

Problems with Corporations

Introduction

The ever-evolving corporate structure presents interesting challenges to Jewish Law.¹ Some Jewish Law authorities have attempted to resolve these difficulties through complicated legal reasoning and the adoption of a “Halakhic Entity” theory of the corporation. Critics of the Halakhic Entity note, however, that traditional notions of shareholder primacy coupled with certain principles of Jewish Law relating to slavery place the usefulness of the Halakhic Entity in question. This Note argues that the team production model of the corporate structure² may help resolve some of the difficulties with the Halakhic Entity and secure its footing as a solution to many Jewish Law problems.

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¹ As an aid to understanding the Jewish Law context of this Note, it is useful to have a general understanding of the history and structure of Jewish Law. For the following overview, see Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 Wayne L. Rev. 1685, note 1 (1997):

Jewish law or Halakhah, is used . . . [to] denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. . . . The Pentateuch (the five books of Moses, referred to collectively as the Torah) is the elemental document of Jewish law, and according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 200 before the Common Era (B.C.E.). . . . The period from the close of the canon until 250 of the Common Era (C.E.) is referred to as the era of the Tannaim, the redactors of Jewish law. . . . The next five centuries constitute the epoch in which the two Talmuds (Babylonian and Jerusalem) were written and edited by scholars called Amoraim (“those who recount” Jewish law) and Savoraim (“those who ponder” Jewish law). . . . The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work. . . . From the period of the mid- fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo [1488-1575], called the Shulhan Arukh, which serves as the basis for modern Jewish law. . . .

² See generally Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247 (1999) (rejecting traditional theories of the firm and suggesting a team production model as an alternative).

I. Two Illustrations of Jewish Law Problems with Corporations

Classical Jewish Law (Halakha)³ does not directly address the modern corporation. However, how Jewish Law would characterize the corporate entity and whether it would consider shareholders to be responsible for corporate actions or the owners of the corporate assets plays an important role in resolving many Halakhic questions.⁴

By way of illustration, Jewish Law⁵ requires the giving of charity.⁶ The question arises, if a corporation makes a charitable contribution,⁷ has a Jewish shareholder fulfilled her personal

³ The terms “Jewish Law” and “Halakha” are used interchangeably.

⁴ See Broyde & Resnicoff, *supra* note 1, at 1685 (presenting a comprehensive analysis of the prevailing Halakhic authorities’ responses to the Jewish Law problems arising from the lack of clarity in Halakha regarding the legal status of various business entities).

⁵ JOSEPH KARO, SHULHAN ARUKH: YOREH DEAH 247:1-2. A literal translation of “Shulhan Arukh” is “The Set Table.” For the following explanation on the rather peculiar titles of Jewish Law books, see Broyde & Resnicoff, *supra* note 1, at note 13.

Unlike the tradition of most Western law, in which the titles of scholarly publications reflect the topics of the works, the tradition in Jewish legal literature is that a title rarely names the relevant subject. Instead, the title usually consists either of a pun based on the title of an earlier work on which the current writing comments, or of a literary phrase into which the authors' names have been worked (sometimes in reliance on literary license). Rabbi Jacob ben Asher's [c. 1269-1340] classical treatise on Jewish law was entitled "The Four Pillars" (Arba Turim) because it classified all of Jewish law into one of four areas. . . . A major commentary on this work that, to a great extent, supersedes the work itself is called "The House of Joseph" (Beit Yosef), as it was written by Rabbi Joseph Karo. Once Karo's commentary (i.e., the house) was completed, one could hardly see "The Four Pillars" it was built on. A reply commentary by Rabbi Joel Sirkes [1561-1640], designed to defend "The Four Pillars" from Karo's criticisms, is called "The New House" (Bayit Hadash). Sirkes proposed his work (i.e., his new house) as a replacement for Karo's prior house. When Rabbi Karo wrote his own treatise on Jewish law, he called it "The Set Table" (Shulhan Arukh), which was based on (i.e., located in) "The House of Joseph." Rabbi [Moses] Isserles' [1530-1572] glosses on "The Set Table," which were really intended vastly to expand "The Set Table," are called "The Tablecloth" because no matter how nice the table is, once the tablecloth is on it, one hardly notices the table.

⁶ To fully appreciate the legal significance of charity in Jewish Law, it is worthwhile to provide a brief synopsis of the biblical sources for the charitable obligation and a sampling of relevant Halachot (pl. Halakha). Maimonides (1135-1204) considers the biblical mandates of “[y]ou shall certainly open your hand to him” (*Deuteronomy* 15:5), “[y]ou shall support him, a stranger and a resident and they shall live with you” (*Leviticus* 25:35), and “[y]our brother shall live with you” (*Id.* at 25:36) as the primary sources for the Jewish Law obligation to give charity. MAIMONIDES, MISHNA TORAH: HILCHOT MATNAT ANIYIM 7:1. Additionally, one who ignores the plight of the poor is guilty of transgressing the biblical prohibition of “do not harden your heart or close your hand against your brother, the poor person” (*Deuteronomy* 15:7). *Id.* at 7:2. Jewish Law considers the withholding of charitable contributions a violation of Halakha comparable in severity to the sin of idolatry. KARO, *supra* note 5, at 247:1.

obligations?⁸ Arguably, the answer largely depends on whether Jewish Law accepts the notion that corporations are legal entities distinct from their shareholders.⁹ If Jewish Law does not recognize the corporation as a separate legal entity, then corporate activity (including corporate donations) should be considered directly attributable to the shareholders themselves. Therefore, when a corporation makes a charitable donation its Jewish shareholder's charitable obligations are satisfied.

