. Ephraim b. Aaron Navon (Constantinople, 1677–1735), *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 would probably not be considered daily workers of the Jewish shareholders. It seems unlikely that corporate directors would fall into the class of "daily workers."

R. Shaul Weingart[31] is one of the first Jewish law commentators to *expressly* advance the *halakhic* entity approach.[32] R. Weingart considers the Jewish law prohibitions against a Jew's owning hametz *during* Passover and against a Jew's benefitting *after* Passover from dough that was illegally owned by a Jew during Passover.[33] He argues that, because a corporation as a *halakhic* entity is not "Jewish," its ownership of *hametz* during Passover does not violate Jewish law, and Jewish shareholders—as well as Jewish consumers—may benefit from the *hametz* after Passover.[34]

R. 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. He emphasizes not only the ways in which a shareholder's rights are restricted—that is, that a shareholder has no right to eat, sell, or destroy the corporation's *hametz* or to use or even to enter the corporation's premises[35]—but also the fact that a shareholder enjoys unusual financial protection—that is, 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. In

[31]R. Saul Weingart, "Corporations and *Hametz*," in Yad Shaul (1954), pp. 35–49 (apparently with respect to an Austrian or German corporation).

[32]As will be discussed in Part III:D, below, 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.

[33]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 in Part III:A:2, below.

[34]R. 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.

[35]Of course, these shareholders—just as any other consumers—could enter corporate premises as customers.

addition, R. Weingart argues that two widespread practices can only be justified by treating corporations as *halakhic* entities. He asserts that rejection of the *halakhic* entity approach would mean that countless Jews would be violating Jewish law.[36]

The truth, however, is that the practices that bother R. Weingart, at least as he presents them, do not really seem troublesome. R. Weingart refers to: (1) ownership of "paper" of the "government bank"; and (2) ownership of governmental currency ("paper money").[37] 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[38] owns

[36]R. 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 R. 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 R. Weingart rejects the "relationship test" discussed in Part III:D of this chapter, his dismissal of that test may be unwarranted. Similarly, other approaches not addressed by R. Weingart—such as the purchaser of entitlements approach examined in Part III:C—may be correct.

[37]The transliteration of the word R. Weingart uses is "papiergelt." The German word "gelt" is used for "money."

[38]The truth is that R. Weingart is unclear in expressing his argument with respect to currency. 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. . . ." 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 R. Moshe

a percentage of the government's assets. 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 *hametz*. The weakness of his argument lies in the fact that banknotes 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 personality.[39] Even if the liens did apply to such dough, so long as the *hametz* is not in the lienholder's possession, there would be no Jewish law violation.[40]

R. 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.[41] For example, at least one decision of the Rabbinical Court of Israel also

---

Sternbuch, *Moadim Uzmanim* 3:269, n. 1 (which argues that the right R. Weingart referred to was not transferrable), interpreted R. Weingart as making this argument. Nevertheless, it does not seem reasonable to suggest that paper currency attests to any rights based on political theory. After all, noncitizens may possess paper currency while some citizens (who, for instance, may live abroad) may not. Consequently, as stated in the text, it seems that R. 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 R. Yitzhak Yaakov Weiss, *Minhat Yitzchok* 3:1, seems to have understood R. Weingart. 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, R. Weingart's argument seems to be completely undermined.

[39]See, generally, *Shulkhan Arukh, Hoshen Mishpat* 39, 40.

[40]*Shulkhan Arukh, Orah Hayyim* 440:4.

[41]As discussed in the text, the Israeli Rabbinical Court and R. Regensberg are among those who explicitly adopt this approach, and several other authorities, such as R. Isaac Aaron Ettinger (Lemberg, 1827–1891) and R. Moshe Shick (Hungary, 1807–1879; *Maharam Shick*), may have implicitly endorsed it. See Part III:A2(a) and associated text, below.

adopts the *halakhic* entity approach.[42] 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. Because the father of several of the shareholders had passed away, they were considered by Jewish law to be minor orphans. Jewish law provides that a court can entertain valid legal arguments on behalf of such orphans even if the orphans, or their legal representatives, fail to raise the arguments themselves.[43] The majority opinion concludes that the corporation is the real defendant and, therefore, the rule regarding orphans is irrelevant. As to corporations, the court broadly declares: "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."[44]

The Israeli Rabbinical Court justifies the *halakhic* entity approach: (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.

a. Corporate analogs in Jewish Law. The Israeli Rabbinical Court begins by contending that the concept of a corporation is already embodied within traditional Jewish law by the concept of the "public" (*tzibur*). The court differentiates between a partnership, which is a conglomeration of persons in which each person retains his individuality and each of whom possesses a rich and complete form of ownership in partnership property, 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.[45] The court argues that this distinction

[42]*Piskei Din Rabanayim* 10:273 at § 7 (as reported in Bar Ilan's CD-Rom *Judaica Library*, version 4.0). But see *Piskei Din Rabanayim* 6:322.

[43]*Piskei Din Rabanayim* 10:273 at § 7 (as reported in Bar Ilan's CD-Rom *Judaica Library*, version 4.0).

[44]Ibid.

[45]See also R. Shemaya Eliezer Dekhovsky, *Naot Desha*, at pp. 40–56; R. Moshe Ameil, *Responsa Darkei Moshe-Derekh HaKodesh* 1:5(10–11); R. Yitzhak Bari,

explains the dissimilar rules applicable to a voluntary sacrifice brought by a partnership and a voluntary sacrifice offered by the public.[46]

In addition to referring to other authorities who provide more extensive discussions of the distinction between a partnership and a community,[47] the court cites a few examples.[48] Citing R. Menachem Zemba (Poland, 1883–1943) the distinction is apparent in the rules applying to the mandatory Passover sacrifice.[49] Such an offering is not allowed to be made if its owner still has dough in his possession. When a group of people brings 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 that R. Yehuda's view is that, on the day before Passover, the daily offering of the public may also not be brought if the public has *hametz*. Nonetheless, according to R. Zemba, *Tosafot*[50] states that R. Yehuda agrees that this offering of the public may be brought even if there is an individual among the public that still possesses *hametz*. The reason for this is that the public is a legal person that is considered as a whole; the fact that an individual member of the public has *hametz* is insignificant.[51]

Ha-torah V'hamedina 11–13:461; R. Menachem Zemba (Poland, 1883–1943), *Zera Avraham* 4:21–24; Hayyim David Regensberg, *Mishmeret Hayyim* (1966), at pp. 134–137.

[46]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.

[47]See, for example, R. Menachem Zemba, *Zera Avraham*, no. 4:21–24; R. Moshe Amiel, *Darkei Moshe-Derekh HaKodesh* 1:5 (10, 11). See also R. Hayyim David Regensberg (Israel, contemporary), *Mishmeret Hayyim*, pp. 135–137.

[48]The author of the ruling writes that he had elsewhere expounded on the qualitative distinction between *tzibur* and partnership.

[49]R. Hayyim David Regensberg makes the same argument. See R. Hayyim David Regensberg, *Mishmeret Hayyim*, at pp. 135–137.

[50]*Tosafot*, B.T., *Menahot* 78b, s.v. *oh*.