However, if Jewish Law does recognize the corporation as a legal entity then the donations should be considered directly attributable to the corporation itself (and not to its shareholders). Therefore, when a corporation makes a charitable donation its Jewish shareholder's charitable obligations are not satisfied.

A second illustration relates to the Jewish Holiday of Pesach (Passover).¹⁰ Jewish Law prohibits Jews from owning certain leavened foodstuffs (Hametz)¹¹ during the holiday of

The obligation to give charity is imposed on all persons. *Id.* at 248:1. Even the poor are obligated to give charity. *Id.* However, orphans who have not reached the legal age are exempt from giving charity. *Id.* at 248:2. The sum of the charitable contribution should be equal to whatever the donor could possibly afford, but not so much that the donor themselves would be rendered needy. *Id.* at 249:1; *see also* MAIMONIDES at 8:13 (describing one who gives all of her assets to charity as “foolish” rather than “pious”). *But see* MOSES ISSERLES, HAMAPEH: YOREH DEAH 249:1 (holding that a mortally ill person may donate all of their assets to charity). A yearly charitable contribution which equals less than ten percent of the donor's annual income is considered “miserly.” KARO at 249:1. It is forbidden to turn a poor person away empty-handed. ISSERLES at 249:4. Poor women in need of money to pay for their wedding expenses have preference to any surplus in the communal charitable fund. *Id.* 249:1. The hungry have preference to the charitable funds over those in need of clothes. *Id.* at 251:7. Needy women have preference to the charitable funds over needy men. *Id.* at 251:8.

⁷ *See, e.g.*, DEL. CODE ANN. tit. 8 § 122 (9) (2011) (granting corporations the power to “[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof.”).

⁸ Broyde & Resnicoff, *supra* note 1, at 1692.

⁹ *But see, infra* Part V.

¹⁰ There are many examples of Jewish Law questions resulting from the ambiguity regarding the Halakhic status of the corporation. *See, e.g.*, Aaron Kirschenbaum, *Legal Persons*, in PRINCIPLES OF JEWISH LAW, 160 (Menachem Elon ed., 1974) [hereinafter *Legal Persons*] (noting Jewish Law problems resulting from the corporate entity and the prohibition against “labor” on the Sabbath and against lending or borrowing from Jews on interest); Broyde & Resnicoff, *supra* note 1, at 1691-92 (corporate bankruptcy and the prohibition against the sale of certain non-kosher foods). Nonetheless, this Note presents corporate charitable contribution and violations of the Passover laws as

Passover.¹² The question arises, if a corporation owns bread during Passover,¹³ has a Jewish shareholder violated this prohibition?¹⁴ Additionally, Jewish Law forbids Jews from enjoying bread after Passover that was owned by Jews during Passover.¹⁵ This raises an additional question. May a Jew purchase bread that was owned during Passover by a corporation with Jewish shareholders?¹⁶

Once again, it seems that the solution to these problems depends on whether Jewish Law accepts the notion that corporations are legal entities distinct from their shareholders. If Jewish Law does not recognize the corporation as a legal entity, then all corporate assets ought to be considered as if they were owned by the shareholders themselves.¹⁷ Therefore, if a corporation owned bread during Passover it should be considered as if the Jewish shareholder themselves

examples because they illustrate the paradoxical consequences resulting from Halakhic recognition of the corporate entity. *I.e.*, in the case of corporate charitable donation, if Jewish Law accepts the entity theory of corporations, Jewish shareholders will not have satisfied their personal Halakhic obligation. However, in the case of corporate violations of the Passover laws, the Jewish shareholder would be exempt from Halakhic liability. On the other hand, if Jewish Law does not recognize the entity theory of corporation, a Jewish shareholder would be relieved of her Halakhic charitable obligation via a corporate donation yet would be Halakhically liable for transgressing the Passover laws if the corporation owned bread during Passover.

¹¹ Hametz is best defined as “fermented dough” derived from wheat, spelt, barley, rye, or oats. Other grains, such as rice and corn, do not fall within the ambit of the prohibition because they “rot” rather than “ferment.” *See* Babylonian Talmud, *Pesachim*, 35:A; Encyclopedia Judaica vol. 7, *Hamez* 1235 (1996 corrected edition bt Keter Publishing House Jerusalem Ltd., Israel.) (same) In this article, Hametz will be referred to as “bread.”

¹² *See* KARO, *supra* note 5, at *Orach Hayyim* 447:1. A brief synopsis of the biblical sources and relevant Halachot of Passover will help the unfamiliar reader gain a better understanding of the issue at stake. Passover (*Pesach*) is a spring holiday that commemorates the exodus from Egypt. (*Exodus* 13:2-3) The name Passover is derived, amongst other reasons, from the Biblical account of God’s “passing over” (“*pusach*”) the Jewish homes during the Plague of the First-Born. (*Id.* at 12:23) The holiday lasts seven days in Israel and eight days in the Diaspora. (The reasons for this peculiarity, while fascinating, are beyond the scope of this paper.) Halakha prohibits owning, consuming, deriving any benefit, or retaining in one’s possession Hametz, or any derivation thereof, throughout the duration of the holiday. KARO, *supra* note 5, at *Orach Hayyim* 447:1.

¹³ *E.g.*, a corporation that owns a chain of supermarkets which sells bread.

¹⁴ Broyde & Resnicoff, *supra* note 1, at 1692.

¹⁵ *See* KARO, *supra* note 5, at *Orach Hayyim* 448:1 (prohibiting post-holiday consumption of bread that was possessed by a Jew during the Passover and in violation of the Passover restrictions).

¹⁶ Broyde & Resnicoff, *supra* note 1, at 1692.