[51]R. Zemba construes the *Rambam*, *Mishneh Torah*, *Temurah*, Chapter 1:1, as disagreeing with *Tosafot*, because the *Rambam* states that members of the *tzibur* 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, R. Zemba and the Israeli Rabbinical Court argue that this

The court explains that another distinction between a partnership and the public is that the public, just as a corporation, enjoys perpetual existence. The Talmud states that "the public never dies."[52] 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.[53] On the other hand, the Talmud declares that when a particular atonement[54] is effectuated for the public, 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. 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 that endures indefinitely.[55]

R. Hayyim David Regensberg, who makes some of these same observations, also argues that this discrete concept of the public is supported by a *Mishneh* in the fifth chapter of the tractate "Vows" (*Nedarim*).[56] Jewish law generally permits a Jew, through a vow, to ban another from deriving any benefit from the first's person or property. The *Mishneh* provides that:

> [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].

---

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.

[52]In Hebrew, *ain tzibur maitim*. See B.T., *Temurah* 15b and the accompanying commentary by *Tosafot* s.v. *ka*.

[53]B.T., *Temurah* 15a.

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

[55]B.T., *Temurah* 15b. See also *Encyclopedia Talmudit* 10:435–438.

[56]B.T., *Nedarim* 46b.

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.[57] R. Solomon b. Isaac (Troyes, 1040–1105; *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." 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, he or 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 *Mishneh* may continue to benefit from the properties of those that came up from Babylon despite the vow that was taken.

R. Regensberg[58] also suggests that R. Yochanan ben Zachai endorses this view of the public as a legal entity in his dispute with Ben Buchri, reported in the fourth *Mishneh* of the first chapter of tractate *Shekalim*.[59] R. Yochanan ben Zachai rules that Jews of 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. R. 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 offererings were so considered, an inconsistency would arise among biblical passages.[60] While one verse states that: "[e]very flour-offering brought by a *Kohain* must be completely burned; it shall not be eaten,"[61] other verses clearly require that *Kohanim* eat—and not burn—three types of flour offerings that are purchased with

---

[57]B.T., *Nedarim* 48a.

[58]R. Hayyim David Regensberg, *Mishmeret Hayyim*, at p. 136. See also R. Moshe Ameil, *Darkei Moshe-Derekh HaKodesh*, vol. II, at p. 308.

[59]In the Talmud, this *Mishneh* is cited in tractate *Shekalim* 3b as the third *halakhah* in the first chapter.

[60]See R. David Frankel, *Korban Ha-Eida*, on *Jerusalem Talmud, Shekalim* 3b.

[61]Leviticus 6:16.

public funds.[62] The *Kohanim* therefore argued that it was only because they were exempt from contributing to the public fund that prevented these three types of flour-offerings from being deemed to have been "brought by a *Kohain*" and, therefore, permitted the *Kohanim* to eat the offerings.

R. 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, that they 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. R. 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 considered to be those of the *tzibur* as a whole and can be eaten.[63] R. Moses ben Maimon (Egypt, 1135–1204; *Rambam* or *Maimonides*) states that Jewish law is in accordance with R. Yochanan ben Zachai.[64]

The Jewish law concept of the public arguably applies at certain subnational levels as well. For example, the Jewish people is 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.[65]

---

[62]These three offerings are: (1) the *Omer*, consisting of barley; (2) the two loaves of wheat bread offered on the holiday of Pentecost (*Shavuot*); and (3) the shewbread, consisting of twelve loaves of bread brought each week.

[63]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.

[64]*Rambam, Mishneh Torah, Shekalim* 1:7.

[65]*Rambam, Mishneh Torah, Maaser* 6:15–17 (discussing when such money must be returned).

Similarly, there is a concept of the "tribe" of the poor.[66] Each local community establishes a public charity fund[67] 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.[68] 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.[69] 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 R. Joseph b. Moses Tranti (1568–1639; *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 money was held and used, are not really "owners" of the money.[70] In this same vein, R. Shimon Greenfeld (d. 1930; *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."[71]

The holy Treasury,[72] 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.[73] The Temple treasurer[74] participates in the

[66]In Hebrew, *shevet aniyim*.

[67]In Hebrew, a *havurat tzedakah*.

[68]See, for example, B.T., *Bava Kamma* 36b.

[69]*Rambam, Mishnah Torah, Matanot Aniyim* 8:5.

[70]R. Moshe Natan Lemberg, *Ribit B'Halva'ah Bankit, Noam* 2:241.

[71]Id. Although he 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 although the *Maharshag* refers to these monies as *hekdesh aniyim*, he does not mean the concept of *hekdesh* referred to earlier in this text.

[72]The holy Treasury is known as *hekdesh*.

[73]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.

[74]The treasurer is known as the *gizbar*.

acquisition and sale of the properties,[75] administers them and represents the interests of the Treasury in any Jewish Law litigation.[76] 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.[77] Property that belongs to the Treasury is exempt from these rules because they are not considered property that belongs to another person as that phrase appears in the Bible.[78] Although the Talmud refers to these properties as money belonging to "the above" or "to the One who dwells above (*i.e.*, God),"[79] R. Regensberg suggests that this phrase may merely be intended to make it clear that the property does not belong to any individual.[80]

R. Regensberg states that by regarding the holy Treasury as a *halakhic* entity, one can better understand the position taken by *Tosafot* and R. Shimon ben Meir (Ramerupt, ca. 1080–1174; *Rashbam*) that the Treasury cannot acquire property by a process known as "acquisitions made by one's yard."[81] Jewish law recognizes that a normal person may acquire property in two ways, by his own act or by the act of others. 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

---

[75]*Hekdesh, Encyclopedia Talmudit*, 10:435–438.

[76]Aaron Kirschenbaum, "Legal Persons," in Menachem Elon, ed., *Principles of Jewish Law*, at columns (Jerusalem: Keter Publishing House, Ltd., 1975), pp. 162–163.

[77]*Hekdesh, Encyclopedia Talmudit* 10:399–431. For example, *hekdesh* was exempt from 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*), ritual rules (such as the prohibition against owning dough on Passover), and limitations on financial transactions (such as prohibitions against lending on interest and overcharging).

[78]This phrase is transliterated as *shel re'eihu*.

[79]This phrase is transliterated as *mamon govoha*.

[80]R. Hayyim David Regensberg, *Mishmeret Hayyim*, at p. 136. R. Regensberg also suggests that because the property of *hekdesh* 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.

[81]The Hebrew expression is *kinyan hatzer*.

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 could grasp otherwise ownerless objects that come within its boundaries. R. Regensberg reasons that because the Treasury, as an artificial or legal person, but not a natural person, cannot act on its own to acquire property,[82] it cannot acquire property that lands in its yard either. Instead, the Treasury can only acquire property which someone else transfers to it. R. Regensberg thinks that R. Moses ben Nachman (Spain, 1194–1270; *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 owner of the yard is oblivious to what is happening. Because the process does not require human thought or intention,[83] *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.

Reminiscent of the sentiments of many secular theorists,[84] R. Regensberg argues that the notion of the public as more than merely a combination of individuals is a well-established "sociological reality."[85] Although the same argument might be used to argue that a partnership—which is also an *association* of people—might constitute a separate sociological reality, R. 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.[86] 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.

---

[82]Obviously, Jewish law does allow *hekdesh*, as a legal person, to act through its agents, such as *gizbar*. R. Regensberg, however, 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*.

[83]The Hebrew expression is *daat*.

[84]See, for example, Boudewijn Bouckaert, "Corporate Personality: Myth, Fiction or Reality," 25:2 *Israel Law Review* 156 (1991), pp. 170–172; David Millon, "Theories of the Corporation," *Duke L.J.* 201 (1990), pp. 211–221.

[85]R. Hayyim David Regensberg, *Mishmeret Hayyim*, at pp. 136–137.

[86]Id.

The Israeli Rabbinical Court cites *tefisat habayit*, loosely translated as a "decedent'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 to 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.[87] When partners own animals, no animals need be set aside. While 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.

Although opponents of the *halakhic* entity approach may not deny 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 involves 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, certainly not by the voluntary actions of individuals intending their own personal gain.[88]

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.[89] On the other hand, some of these institutions, such as the charity fund,

---

[87]The animals set aside are referred to as *maaser behaima*.

[88]R. Yitzhak Wassermann, "Interest from Loans to Banks," *Noam* 3:195–203 (5720); R. Menashe Klein, *Mishneh Halakhot* 6:277; R. Moshe Sternbuch, *Moadim Uzmanim* 3:269, n. 1; Simcha Meron, "The Creation known as a 'Corporation' in Jewish Law," *Sinai* 59:228 (5726). Cf. R. J. David Bleich, *Contemporary Halakhic Problems*, vol. 3, at p. 388.

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

were, arguably, voluntarily created.[90] 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 applied to *commercial* organizations.[91] To a large extent, the split of authority between proponents of the *halakhic* entity and *halakhic* partnership approaches seems 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 interest. Nevertheless, many authorities found that there was a problem regarding interest.[92] Still others resolved the interest issue through rather complicated rationalizations.[93] 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 a historical explanation for this phenomenon, at least as to early Jewish Law literature. As explained in Parts II and III of this chapter, until relatively recently, secular law provided for a closer relationship between shareholders and their assets. Moreover, although English and early American law adopted the corporate entity theory rather early, the aggregate theory retained for quite some time considerably greater standing in Europe, where these early responsa originated. In addition, shareholders of many corporations were not entitled to limited liability. Indeed, even the early responsa that allow investing in banking corporations

---

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

[91]See, for example, R. Hayyim David Regensberg, *Mishmeret Hayyim*, at p. 135.

[92]See, for example, R. Tzvi Pesah Frank (Jerusalem, 1873–1960), *Har Tzvi, Yoreh Deah* 126.

[93]For a discussion of a variety of such solutions, *see* R. Yitzhak Blau (Contemporary), *Brit Yehuda* 7:25.

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 the *halakhic* entity theory.[94] R. Isaac Aaron Ettinger (Lemberg, 1827–1891), for instance, rules that there is no problem in being a shareholder in a banking corporation that loans on interest.[95] Among other things, R. Ettinger refers to the end of the *Mishneh* in *Nedarim* that was quoted above. The *Mishneh* provides that if a person vows that his fellow should derive no

[94]A number of responsa that permit Jews to hold shares in corporations that lend on *ribbit* 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 R. 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. R. 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*). R. Shick argues that money that is so *meshubad* is not called *kaspekhah*. On the surface, however, 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 (*kaspekhah*) than if he had made it *meshubad* only to a gentile. Yet it does not seem that a Jew prevents his money from being *kaspekhah* 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 words are that each bit of the money invested is *meshubad* to the company. Perhaps it is possible that what he really means is that since the money was given to the company, it no longer belongs to the individual investors. If so, to whom does it belong? Perhaps to the company as a distinct halakhic entity.

[95]R. Isaac Aaron Ettinger, *Maharyah Ha-Levi* 1:54.

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 was kept), and the holy books.[96] 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 *Mishneh* could permissibly derive benefit from the property if they would first transfer their ownership of the property to the someone else, such as the political leader of the community.[97] Once they no longer owned interests in this property, they could derive benefit from the property without deriving 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.[98] With respect to the case of the bank, R. 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* [*i.e.*, the Jewish shareholder][99] 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

[96]B.T., *Nedarim* 48a.

[97]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; people could confidently transfer their interests to the *Nasi* without fear that the *Nasi* would prohibit them from using his share in the community property. Jewish Law commentators indicate that a transfer to anyone else would also work. See, for example, R. Yeheil Mekheil Epstein, *Arukh HaShulkhan, Yoreh Deah* 224:7.

[98]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 it 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 confidant—and justifiably so—that the political leader of the community would ordinarily permit the transferor to use the property.

[99]Interestingly, the Jewish term *malveh* literally means "lender."

> community because that [process] involves a bit of a trick, as . . . [Nahmanides] says there, unlike our case [of the bank].[100]

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*, R. Ettinger seems implicitly to be stating that the bank was a separate legal entity and not merely a partnership. Later on R. Ettinger makes basically the same point, although he puts it a little differently, when he says 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."*

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 was really a partnership, not a corporate body.[101] 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*.[102] 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.[103] Second, the testimonial dis-

---

[100]In the case of the bank, the Jewish shareholder really does not have the power to control collection of the loan. R. Isaac Aaron Ettinger, *Maharyah Ha-Levi* I:54, at 30.

*R. Isaac Aaron Ettinger, *Maharyah Ha-Levi* I:54, at 30.

[101]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 Aaron Kirschenbaum, "Legal Person," in Menachem Elon, ed., *Principles of Jewish Law*, at col. 161.

[102]Id. See also *Shulkhan Arukh, Hoshen Mishpat*, no. 37.

[103]The language of the *Rambam*, for instance, suggests that the disqualification is not based on the concept of "ownership" but because members of the public could benefit themselves from self-serving testimony. See, for example, *Rambam, Mishneh 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").

qualification 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 use 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. Because this person could obtain release from the vow, it is considered, for certain purposes, as if he had already been released.[104] 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.[105] Second, they might argue that what could happen if there were unanimous agreement is irrelevant. The talmudic reference to someone's obtaining release from a vow is inapt, because such 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 this ability. Indeed, merely obtaining the names and addresses of the other shareholders and communicating with them may be prohibitively costly. Of course, as discussed 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.

b. The Creation of New Halakhic *Rules.* The Israeli Rabbinical Court observes that some, such as R. 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. The court declares that the assertion is incorrect and argues that, even if there were no precedent for the halakhic entity approach, Jew-

[104]*Hafara, Encyclopedia Talmudit* 10:121, 123.

[105]See, generally, Daniel J. H. Greenwood, *Fictional Shareholders: for Women Who Are Corporate Managers Trustees, Revisited*, 69, Southern California Law Review 1021 (1996), n. 90.

ish law doctrines would allow a court to treat a corporation as a halakhic entity. The court cites 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 demalkhuta dina*).

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. 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, 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. R. Aryeh Leib b. Joseph Ha'Kohen Heller (1745–1813) states that those who assert that liens are Biblically invalid do not distinguish between implicit or 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."[106] As the Israeli 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*. 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 a rabbinical courts can introduce into Jewish Law the concept of a voluntarily transferred lien, they can also introduce the secular concept of a corporation as a distinct entity.[107]

---

[106]R. Aryeh Leib b. Joseph Ha'Kohen Heller (1745–1813), *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.