¹⁷ *But see, infra* Part V.

owned the bread (in violation of the Passover prohibition). To comply with Jewish Law, Jews owning shares of such a corporation would be obliged to sell their shares before Passover begins. Additionally, if the Jewish shareholders of such a company did not sell their shares before the advent of the Passover holiday, it would be forbidden for a Jew to buy bread from the corporation after Passover.¹⁸

However, if corporations are recognized by Jewish Law as legal entities distinct from their shareholders then ownership of the bread should be attributable to the corporation itself.¹⁹ Therefore, a corporation's ownership of bread in violation of the Passover laws would not implicate its Jewish shareholders.²⁰ The Jewish shareholders would therefore be permitted to retain their shares during Passover. Additionally, after Passover, it would be permissible for a Jew to buy bread from the corporation.

II. The "Halakhic Entity" Approach

The precise Halakhic status of the corporate entity has not been definitively resolved by contemporary Jewish Law scholars.²¹ However, it is clear that at least some Halakhic

¹⁸ KARO, *supra* note 6, at *Orach Hayyim* 448:1.

¹⁹ See Broyde & Resnicoff, *supra* note 1, at 59 (citing MOSHE STERNBUCH, *MOADIM UZMANIM* at 3:269 ("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 bread on Passover because all he would own is shares of stock.").)

²⁰ DAVID TZVI HOFFMAN, *MELAMED Le-HO'IL*, *ORACH CHAYIM* 1:91.

²¹ See, e.g., *Legal Person*, *supra* note 10, at 162 ("The response of the rabbinic authorities of the past 100 years has been divided"); Steven H. Resnicoff, *Essay: Jewish Law and Socially Responsible Corporate Conduct*, 11 *Fordham J. Corp. & Fin. L.* 681, 690 ("Jewish law authorities do not agree as to how, as a matter of law, a corporation is to be perceived."). Although the issue is far from being resolved, the respective positions' of contemporary rabbinic authorities can be classified into several categories. See, e.g., Broyde & Resnicoff, *supra* note 1 at 1695 (identifying at least five principal positions). Some authorities entirely disregard the corporate entity and classify the relationship between a shareholder and a corporation as a partnership or as debtor-lender depending on whether the Jewish shareholder possesses voting or non-voting shares. See YITZHAK YAAKOV WEISS, *MINHAT YITZHAK* 7:26, 3:1. According to this approach, a Jewish shareholder of voting shares is considered to be a partner of the corporation

authorities,²² including the Israeli Rabbinical Court,²³ are willing (at least in some instances)²⁴ to recognize the corporation as a legal entity.²⁵ Professors Broyde and Resnicoff have aptly named this position the “Halakhic Entity” approach.²⁶ A comprehensive analysis of the Halakhic Entity is far beyond the scope of this paper and a brief overview of one of the more cogent arguments will have to suffice.

Proponents of the Halakhic Entity point to various institutions that are indigenous to Jewish Law yet possess the essential characteristics of a legal entity. For example, post Talmudic jurisprudence endowed communal charity funds (Havurat Zedakah) with the character of an artificial person.²⁷ An association (Havura) founded for charitable purposes was regarded as somewhat akin to the modern corporation, i.e., an aggregate of property earmarked for a specific purpose with the Havurah construed as the means created for the advancement of this purpose.²⁸ The fund’s directors were granted the power to fully conduct its affairs and to bring

and consequently the owner, for Halakhic purposes, of a proportional share of corporate assets. *Id.* Others view a minority shareholder as having merely purchased the rights to certain profits or losses of an unspecified business entity. *See* MOSHE FEINSTEIN, IGGEROT MOSHE, EVEN Ha-EZER 1:7. A significant qualification of the latter approach is that its perception of the shareholder as a purchaser of rights would necessarily shift should the shareholder gain a position of control in the company. *See, e.g.*, Broyde and Resnicoff, *supra* note 1, at 1795-1800 (pointing out the analytical difficulties inherent in Feinstein’s approach).

²² *See, e.g.*, HOFFMAN, *supra* note 20.

²³ Broyde & Resnicoff, *supra* note 1, at 1748-51 and note 17 (summarizing the Rabbinical Court’s position).

²⁴ *See id.* at note 182 (noting that other opinions of the Rabbinical Court assume an arguably different approach to the corporate entity).

²⁵ *See id.* at 1748-84 (offering a comprehensive analysis of the “Halakhic Entity” approach).

²⁶ Broyde & Resnicoff, *supra* note 1, at 1695.

²⁷ *See Legal Persons, supra* note 10, at 161 (citing Beit Yosef, *Choshen Mishpat*, 149:37; Netivot haMishpat, *Choshen Mishpat* 149).

²⁸ *Id.*

suit in court to protect the interests of the funds under their supervision.²⁹ These proponents of the Halakhic Entity argue that Jewish Law recognition of the corporate entity is a permissible extension of doctrine from these indigenous institutions.³⁰

III. The Great Debate: Shareholder Primacy v. Corporate Social Responsibility

Since the early 1930's, corporate law scholars have debated "for whom corporate managers are trustees."³¹ Proponents of the "shareholder primacy" theory posit³² that

²⁹ In the Talmud, the "tribe of the poor" (Shevet Aniyim) was construed as the owners of the money deposited in the charity fund, and the communal collectors were viewed as the "tribe's" agents. *Id.* This effectively worked to the disadvantage of the poor, for the rule of procedure in the Talmud was that the interests of indeterminate plaintiffs (the members of the "tribe") were not actionable. *Id.* The Havurat Zedakah was created to circumvent this problem. *Id.*