[107]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

Opponents of the *halakhic* entity approach raise at least two objections. First, they argue that even if rabbinic authorities *could* implement the concept of a corporation into Jewish law, rabbinic authorities have not done so yet.[108] 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 his or her ownership rights, it cannot function to create ownership rights for someone—or something (corporeal or incorporeal)—to which Jewish Law does not otherwise give any such rights.[109] 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 per-

---

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. Not all of these matters would be likely to involve litigation or a *beit din*'s ruling. Moreover, even if there were such a ruling, it would likely 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, however, 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 under *Israeli* law, it is unclear whether it could 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.

[108]See, for example, Simcha Meron, "The Creation Known as a 'Corporation' in Jewish Law," *Sinai* 59:228 (5726).

[109]See, for example, R. Moshe Sternbuch, *Moadim Uzmanim* 3:269; R. Menashe Klein, *Mishneh Halakhot* 6:277; R. Yitzhak Wasserman, "Interest in Bank Loans," *Noam* 3:195 (5720).

son of ownership but also *create* ownership rights for someone else.[110] Except for the *halakhic* entity theorists themselves, no one seems to say that a rabbinical court can create ownership rights for something which, 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; and (2) customs established among merchants acquire Jewish law validity,[111] provided that the practices are not otherwise prohibited by Jewish Law. [112] These two precepts are arguably interrelated; commercial customs are sometimes said to be binding because business people implicitly agree to abide by them.

The *Mishneh* pronounces the validity of commercial customs. It 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.[113]

The *Shulkhan Arukh* makes it clear that common commercial practices override many Jewish law default rules that would otherwise govern a transaction.[114] Moreover, these customs are valid even if the majority of the business people establishing them are not Jewish. R. Moshe Feinstein explains:

---

[110]Menachem Elon, *Principles of Jewish Law*, columns 507–515, 686–690, 913–920.

[111]Id.

[112]Doing business on the Sabbath is prohibited by Jewish law. No matter how often merchants might, regrettably, violate this rule by operating on the Sabbath, their illegal conduct could not establish a valid custom to work on the Sabbath.

[113]B.T., *Bava Metziah* 83a.

[114]*Shulkhan Arukh, Hoshen Mishpat* 331:1. See also *Jerusalem Talmud, Bava Metziah* 27b (statement of Rav Hoshea, "Custom supersedes *halakhah*"); R. Joseph Kolon, *Maharik*, no. 102; and R. Shlomo Shwadron (Israel, contemporary), *Maharashdam*, no. 108.

> 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.[115]

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.[116]

Nevertheless, just as there are authorities who 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*, that is, 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*. There is a classical controversy among *Rishonim*, talmudic commentators who lived from 600 to 1,000 years ago,

---

[115]R. Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat* 1:72. See also R. Yeheil Mekheil Epstein, *Arukh HaShulkhan, Hoshen Mishpat* 73:20. See, generally, Steven H. Resnicoff, "Bankruptcy: A Viable Jewish law Option?" *Journal of Halacha and Contemporary Society* 24:10–14 (1992).

[116]See, for example, R. Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat* 1:72; R. David Chazan, *Nidiv Lev*, no. 12; R. Eliyahu Chazan, *Nidiv Lev*, no. 13; R. Isaac Aaron Ettinger, *Maharyah Ha-Levi* 2:111; R. Avraham Dov baer Shapiro, *D'var Avraham* 1:1; R. Israel Landau (Israel, contemporary), *Beit Yisroel*, no. 172; R. Yitzhak Blau, *Piskei Choshen, Dinei Halva'ah*, ch. 2, *halakhah* 29, note 82. For example, R. Yosef Iggeret, *Divrei Yosef*, no. 21, 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.

however, as to whether *situmta* is effective *to accomplish tasks that cannot normally be transacted according to Jewish law.*

R. Asher b. Jehiel (Germany, 1250–1327; *Rosh*), R. Shlomo b. Jehiel Luria (Poland, 1510–1573), 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 place would incorporate the practice as valid and enforceable.[117] For instance, no basic Jewish law form of *kinyan* permits someone to sell *something* that does not yet exist or to sell to *someone* who does not yet exist.[118] Nevertheless, R. Shlomo

[117]R. Asher ben Yeheil, *Responsa of the Rosh* 13:20; *Maharam Me'Rutenberg* (R. Meir b. Baruch of Rothenburg, 1215–1293), cited in *Mordechai* (R. Mordechai b. Hillel, 1240–1298), on B.T., *Shabbat* 472; R. Shlomo Luria, *Maharshal* 36. See also R. Jacob Lorberbaum (Lisa, 1760–1832), *Netivot, Biurim on Shulkhan Arukh, Hoshen Mishpat* 201:1, who appears to agree.

[118]Jewish law distinguishes between different categories of things "that do not yet exist." Perhaps the case about which there is 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 R. 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. R. Meir rules: she is wed. B.T., *Kiddushin* 63a. According to Jewish law, formation of a Jewish marriage requires a man to acquire "ownership" interests in his intended and the woman's agreement to transfer herself to him. Consequently, the Talmud interprets the debate between the Sages and R. 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 (B.T., *Bava Metziah* 16b), to "what my trap shall ensnare" (id.), to "what I shall inherit" (id.), and to the fruit that will grow on a particular tree in the future (id., at 33b). In each of these cases, the Sages rule that the agreement is not legally effective or binding.

ben Avraham Aderet (Spain, 1235–1310; *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]."[119]

If R. 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 into Jewish law the ability to transact business with a person, or a product, that does not *yet* exist and the arguably much greater novelty of introducing the ability to transact business with a Jewish law entity which never has and never will "exist." Thus, some authorities argue that the creation of a *halakhic* entity is like allowing property to acquire other property, something which cannot be done.[120]

Second, unless commercial custom "gives life" to a corporation and allows it to *actually acquire property*—and not merely permits *financial* matters to proceed "as if" the corporation were 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, here, because the shareholders would no longer own the property, the rule allowing rabbinic courts to declare property ownerless would *indirectly* affect nonmonetary 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

---

[119]R. Shlomo ben Aderet, *Teshuvot Ha-Rashba* 1:546.

[120]R. Menashe Klein, *Mishneh Halakhot* 6:277.

which to transfer title 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.[121]

iii. THE LAW OF THE LAND INCORPORATED INTO JEWISH LAW

(1) *THE JEWISH LAW VALIDITY OF SECULAR LAW—AS APPLIED TO JEWS*

The Jewish law doctrine that "the law of the land is the law" 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 chapter. 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. R. Joseph Caro (Safed, 1488–1575) 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.[122]
2. R. Moshe Isserles (Poland,1525 or 1530–1572) agrees that secular laws directly affecting the government's financial interests are binding, but adds that secular laws enacted for the benefit of the people of the community as a whole are also, as a general matter, effective under Jewish law.[123]
3. R. Shabtai b. Meir HaKohen (Poland, 1586–1667; *Shakh)* disagrees with R. Isserles in one respect. He believes that even if secular laws are enacted for the benefit of the community, they are not valid

[121]Rabbenu Yeheil is cited in *Mordekhai*, on B.T., *Shabbat* 472. A similar approach can be found in R. David ibn Zimra (Spain, 1480–1574), *Radvaz* 1:278, and is accepted as correct by R. Aryeh Leib HaKohen Heller, *Kitzot Ha-Hoshen on Shulkhan Arukh, Hoshen Mishpat* 201:1.

[122]*Shulkhan Arukh, Hoshen Mishpat* 369:6, 11.

[123]*Shulkhan Arukh, Hoshen Mishpat* 369:11. Note, R. Moses Isserles is known as the "*Rama*."

> under Jewish law if they are specifically contrary to indigenous Jewish law precepts.[124]

There is substantial debate among Jewish law authorities as to which approach to follow.[125] Nevertheless, it seems that most modern authorities agree that, at least outside of the State of Israel, R. Isserles's view should be applied.[126]

---

[124]Shabtai HaKohen (*Shakh*) on *Shulkhan Arukh, Hoshen Mishpat* 73:39. Thus, for example, according to *Shakh*, secular law can require that one return lost property in a case that Jewish law permits, but does not mandate that it be returned, but cannot permit one to keep a lost object that Jewish law requires be returned.

[125]See, for example, R. Yaakov Breish (Israel, contemporary), *Helkat Yaakov* 3:160 and R. Shmuel Shilo, *Dina De'Malkhuta Dina*, at pp. 145–160, who list authorities adopting either the approach of *Shakh* or *Mehaber*.

[126]This was the approach of R. Moshe Feinstein, see R. Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat* 2:62, and R. Yosef Eliyahu Henkin, *Teshuvot Ibra* 2:176. See also R. Shmuel Shilo, *Dina De'malkhuta Dina*, at p. 157, who asserts that most Jewish law authorities adopt the *Rama*'s view and lists many of these authorities.

A contemporary authority, R. 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 d'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*.

Despite R. Klein's views, it is important to note that most authorities have held that *dina de'malckuta dina* does not apply only to laws issued by a king. R. Menashe Klein, *Mishneh Halakhot* 6:277. 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 demo-

Of course, just as with respect to commercial custom, there is a question as to precisely what "the law of the land is law" can accomplish. Some Jewish law decisors clearly rule that when this doctrine incorporates

---

cratic form of government, the judiciary, the jury system, or the possibility of judicial review. See references to Rabbis Moshe Feinstein and Eliyahu Henkin, above.

Indeed, once one acknowledges that *dina de'malkhuta dina* applies to nonmonarchical 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 work, 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 R. 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 who 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*.

secular law into Jewish law, the secular law so incorporated can accomplish things that would have been hitherto impossible under Jewish law.[127]

For example, there is a Jewish law dispute as to the validity of a secular will. A will purports to transfer assets from the deceased's estate after his death. Conventional Jewish law rules would not allow this transfer. 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 Jewish law, there is no decedent's estate to transfer funds from; 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 affected property would, under Jewish law, be tantamount to taking property that was owned by others, namely, 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.[128] Although not all of these explicitly declare that "the law of the land is law" can accomplish more than an ordinary Jewish Law procedure, this proposition is at least implicit in their rulings.[129] 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.

---

[127]See R. Aryeh Leib HaKohen Heller, *Kitzot Ha-Hoshen*, and R. Jacob Lorberbaum, *Netivot* on *Shulkhan Arukh, Hoshen Mishpat* 201:1.

[128]See, for example, R. Moshe Feinstein, *Iggerot Moshe, Even ha-Ezer* 1:104, 105; R. Shlomo Shwadron, *Maharsham* 224; R. Yaakov Ettlinger, *Binyan Tziyon*, at p. 24; R. Ezekiel Ledvalla, *Sefer Ikkarei ha-Dat, Orah Hayyim* 21; and R. Aaron Parchi, *Perah Mateh Aharon* 1:60. R. Isaac Herzog also maintains that these wills are at least post fact valid. See R. Isaac Herzog, *Techukah le-Yisrael al pi ha-Torah*, vol. 2, ch. 5 (1989).

[129]*Situmta* is the talmudic term for a secular convention for the transfer of title that is incorporated into Jewish Law by common commercial practice. For more on *situmta*, see *Shulkhan Arukh, Hoshen Mishpat* 201 and R. Aryeh Leib HaKohen Heller, *Kitzot Ha-Hoshen* and R. Jacob Lorberbaum, *Netivot*, who discuss whether this is a biblical or Rabbinic form of acquisition. See also Menachem Elon, *Principles of Jewish Law*, at columns 916–920.

(2) *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. But 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." 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 only between Jews.[130] Moreover, the majority view is 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.[131] 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,[132] but is effective under secular law. C, a

[130]See, for example, R. Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat* 2:62. See also Michael Broyde, *The Pursuit of Justice*, pp. 83–99, and Nahum Rakover, "Jewish Law and the Noahide Obligation to Preserve Social Order," 12 *Cardozo L.R.* 1073, 1098–1118, and App. I and II (1991) for a discussion of this issue.

[131]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, R. Sternbuch, in *Teshuvot ve-Hanhagot*, vol. 1, no. 795 (revised edition), 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, an apostate has the same status as a gentile. R. Sternbuch states that it is not clear whether this rule applies to commercial transactions in which it would operate to the apostate's detriment. For more on this, 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 nonobservant Jews.

[132]For example, the sale might be void or voidable as violative of the Jewish law prohibition against price gouging. See, for example, R. Aaron Levine, *Free Enterprise and Jewish Law*, pp. 99–110.

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.[133] 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.[134] Nonetheless, it is possible that some 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, two questions: (1) is a Jewish shareholder an owner of the corporate asset, 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 corporation exists in the Talmud. They also deny that any of the above-mentioned doctrines has 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 en-

---

[133]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 54 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.

[134]R. Moshe Sternbuch, *Moadim Uzmanim* 3:269.

titled to the benefit of limited liability, at least as to voluntary creditors (*i.e.*, those, such as 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—pointing out that people in the business world realize that corporate shareholders are not going to be personally liable and it is on the basis of this understanding that they do business with corporations.[135] Although a particular plaintiff may in fact not have known the law of limited liability, he or she could and should have found out about it beforehand. Consequently, he is bound as if she had known the custom and had agreed to it.[136] Others 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.[137] Still others just seem to assume that the limited liability rule would be valid under Jewish law without even discussing why.[138]

The failure by some authorities to articulate precisely which Jewish Law doctrine justifies the limited-liability rule is problematic for two

---

[135]R. Menashe Klein, *Mishneh Halakhot* 6:277; R. Moshe Sternbuch, *Moadim Uzmanim* 3:269, n. 1; R. Ezra Batzri (Israel, contemporary), *Dinei Mamanot*, vol. 3, p. 315.

[136]Id. See also R. Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat* 1:72.

[137]R Yitzhak Blau, *Brit Yehuda* 7:25–26; R. Yitzhak Blau, *Pitkhei Hoshen, Shutfut* 1:76.

[138]See, for example, R.Yitzhak Yaakov Weiss (Jerusalem, contemporary), *Minhat Yitzhak* 3:1; R. Moshe Sternbuch, *Moadim Uzmanim* 3:269; Shaul Weingart, "Corporations and *Chametz*," in Yad Shaul (written in 1938, and published in 1954). Many authorities disagree as to whether the limited liability principle avoids the prohibition against the charging or paying of interest in 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* of limited liability on the prohibition against charging or paying interest.

reasons. First, depending on which doctrine is used, it is possible that the rule would not apply to all possible claims. Consider, for instance, claims asserted by nonconsensual creditors, such as those that assert tort claims against the corporation.[139] If one believes that the limited-liability rule is effective because it is as if those doing business with a corporation agree to the rule (either because all conditions agreed 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 asserted by people, such as a pedestrian struck by the corporation's vehicle, 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 because rabbinical courts can declare property ownerless or "the law of the land is law," the rule *might* operate as to tort claims as well.[140]

Of course, if an individual shareholder personally committed the tort, he may not enjoy limited liability even as a matter of secular law.[141] 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 paper, 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

---

[139]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.