³⁰ In support of the argument that Jewish legal theory permits this extension of doctrine, the Halakhic Entity approach relies heavily on various Jewish legal mechanisms which allow for selective incorporation of secular law and informal commercial customs into the corpus of Jewish Law. *See, e.g.,* Broyde & Resnicoff, *supra* note 1, at 1763. The primary mechanisms applied by the Halakhic Entity are "the law of the land is the law" (*Dinah Dimalchusa Dinah*) and "commercial customs" (*Minhag Hasochrim*). *Id.* It should be noted that the scope of these complicated mechanisms is highly circumscribed and is a matter of dispute between the Jewish Law authorities. *See, e.g., id.* at 1757-84; Michael J. Broyde, *The Foundations of Law: A Jewish Law View of World Law*, 54 Emory L. J. 79, at note 45. Indeed, the principle opposition to the Halakhic Entity is the assertion that the Halakhic Entity's application of these mechanisms to the corporate entity is unduly liberal. *See, e.g.,* Broyde & Resnicoff, *supra* note 1, at 1757-84.

³¹ It is generally accepted that the genesis of this decades-long debate was a 1932 exchange between Professors Adolph Berle and Merrick Dodd in the Harvard Law Review. *See* Adolf A. Berle, *Corporate Powers As Powers In Trust*, 44 Harv. L. Rev. 104 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 Harv. L. Rev. 1365 (1932). *But see* William S. Bratton and Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 Iowa J. Corp. L. 99 (2008) (arguing that the modern day formulation of the shareholder primacy and corporate social responsibility theories are not necessarily accurate reflections of Berle and Dodd's views).

³² It is significant to note that modern adherents of the shareholder primacy view reject the entity theory of the corporations. As an alternative to the entity theory of corporations, these self-described "contractarians" suggest that a corporation is more accurately described as a "nexus of contracts" rather than as a fictional legal entity. *See, e.g.,* David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1, 2-3 (Lawrence E. Mitchell ed., 1995) [hereinafter *Communitarianism and PROGRESSIVE CORPORATE LAW* respectively] (noting "shareholder primacy's" evolution from acceptance of the entity theory to the nexus of contracts theory). The underlying theme of the nexus of contracts theory is the observation that shareholders and managers would face formidable agency costs if they were to attempt to privately negotiate the "best" contract terms to govern their relationship. Corporate law avoids these agency costs by providing the "most efficient" set of default contract rules. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 1-39 (1991) (discussing the corporate contract).

corporations exist to make money for the shareholders.³³ Put differently, corporate managers are trustees or “agents” of the shareholders of the corporation.³⁴ It follows that corporate managers have the legal duty to maximize the shareholders’ returns even at the expense of all other parties (including the community at large).³⁵ Furthermore, the fiduciary duty owed to shareholders

The contractarians dismissal of the corporate entity and acceptance of the nexus of contracts theory of the firm has virtually no practical implications for shareholders or corporations. However, such a proposition may be fatal for those Halakhic authorities who have accepted the notion of a Halakhic Entity. *See supra* note 30 and accompanying text. The underlying assumption behind these authorities was the understanding that secular law viewed corporations as a separate legal entity. These authorities merely argued that it was possible to integrate the secular entity theory of corporations with Jewish Law using the principles of “the law of the land is the law” and “commercial custom.” *Id.* However, if secular law was to entirely reject the entity theory of corporations (as the contractarians have done), even these Halakhic authorities would have to agree that there is no Halakhic justification for recognizing the corporation as a legal entity.

³³ The shareholder primacy theory is generally thought to represent Berle’s views. *See, e.g.*, Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547, 561 (2003) (“Berle thought the law should put renewed emphasis on managers’ fiduciary duty to maximize shareholder wealth.”); Ronald Chen & Jon Hanson, *The Illusion of Law*, 103 Mich. L. Rev. 1, 34 (2004) (“Berle described the protection of shareholders as the critical challenge facing corporate law.”); Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. Cal. L. Rev. 1189, 1189 (2002) (“Berle argued for what is now called ‘shareholder primacy’ - the view that the corporation exists only to make money for its shareholders.”).

³⁴ *See* EASTERBROOK & FISCHER, *supra* note 32, at 36 (describing corporate managers as “agents of the equity investors” who “pledge their careful and honest services”); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 (“The manager is the agent of the individuals who own the corporation and his primary responsibility is to them.”).

³⁵ The moral hazard that results from the combination of a shareholder primacy approach to corporate governance with limited liability is well-known. *See generally* LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY* (2001) (advocating for dramatic reforms in corporate law as a means to temper the moral hazard encouraged by the existing legal structure of the corporation).

The recent crash in the housing market, and consequently in the general economy, provides a vivid demonstration of the possible consequences of this hazard materializing. Arguably, a catalyst for the economic downturn was the securitization of sub-prime mortgages, the resulting liquidity, and the yield drawn from their subsequent sale. The return on these mortgage backed securities maximized the investments of the various banks that participated in the sub-prime business (and consequently maximized the value of the shares of the underlying shareholders). Fannie Mae and Freddie Mac’s special status as Government Sponsored Enterprises (GSE), coupled with traditional concepts of limited liability and the risk-spreading qualities of securitization, helped to create a delusional sense of security for shareholders. As private-label banks joined in the game, the stakes were raised higher. Banks (and shareholders) reaped the benefit of easy liquidity offered by securitization, while the buyers of these mortgages were stuck with “toxic” mortgages. The cycle of irresponsible lending, securitization, and large profit margins continued until the cycle’s inevitable bust. The end result was the collapse of the housing market and economy. *See, e.g.*, ROGER LOWENSTEIN, *THE END OF WALL STREET* 1-39 (2010) (describing the role of the secondary mortgage market in the collapse of the housing market and economy).

(arguably) precludes³⁶ corporate managers from giving independent consideration to the interests of other corporate constituents (e.g. employees of the corporation).³⁷

Proponents of the “progressive” theory (sometimes referred to as the “corporate social responsibility” (CSR)³⁸ theory) insist that corporate managers should be viewed as holding powers in trust for the community at large.³⁹ Put differently, a corporation’s purpose should not be confined to making money for shareholders, but rather should be broadened to include benefiting the interests of non-shareholding constituents (e.g., the community at large).⁴⁰

For several decades it seemed that the shareholder primacy view had prevailed.⁴¹ However, recent developments in corporate law, such as the adoption of corporate constituency statutes⁴² in the majority of the states, suggest that there is a growing acceptance of the CSR

³⁶ See, e.g., Friedman, *supra* note 34.

³⁷ See, e.g., *Dodge v Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“The discretion of directors is to be exercised in the choice of means to attain that end [of maximizing shareholder profits], and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.”).

³⁸ The terms “progressive” and “CSR” are used interchangeably.

³⁹ See, e.g., PROGRESSIVE CORPORATE LAW, *supra* note 32 (a collection of essays offering a progressive view of corporate law).

⁴⁰ See Dodd, *supra* note 31, at 1148 (arguing that corporations should be viewed as an “economic institution which has a social service as well as a profit making function”); Stout, *supra* note 33, at 1189 (“Dodd claimed... corporations purpose include securing jobs for employees, better quality products for consumers, and greater contribution to the welfare of the community at large.”).

⁴¹ Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L. J. 439, 439 (2001); Stephen M. Bainbridge, *Director Primacy: The Means and End of Corporate Governance*, 97 N.w. U. L. Rev. 547, 575 (2003); See also Nat'l Ass'n of Corporate Dirs., Report of the NACD Blue Ribbon Commission on Director Professionalism 1 (1996) (“The primary objective of the corporation is to conduct business activities with a view to enhancing corporate profit and shareholder gain”). *But see* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 Law & Contemp. Probs. 109, 112-15 (2004) (suggesting that the enactment of the National Labor Relations Act and other such New Deal legislation which “involve[d] important limitations on the rights of stockholders and managers acting in their interest to treat the enterprise as private property” were partial endorsements of the progressive approach; citing E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1150 (1932)).

⁴² Corporate constituency statutes (or stakeholder statutes) were developed to provide corporate leaders with a mechanism for considering corporate stakeholders interests without breaching their fiduciary obligations to shareholders. Kathleen Hale, *Note: Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 Ariz.

view.⁴³ This resurrection of the progressive approach is attributable to the Supreme Court's validation of state anti-takeover statutes⁴⁴ and a slew of articles, appearing in the 1990's,⁴⁵ that exposed fundamental weaknesses in the shareholder primacy position.⁴⁶ Of particular relevance to this Note, critics have argued that corporate law's grant of managerial control⁴⁷ and imposition of severe limitations on shareholder rights makes the shareholder primacy view of managers as shareholder's agents (among other flaws) inaccurate,⁴⁸ misplaced,⁴⁹ and morally hazardous.⁵⁰

L. Rev. 823, 832 (2003). These statutes authorize (but do not necessarily obligate) directors of a corporation to consider interests of constituencies other than the stockholders while making corporate decisions.

⁴³ See, e.g., Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 Tex. L. Rev. 579, 595-603 (1992) (stating that the adoption of corporate constituency statutes "put to rest the notion that directors are in any sense agents of the stockholders and that stockholders are thus the exclusive beneficiaries of directors' duties").

⁴⁴ *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987) (upholding the constitutionality of Indiana's anti-takeover Act).

⁴⁵ See, e.g., PROGRESSIVE CORPORATE LAW, *supra* note 32 (a collection of essays offering a progressive view of corporate law).

⁴⁶ See Theresa Gabaldon, *Women and the "New" Corporate Governance: Like a Fish Needs a Bicycle, Public Corporations and their Shareholders*, 65 Md. L. Rev. 538, 540 (2006) (describing the series of articles as an "attack launched" by "scholars possessing communitarian values" against the notion of shareholder primacy).

⁴⁷ See, e.g., DEL. CODE ANN. tit. 8, 141(a) (2011) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.").

⁴⁸ See, e.g., Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. Cal. L. Rev. 1021, 1038-45 (1996) (challenging the notion of directors as common law agents of shareholders).

⁴⁹ See, e.g., *Communitarianism*, *supra* note 32, at 9-10 (arguing for a multi-fiduciary [shareholders and non-shareholder] model of corporate law based on the progressive approach of viewing corporations as a "community of interdependence, mutual trust, and reciprocal benefit").

⁵⁰ See, e.g., *supra* note 35. It is important to note that the progressives concede, as a practical matter, that the CSR argument is of a normative nature rather than a descriptive one. *I.e.*, the progressives do not necessarily dispute the shareholder primacy description of corporate law. See, e.g., *Communitarianism* *supra* note 32, at 9-15 (articulating a "communitarian normative vision" through corporate law reform). Additionally, the progressives are not particularly interested in debating the merits of the contractarian's dismissal of legal entity description of the corporation or the contractarians' subsequent adoption of the "corporation as a nexus of contracts" theory. See *id.* Rather, the progressive's argue for a normative *change* is the existing law. See generally MITCHELL, *supra* note 35 (advocating for progressive reforms in corporate law). *But see*, Winkler, *supra* note 41, at 112-15 (arguing that the progressive view is in fact partially descriptive because of the limitations on shareholder primacy governance as a result of significant progressive legislative successes and the general "law of business"). The team-production model, however, purports to offer a descriptive interpretation of existing corporate law. See generally, Lynn A. Stout, *The*