[140]*But see* R. 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).

[141]See, for example, *Van Dam Egg Co.* v. *Allendale Farms, Inc.*, 199 N.J.Super. 452, 489 A.2d 1209 (1985) (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 Cyc. Corp. § 11.35 (1996 Cum. Supp.) (describes rules regarding personal liability of corporate officers, directors, and agents for torts they committed or in which they participated).

negligent.[142] 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.[143] Thus, as a practical matter, the difference between justifying the limited-liability rule by the rules that all conditions agreed to regarding monetary matters are valid, or that commercial custom is binding, on the one hand, or by justifying it by the rules that a rabbinical court may declare property to be ownerless or "the law of the land is the law," on the other, would involve 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.[144]

---

[142]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), the Master's words should be heeded. See B.T., *Kiddushin* 42b. See also R. Yeheil Mekheil Epstein, *Arukh HaShulkhan, 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 Levinthal, "The Jewish Law of Agency," in Edward M. Gershfield, ed., *Studies in Jewish Jurisprudence* (New York: Hermon Press, 1971), pp. 51–58. 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, for example, *Shulkhan Arukh, Hoshen Mishpat* 182:3; R. Yeheil Mekheil Epstein, *Arukh HaShulkhan, Hoshen Mishpat* 182:17. See, generally, Steven F. Friedell, "Some Observations on the Talmudic Law of Torts," *Rutgers L.J.* 15:897 (1984); Hayyim S. Hefetz, "Vicarious Liability in Jewish Law," *Dine Israel* 6:49 (1975).

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

[144]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.

Second, which doctrine is used to justify the limited-liability rule may also affect the Jewish law rule as to consensual creditors in cases in which 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, above, 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 whether or not to pierce the corporate veil. It *may* be that the commercial custom, which involves 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.[145]

Interestingly, an Israeli Rabbinical Court initially expressed doubt as to the limited-liability process even as to voluntary creditors.[146] Possibly assuming that a corporation is a *halakhic* partnership, 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 serves as collateral—without assuming any personal liability for the debt.[147] The

[145]Of course, adding another level of analysis, one might argue that the reasons why a court pierces the corporate veil may be relevant. 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.

[146]*Piskei Din HaRabanayim* 3:354.

[147]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

court stated that, according to at least one interpretation of Rabbenu Asher's commentary, this type of transaction would be invalid according to fundamental Jewish law rules. Those rules, according to Rabbenu Asher (*Rosh*), provide that a person's property can only serve as a "guarantor" that the person will pay his or her debt. If the person, however, is not obligated to pay a debt, then there is nothing to guarantee, and nothing can be collected from the guarantor.

Rabbenu Asher's view is expressed in connection with the following talmudic discussion: "*Rava* states in the name of R. 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."[148]

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.

Rabbenu 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].[149]

The Israeli Rabbinical Court did not suggest that R. Asher's position would require finding the corporate shareholders to be personally liable. On the contrary, it assumed that the corporate shareholders would not

---

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—that, according to the *Rosh* was a sine qua non to create a lien on property—was simply inapplicable to a *halakhic* entity, that is, that it was meaningless to talk about the personal liability of a corporation. But cf. R. Ezra Batzri, *Dinei Mamonot*, vol. 3, p. 316 (argues that this Israeli Rabbinical Court apparently did not believe that the corporate entity theory was part of indigenous Jewish law).

[148]B.T., *Kiddushin* 8a-8b.

[149]R. Asher ben Yeheil, B.T., *Kiddushin* 1:10.

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. Nevertheless, the court concluded that even Rabbenu Asher would agree that the "lien" on the corporation's assets would be valid because of commercial custom or "the law of the land is the law."

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*.[150] But, once *halakhic* partnership theorists acknowledge that these doctrines 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 R. Aderet who categorically disagree with R. Asher, explaining that 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 personal obligation.[151] Many, if not most, Jewish law authorities appear to accept the approach of Nahmanides and R. Aderet.[152] Second, they could argue that Rosh

[150]As discussed above, *Shakh* would apparently not agree that *dina de'malkhuta dina* could introduce a commercial rule inconsistent with *halakhah*. Perhaps, *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*.

[151]Commenting on B.T., *Kiddushin* 8a.

[152]*Shulkhan Arukh Even Ha-Ezer* 29:6, and the comments of R. Moshe Breish (Israel, contemporary), *Helkat Mehohek*; R. Shmuel M-Purdah, Beit Shmuel and R. David b. Shmuel HaLevi (Poland, 1586–1667), *Taz* ad loc. This is also endorsed by Beit Yosef, commenting on *Tur* (R. Jacob b. Asher, Toledo, 1270–1340) *Even Ha'ezer* 29. R. Aryeh Leib HaKohen Heller, *Avnei Meluim* seems to accept this approach, too. See commentary on *Shulkhan Arukh, Even Ha-Ezer* 29:10d.

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 corporation, incurred some "obligation" by, for example, acquiring property sold by a corporate creditor. The corporate transaction could arguably be perceived as the creation of an 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 Rabbenu Asher, inconsistent with traditional Jewish law, it is difficult to find a principled basis on which to distinguish incorporation of the limited liability rule from incorporation 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, R. Moshe Sternbuch believes that Jewish law, even after considering the various doctrines described above, does not recognize a corporation as a *halakhic* entity. R. Sternbuch argues that if Jews constitute the essential part of a corporation's shareholders,[153] the corporation could be characterized under Jewish law as a partnership subject to certain conditions, such as limited liability, agreed to by the partners.[154] He

[153]R. Sternbuch does not clarify whether the essential part of the 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.

[154]The validity of the limited-liability condition against third parties is discussed in the text associated with Part III:A:2:b:iv, above.

contends that Jewish law could "force" the transaction to be construed in this manner even though the shareholders really intended only to become stockholders in a secular corporate entity.[155]

R. 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.[156] This implication renders his version of the *halakhic* partnership theory somewhat troublesome.

If, however, non-Jews constitute the essential part of the investors, R. Sternbuch argues that the non-Jewish shareholders have the right to be shareholders of a corporate entity and that Jewish law cannot make them be partners in a partnership.[157] Consequently, R. Sternbuch states that if a Jew tries to purchase stock in such a corporation, the money he

---

[155]It is unclear whether R. Sternbuch would contend that Jewish law would infer such agreement if some of the Jewish shareholders were not religiously observant and would not ordinarily desire to be bound by Jewish law.

[156]R. 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." R. Moshe Sternbuch, *Moadim Uzmanim* 3:269, n. 1.

[157]R. Weiss argues that R. Sternbuch is inconsistent. R. Weiss reasons that if Jewish law would treat a corporation as a partnership if the shareholders are all Jews, then it would treat it that way even if most of the shareholders are not Jews. See R. Yitzhak Yaakov Weiss, *Minhat Yitzhak* 3:1. One might question R. 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 R. Sternbuch, when they do not constitute the essential part of the shareholders? Moreover, R. 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.

pays constitutes a loan to the "managers of the corporation."[158] According to R. 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. 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.[159]

There are several noteworthy aspects of this approach. First, it is interesting that even though neither the Jewish shareholder nor the corporate managers intend for there to be a loan, R. Sternbuch states that Jewish law would treat it as a loan. It is unclear who R. Sternbuch means when he refers to the corporate managers. Perhaps he means the people who received the Jewish investor's payment for the stock.[160] These managers thought they were acting on behalf of the corporate entity. However, according to R. 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.[161]

---

[158]R. Sternbuch refers to the corporation's *menahalim*.

[159]R. Moshe Sternbuch, *Moadim Uzmanim* 3:269, n. 1. Interestingly, although most authorities agree that corporate shareholders would have limited liability for corporate debts, R. Sternbuch's analysis results in corporate *managers* being *personally* liable for debts they never thought they were incurring.

[160]This "seems" to be the case because it allows for the explanation set forth in the text. R. Sternbuch himself provides no indication as to who he means when he uses the word "*menahalim*."

[161]*Taz*, in his commentary to *Shulkhan Arukh*, *Yoreh Deah* 150, makes a similar argument. *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, since it involves *ribit*, would violate Jewish Law. Consequently, *Taz* says that

If the corporate managers are Jews, then, according to R. 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.[162] 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.[163]

Second, R. Sternbuch's explanation seems to presuppose that the Jewish shareholders bought their stock from the corporation. It is unclear what R. 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 they had no personal liability to him. Indeed, according to R. 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 the corporation.[164] When a Jewish investor purchases the non-Jew's shares, none of the purchase money goes to the corporation or to the corporate

---

when *A* handed the money to *B*, *A*, under Jewish Law, made a loan to *B*, even though neither *A* nor *B* intended such a loan. Since 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.

[162]Note: if the limited-liability rule applied, there are Jewish law authorities who would argue that there would be no prohibition regarding the charging of interest on loans. However, if, as R. Sternbuch suggests, it is a loan from the Jewish investor to the corporate *managers* and if, as R. Sternbuch continues to suggest, the corporate managers would not be entitled to limited liability, the question of charging interest is certainly relevant.

[163]Rabbinic rules regarding the charging and paying of interest are too complex to consider in depth in this chapter. See, generally, Yeheil Grunhaus, "The Laws of Usury and Their Significance in Our Times," *Journal of Halacha and Contemporary Society* 21:48–59 (1982).

[164]Assume, for instance, that a predominant portion of the shareholders are non-Jewish. Even R. 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 text associated with Part III:A:2:b:iii, above.

managers. Consequently, neither the corporation nor the corporate managers could be found to have directly borrowed money from the Jewish investor. 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, R. Sternbuch would approve the *halakhic* entity theory.[165] Yet this occurrence is common, and R. 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, unbeknownst to himself, 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, unbeknownst to himself, 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 R. Yitzhak Yaakov Weiss. Interestingly, R. Weiss believes that the corporation is a *halakhic* partnership with respect to Jewish 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 the Jewish shareholder, according to R. Weiss, would face the prohibition of owning dough on Passover.

On the other hand, R. Weiss rules that a Jew who owns only nonvoting shares—even if the shares are of common stock—is not a partner

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

but, rather, a lender.[166] R. 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.[167] R. Weiss says that he made a kind of a compromise (*k'ayn hechrah*) between those who say that a secular corporation is never a partnership and those that say it is always a partnership.[168]

Critics of R. Weiss's position argue that the distinction between voting and nonvoting shares is not defensible.[169] 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 R. Weiss's approach is that he fails to explain, when there is a loan, To whom is the loan made? Would he, for instance, agree with R. Sternbuch and rule that the loan is made to the corporate managers? Or would R. Weiss believe that the loan is made to the partnership consisting of the shareholders holding voting stock? As was evident when discussing R. Sternbuch's position, there could be Jewish law consequences arising from such a loan and, therefore, it is important to know to whom it is made.

Part III:A, above, explained that a responsum of R. Ettinger with respect to the charging of interest could be interpreted as supporting the

---

[166]R. Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:26 and 3:1. We query how R. Weiss would characterize the status of a person who owns voting stock but who, because of a control share acquisition statutes, described in our longer work, is not entitled to vote such shares for a number of years.

[167]R. Weiss says that this is the view of Rabbis Ettinger (citing his *Responsum* 2:124), Moshe Shick (*Maharam Shick*), and Hanoh Dov Padua (*Kheishev Ha-Ephod*). See R. Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:26.

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

[169]See, for example, R. Moshe Sternbuch, *Moadim U'zemanim* 3:269; Israeli Rabbinical Court, *Piskei Din Rabanayim* 10:273; Hanoh Dov Padua, *Kheishev Ha-ephod* 2:52.

halakhic entity analysis. Citing a different responsum of R. Ettinger, R. Weiss contends that R. Ettinger follows the creditor approach.[170] Nevertheless, a close reading of that responsum does not provide any specific support for R. Weiss's interpretation. Although R. Ettinger states that Jewish shareholders do not own corporate property, he does not say that the Jewish shareholders loaned any money to anyone.

R. Ettinger considers the case of a corporation, some of whose shareholders are Jewish, that had a large supply of beer (a form of *hametz*) that it had owned throughout Passover. Specifically, he ponders whether the corporation's Jewish shareholders are allowed to derive benefit from this beer. He answers that the reason that the Sages prohibited such products was to penalize Jews who failed to fulfill their responsibility to destroy *hametz* prior to Passover. 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. In addition, he argues that the Jewish shareholders were not obligated to sell their stock prior to Passover. 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 the beer), 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*. 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 his responsum regarding the charging of interest was interpreted in Part III:A, above, that is, that the corporation is considered as if it were a separate *halakhic* entity that owned the *hametz*.[171] Alternatively, it is *possible* to

---

[170]See R. Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:26, citing R. Isaac Aaron Ettinger, *Maharyah Ha-Levi* 2:124.

[171]According to this interpretation, when Ettinger says the case is "like" that of a Jew who is *achroi* for the *dough* of a gentile in the possession of the non-Jew,

construe it: (1) as supposing that the Jewish shareholder merely purchased a right to a portion of the corporation's profits, and as similar to the view discussed in Part III:C, below, or (2) as evaluating the overall relationship of the Jewish shareholder to the dough, and as similar to some of the views described in Part III:D, below.[172] 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 R. Sternbuch's *halakhic* partnership analysis. A Jewish investors does not seem to be lending money to corporate managers. He does not perceive himself as a 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—with both hands—a square peg into a round whole.

C. The Purchaser of Entitlements Approach

R. Moshe Feinstein discusses the Jewish law status of corporations in a number of scattered responsa. In several, he briefly indicates that a corporation is not a new type of entity and refers to it as a partnership. Nevertheless, it seems *possible* that in at least some of these responsa he is referring to close corporations.[173] On the other hand, in another

---

what does he mean by the word "like"? He might mean that it is similar to that case because, although the corporation is not a "gentile," it is a Jewish law entity and it is not a Jew.

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

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

responsum he specifically discusses the widespread practice of purchasing stock in public companies that do business on the Sabbath. He states that:

> [T]he 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 [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].[174] 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.[175]

Thus, R. 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. Pursuant to ordinary Jewish law rules, the acquisition of rights in future profits and losses might be difficult or impossible to accomplish because such prof-

---

[174]R. 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.