IV. Team Production as a Normative and Descriptive Alternative

Proponents of the “team production” model of corporations take issue with both the principal-agent model of the public corporation and the shareholder wealth maximization goal that underlies it.⁵¹ In particular, adherents of the team production model argue that the corporation is best understood as a consolidation of team-specific inputs by the various parties involved with the corporation.⁵² These inputs include (among others), the capital provided by the shareholders, the money loaned by the creditors, the managing skills of the board of directors, and the labor of the rank-and-file employees.⁵³ In this view, the proper function of the board of directors⁵⁴ is to employ the inputs of financiers, workers, communities, and others in ways that maximize the joint welfare of all the firm’s stakeholders.⁵⁵

Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance, 152 U. Pa. L. Rev. 667, 692-03 (2003) (explaining how the team production analysis of the corporation is crucial to understanding why widely dispersed shareholders of public corporations cede control over their investments to a board of directors).

⁵¹ Blair & Stout, *supra* note 2, at 249. The team production model purports to be a descriptive and normative analysis of the modern corporation. *See, e.g.*, Stout, *supra* note 50, at 692-03.

⁵² A brief description of the economic analysis underlying the team production model of corporation is helpful. For the following synopsis, *see* Blair & Stout, *supra* note 2, at 249:

In the economic literature, team production problems are said to arise in situations where a productive activity requires the combined investment and coordinated effort of two or more individuals or groups. If the team members' investments are firm-specific (that is, difficult to recover once committed to the project), and if output from the enterprise is nonseparable (meaning that it is difficult to attribute any particular portion of the joint output to any particular member's contribution), serious problems can arise in determining how any economic surpluses generated by team production - any "rents" - should be divided. Ex ante sharing rules invite shirking, while ex post attempts to divvy up rewards create incentives for opportunistic rent-seeking that can erode and even destroy the economic gains that flow from team production. Yet trying to prevent shirking and rent-seeking by defining individual team members' duties and rewards through explicit contracts can be impossibly difficult, especially when the team production process is complex, continuous, or uncertain.

⁵³ *Id.* at 250.

⁵⁴ Adherents to the team production model refer to the board of directors as a “mediating hierarch” responsible for allocating the surplus produced by the corporation to the various team members. *Id.* at 251; Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 Wash. U. L.Q. 403, 404-05 (2001).

⁵⁵ Blair & Stout, *supra* note 2, at 278.

Proponents of the team production theory argue that the underlying assumptions of the shareholder primacy view are incorrect. In particular, the adherents of the team production model do not recognize shareholders as owners of the corporation or of the corporation's assets.⁵⁶ Rather, the only thing that the shareholder actually own is their shares.⁵⁷ Additionally, the corporation itself is recognized as the owner of the corporation and its assets.⁵⁸ From the

⁵⁶ See, e.g., Stout, *supra* note 33, at 1192 (“From both a legal and economic perspective, the claim that shareholders own the corporation . . . is simply incorrect.”).

⁵⁷ See, e.g., Margaret M. Blair, *Team Production Theory and Corporate Law*, 27 *Nordic J. Pol. Econ.* 88, 89 (2001) (noting that although shareholders do not own the corporation, nonetheless, “[S]hareholders own their shares in all the ways that we normally mean when we say someone owns something. They bear the risk associated with the shares, they reap the gains, and they can sell the shares . . . or otherwise control the disposition of the shares.”).

⁵⁸ Proponents of the shareholder primacy view point to the shareholder's right to vote in corporate elections as evidence of the shareholder's ownership of the corporation. Blair & Stout, *supra* note 2, at 310. Virtually all Halakhic authorities hold that, for purposes of Halakhic obligations, “control” (as evidenced by shareholders voting rights) is an essential attribute of ownership. See Broyde & Resnicoff, *supra* note 1, at 1124-26. It is therefore essential to provide an overview of the team production analysis of shareholder's voting rights.

From both a normative and descriptive perspective, team production scholars dismiss the contention that shareholders possess voting rights pursuant to their status as owners of the corporation.

From a normative perspective, these scholars argue that the options theory undermines the idea of shareholders-as-owners. See, e.g., Blair & Stout, *supra* note 54, at 411-12. Corporate law's grant of shareholder voting rights, therefore, cannot be as a result of ownership. As an alternative to ownership, they suggest two theories that might justify shareholder's voting rights. Blair & Stout, *supra* note 2, at 313-15. First, for two reasons, having the shareholders elect the board is the best way to choose directors that will serve the interests of all the stakeholders in the corporate team. The first reason is convenience. Namely, “shareholders who have a relatively homogeneous interest in maximizing share value may exhibit fewer pathologies and be less conducive to rent-seeking [in the exercise of their voting rights] than a vote taken among many competing constituencies with conflicting interests.” *Id.* at 313. The second reason is efficiency. The shareholders are likely to vote for directors who will maximize the market value of their shares. And “maximizing the value of a firm's stock can benefit not just shareholders but other stakeholders in the firm as well, at least when directors can pursue this goal by retaining and reinvesting corporate earnings rather than paying them out as dividends to shareholder.” *Id.* Second, corporate law's grant of voting rights to shareholders is best viewed as “partial compensation for shareholders unique vulnerabilities.” In contrast to the other corporate stakeholders, shareholders rarely interact with the board of directors and hence have few opportunities to “influence the distribution of corporate rents.” *Id.* at 314. Additionally, due to the relatively minor stake of individual shareholder and the large number of shareholders, shareholder's face greater collective action problems than the other members of the corporate team. *Id.*