[175]R. Moshe Feinstein, *Iggerot Moshe, Even Ha-Ezer* 1:7.

its and losses are "things" that "do not exist."[176] This seems to be the reason why R. Feinstein suggests that the acquisition is pursuant to the principle of "the law of the land is the law." Thus, unlike R. Weiss, R. Feinstein does not look to the *formal* distinction between voting and non-voting 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 R. Ettinger's responsum cited by R. Weiss, and discussed above in Part III:B, nor the responsa of R. Shlomo Kluger (R. Solomon b. Judah Aaron of Brody, 1785–1869, *MaHaRShaK*), R. Azreil Hildesheimer, or R. David Zvi Hoffman (Germany, 1843–1921), discussed below in Part III:D, are necessarily inconsistent with R. 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."[177]

There are, however, several difficulties and ambiguities with respect to R. Feinstein's approach. R. 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. 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 *Shulkhan Arukh, Orah Hayyim*, no. 345"[178] or whether either factor would be sufficient. For example, assume an investor purchased stock with the intent to try to influence corporate conduct—perhaps by way of rallying other shareholders and trying to add shareholder resolutions to the proxy materials distributed by management—but, in fact, the shareholder was unsuccessful in these

[176]*Shulkhan Arukh, Hoshen Mishpat* 209:1–3

[177]But see R. Yitzhak Yaakov Weiss, *Minhat Yitzhak* 7:126, who states that, according to R. Ettinger, the Jewish shareholders made a *loan*. R. Weiss does not say to whom the loan was made and whether such a loan would raise questions regarding the charging or collection of interest.

[178]R. Moshe Feinstein, *Iggerot Moshe, Even Ha-Ezer* 1:7.

efforts. Given that the shareholder owned some stock and tried to change 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 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? R. Weiss seems to say a single share of voting stock is sufficient. R. Feinstein clearly disagrees and says that ownership of a small number of shares is insufficiently significant. 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]."[179] 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, for instance, a particular shareholder has a sufficiently large holding that she could affect corporate governance but she simply has no interest in doing so.[180] Would R. Feinstein rule that this person is an "owner" of the corporate assets?

---

[179]Id.

[180]R. Lintz reports views expressed by Rabbis David and Reuven Feinstein, sons of R. Moshe Feinstein. R. Lintz does not assert that Rabbis David and Reuven Feinstein are explaining their father's perspective. It is interesting to note that Rabbis David and Reuven Feinstein may disagree about the very factors discussed in the accompanying text. While R. David Feinstein seems to suggest that some threshold amount of potential control is enough to cause someone to be an "owner," R. 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], . . . R. 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 . . . [R. David] Feinstein, if an in-

Another problem with R. Feinstein's approach is that, assuming the corporation is not a *halakhic* 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 R. 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 R. Feinstein characterize the corporation as a partnership comprised of such directors? If so, however, what degree of ownership interest would each such director possess?

An additional difficulty arises because of R. 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 total of 100,000 shares of stock. Because none of these shareholders purchased the stock with the intent to take an active role in corporate governance, R. Feinstein would presumably con-

---

vestor 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* [footnote omitted] . . .

. . . R. 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 . . . [R. Reuven] Feinstein said it was questionable whether a small percentage of a company which is intended to be held for a long time (for example, for a retirement plan) is permissible.

See George Lintz, "May a Jew Purchase Stock in McDonald's? (and Related Questions)," *Journal of Halacha and Contemporary Society*, 24:69 (1992).

sider them merely as purchasers of entitlements from the corporation and not as partners who owned any interest in the corporate property. But what if 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. According to R. 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 R. 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 running the corporation, such that R. Feinstein would deem A to be a partner with an ownership interest in the corporate property. Assume, however, that A dies and that his stock is inherited by many different people, none of whom has the intent to be active in corporate affairs or enough shares to be successful in influencing corporate affairs even if he or she wanted to. 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 based on the traditional concept of linking ownership with the possession of "legal title." Indeed, 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.[181] 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 her. 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.

---

[181]See, for example, R. Menashe Klein, *Mishneh Halakhot* 6:277. Contemporary halakhic authority R. J. David Bleich also argues that whoever possesses "legal title" to property is the property's owner. Letter from R. Bleich on file with the authors.

Maybe R. Feinstein believes that a person who acquires an amount or percentage of corporate stock acquires two things: (1) a right to share in the profits; and (2) 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 would merely have to formulate the intent to acquire the relevant ownership interest. Contemporary halakhic authority R. Moshe Heinemann suggests that this is R. Feinstein's position.[182]

This explanation is somewhat troublesome. First, R. Feinstein does 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. Without relevant discussion between the parties, it is difficult to discern what precisely creates the option, particularly since secular law does not recognize that the sale of stock involves such options. Third, until the new purchaser of the stock decides to exercise the ownership interests attendant to the stock, who, if anyone, enjoys these 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 a particular stockholder's desires?

Alternatively, perhaps R. Feinstein implicitly suggests a new concept of ownership that does not require possession of legal title. Perhaps he believes that control plus beneficial interest can constitute a form of "ownership." Nonetheless, it remains unclear: (1) what the authority is for such a proposition; (2) what degree of control is required; and (3) what degree of beneficial interest is required.

---

[182]See R. Moshe Heinemann's handwritten comments on an earlier version of this draft on file with the authors.

Neither of the above alternative explanations answers who, according to R. 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, rather, the agents of the corporate entity.

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 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. Similarly, others contend that the prohibition against doing business with forbidden foods poses no problem for Jewish shareholders so long as they are not personally involved in a corporation's business.[183]

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

---

[183]See, generally, George Linz, "May a Jew Purchase Stock in McDonalds? (and Related Questions)," *Journal of Halacha and Contemporary Society*, 24:69 (1992).

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

> that the custom of people with shares in . . . corporations . . . is that they just have only a part of the profit or loss. They do 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].[184]

Thus, without naming the Jewish law doctrine he is relying on, R. 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, R. Hanoh Dov Padua cites the responsa of R. Ettinger and R. Kluger.[185]

R. Azriel Hildesheimer, as cited by R. David Tzvi 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.[186] R. 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. R. Hoffman, although questioning other arguments raised by R. Hildesheimer, treats this one favorably.[187]

Thus, Rabbis Ettinger (at least in his responsum regarding the charging of interest), Kluger, Padua, Hildesheimer, and Hoffman all focus on the relationship between the Jewish shareholder and the corporation's

---

[184]See R. 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.

[185]R. Hanoh Dov Padua, *Heishev Ha-Ephod* 2:52.

[186]See R. David Tzvi Hoffman, *Melamed Lehoil* 1:91.

[187]Id.

assets, but do not expressly explain either who did own such assets or which precise Jewish law doctrine formed the basis for their rulings.

R. Ezra Batzri, a contemporary redactor of Jewish law clearly familiar with secular corporation theory, writes at length about evaluating the precise relationship between Jewish shareholders and corporate property.[188] His argument echoes that of secular scholars who refer to ownership as a bundle of rights and contend that one might be the owner for certain purposes but not for other purposes.[189] Thus, R. 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. 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.

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.

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 sharehold-

[188]See R. Ezra Batzri, *Dinei Mamanot*, vol. 2, pp. 314–321.

[189]See, generally, J. E. Penner, "The 'Bundle of Rights' Picture of Property," *University of California, Los Angeles Law Review* 43:711 (1996).