From a descriptive point of view, it is not true that shareholder's voting rights give shareholder control over the corporation. Indeed, “[p]ractical and legal obstacles ensure that the vast majority of shareholders in the vast majority of firms exercise little or no authority over the board of directors.” *Id.* at 310-12.

viewpoint of the corporation, the shareholder's capital contribution is just another team-specific input for the board of directors to manage.⁵⁹

In support of this challenge to the traditional notions of shareholder primacy, team production scholars rely on a modern formulation of the options theory.⁶⁰ Namely, once a firm issues debt, "it makes just as much sense to say that the debtholders "own" the right to the corporation's cash flow but have sold a call option to the shareholder, as it does to say that the shareholders "own" the rights to the corporation's cash flow but have bought a put option from the debtholders." Indeed, as noted, team production scholars suggest that, besides for the corporation itself, there are in fact no owners of a corporation.⁶¹

V. The Problem with Slaves

Professors Broyde and Resnicoff note a significant gap in the underlying legal theory of the Halakhic Entity.⁶² Namely, the Halakhic Entity do not address whether shareholders are considered, for purposes of Jewish Law, the owners of the corporation. The Halakhic Entity uses complicated Jewish legal reasoning to justify the Halakhic absorption of the corporate entity.⁶³ However, the question remains, who are the owners of the newly recognized Halakhick entity?

⁵⁹ *Id.* at 93.

⁶⁰ *See, e.g.,* Stout, *supra* note 33, at 1192-93.

⁶¹ *Id.*

⁶² *See* Broyde and Resnicoff, *supra* note 1, at 1721-23 (arguing that the Jewish Law of slaves undermines the usefulness of the Halakhic Entity approach).

⁶³ *See supra* note 30.

Because the Halakhic Entity argues for Jewish Law recognition of the existing corporate entity,⁶⁴ secular law descriptions of the corporation are necessarily included in the newly recognized Halakhic Entity. Broyde and Resnicoff point out, although American law regards corporations as separate entities from their shareholders, American courts and commentators commonly refer to shareholders as owners of the corporation in which they hold their shares.⁶⁵ If, in the eyes of secular law, shareholders are considered the owners of the corporation, the same is necessarily true of the Halakhic Entity. In light of this observation, Broyde and Resnicoff pose the following question:

If Jewish Law were to perceive shareholders as owners of the corporation, then, even if corporations were regarded as a separate Halakhic Entity, Jewish Law might still consider corporate shareholders to be the owner of the corporate assets [and hence liable for corporate violations of Halakha]. Under Jewish Law, for instance, a slave is a discrete individual. Nonetheless, the property that a slave owns belongs to the slave's master. Theoretically, that which belongs to a corporation could be viewed as belonging to the corporation's owner, i.e., the shareholders.⁶⁶

To resolve this difficulty, Broyde and Resnicoff suggest that secular law does not really seem to regard shareholders as the owners of a corporation as the term owners is understood in

⁶⁴ *Id.*

⁶⁵ Broyde and Resnicoff, *supra* note 1, at 1721.

⁶⁶ *Id.* at 1722-23. Broyde and Resnicoff's argument against the Halakhic Entity approach can be illustrated with the following syllogism. Slaves are independent entities. Slaves may own property. However, slaves are the legal property of their master. Therefore a master owns her slave's property. Similarly, corporations are independent entities (at least according to the proponents of the Halakhic Entity). Corporations may own property. However, shareholders are a corporation's ultimate owners. Therefore, shareholders own a corporation's property (and resulting Jewish law obligations).

Jewish Law. Rather, by “referring to shareholders as owners, secular courts and scholars seem to mean no more than that the corporation is supposed to operate solely to benefit the shareholders.”⁶⁷ In other words, according to Broyde and Resnicoff, secular law’s referral of “shareholders as owners” seems to be an inelegant endorsement of the shareholder primacy view rather than a legal description of the shareholder status.

Understood as such, Broyde and Resnicoff argue (without citing to any authority) that the “assertion that corporation should advance the shareholders’ interests might fall short of the Halakhic concept of ownership germane to particular Jewish Law question.”⁶⁸

Furthermore, Broyde and Resnicoff argue that, even if a shareholder primacy form of corporate governance would satisfy the Halakhic definition of ownership, nonetheless, “the assertion [of shareholder primacy] itself seems false.”⁶⁹ In support of this contention, Broyde and Resnicoff point to the adoption, by roughly half of the states, of corporate constituency statutes.⁷⁰ In other words, according to Broyde and Resnicoff, the era of shareholder primacy seems to have passed and it is a matter of fact that corporations no longer operate solely to benefit the shareholders. Rather, corporations, while making business decisions, consider the interests of a variety of corporate constituents and not only the interests of the shareholders. Therefore, assuming the validity of the Halakhic Entity’s absorption of the secular corporation,

⁶⁷ *Id.* at 1723. In support of this argument, Broyde and Resnicoff place particular emphasis on corporate law’s separation of ownership from control because “some Jewish law authorities heavily weigh a shareholder’s ability to control a corporation when determining whether the shareholder is an owner of corporate assets.” *Id.* at 1724-26.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Broyde and Resnicoff’s article appeared in 1997. Since then, more than forty states have adopted some form of corporate constituency statutes. Kathleen Hale, *supra* note 42, at 833.

Jewish shareholders should not be considered the owners' of a corporation or responsible for a corporations Halakhic violations notwithstanding the "problem with slaves."

VI. Critique

There are three weaknesses in Broyde and Resnicoff's analysis. First, Broyde and Resnicoff's problem with slaves is premised on their assertion that "[u]nder Jewish Law . . . property that a slave owns belongs to the slave's master." However, while their articulation of the legal principle governing a slave's property is technically correct, it is debatable whether it is as absolute as Broyde and Resnicoff appreciate it to be.⁷¹ Second, the vague and unsupported assertion that "shareholder primacy might fall short of the Halchik concept of ownership" leaves much to be desired in terms of specificity and authority. Third, and more significantly, Broyde and Resnicoff's solution to the problem with slaves is based on a faulty understanding of the progressive view and of corporate constituency statutes.⁷² As noted above, the progressive view does not purport to be a description of the current state of corporate law. Rather, the progressive argument against shareholder primacy is primarily normative in nature. Additionally, most

⁷¹ For example, one way for a slave to acquire her freedom is through the transfer of money to the master. *See, e.g.,* MAIMONIDES, *supra* note 6, at HILCHOT AVADIM 5:1. Pursuant to the Halakhic rule that a slave's property belongs to the slave's master, the redemption-money necessarily originates from a third party as the slave does not have the independent financial capacity to possess assets. In practice, the third party gifts the slave with the redemption money under the stipulation that she (the slave) will use the money for the sole purpose of purchasing her freedom. *Id.* at 5:2. Should the master then accept the payment from the slave, the slave acquires her freedom. *Id.* In other words, a slave may receive a gift of property (albeit for a limited purpose) and is considered to possess some type of interest in the gift that is independent of his master's ownership. In exchange for the slave's interest in the gift, the master grants the slave his freedom. A comprehensive analysis of the Halakhic status of the redemption money while in the hands of the slave but before the owner's acceptance is beyond the scope of this Note. However, at the very least it may be said that, in limited circumstances and for certain transactions, Halakha considers a slave to be in independent possession of property notwithstanding the master's ownership of the slave. Thus, even if shareholders are considered the "owners" of a corporation, it does not *necessarily* follow that all of the corporation's transactions are directly attributable to the shareholders.

⁷² Professor Resnicoff, in a subsequent article, implicitly acknowledges this reality. *See* Resnicoff, *supra* note 21, at 693-94 (noting that "while most states have some form of stakeholder statutes, most statutes are limited to certain scenarios, and virtually all merely permit, but do not require, that interests other than profit maximization be considered").

corporate constituent statutes merely permit corporate-decision makers to pursue socially responsible objectives rather than mandate such behavior. These corporate constituency statutes serve as a safe harbor from liability for directors who, breaking from the normal standards of accepted corporate governance, specify consider interests other than the shareholders while making business decisions.⁷³ Contrary to Broyde and Resnicoff’s perception of the existing legal regime, shareholder primacy is far from dead.⁷⁴ Because the underlying legal mechanism used by the proponents of the Halakhic Entity approach merely integrated the existing secular corporation into the corpus of Jewish Law,⁷⁵ it must be conceded that, for purposes of Jewish Law, it is not significant what corporate law ought to be but rather was the state of the law actually is.

The “problem with slaves” therefore remains.⁷⁶ If shareholders are indeed the owners of the corporation (as evidenced by the widespread acceptance (both in law and in practice) of shareholder primacy), even if one were to assume the validity of the Halakhic Entity, nonetheless, simple application of the Jewish Law principle that (generally) grants a master the

⁷³ Ironically, Broyde and Resnicoff quote to the 1993 version of the Illinois corporate constituency statute to support their description of corporate constituency statutes. Broyde & Resnicoff, *supra* note 1, at 1727. However, the text of the Illinois statute made it clear that it was merely a safe harbor for directors rather than a statutory mandate. *See* 805 ILL. COMP. STAT. 5/8-8.5 (West 1993) (stating that corporate directors “[M]ay . . . consider the effects of any action upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors.”).

⁷⁴ *See, e.g.*, Roberta S. Karmel, *Should a Duty to the Corporation Be Imposed on Institutional Shareholders?*, 60 *Bus. Law.* 1, at 1-2 (2004) (noting how the Sarbanes-Oxley Act of 2002 strengthened and reinforced the shareholder primacy norm and describing shareholder primacy as the dominant model). It is significant to note that Delaware, arguably the standard bearer for corporate law in the United States and home to around 40 percent of all American corporations, has not adopted corporate constituency statutes. Indeed, the short lived rise of the Occupy Wall Street movement can be viewed as a protest against the dominance of the shareholder primacy position. *See, e.g.*, Jon Bussey, *Are Companies Responsible For Creating Jobs?*, *WALL ST. J.* (Oct. 28, 2011) (stating that the Occupy movement poses an “intriguing challenge” to the proponents of shareholder primacy).

⁷⁵ *See supra* Part II.

⁷⁶ *Supra* part V.

ownership rights over a slave's property to the corporate entity leads to the conclusion that shareholders should be considered, for purposes of Jewish Law, the owners of the Halakhic Entity and responsible for the Halakhic Entity violations of Jewish Law.⁷⁷

VII. Team Production as an Alternative

As noted above, the team production theory offers an alternative description of the corporate entity and its constituent parties. Namely, the corporation is best viewed as a consolidation of team specific inputs. Each party relinquishes all of the rights associated with their input to the corporate entity. The board of directors serves as the mediating board between all of the team members, and is entrusted with maximizing the value of the inputs. Additionally, options theory completely undermines the concept of shareholder as owners. Rather, the corporation itself is the owner of the corporation.

The corporate paradigm envisioned by proponents of the team production theory may provide a simple solution to Broyde and Resnicoff's problem with the Halakhic Entity. The Halakhic Entity merely recognizes the Jewish Law validity of the existing corporate entity. Therefore, if one were to assume the validity of the team production description of the corporation, then the corporate entity absorbed by Jewish Law is an entity that is not owned by the shareholders. According to the team production description, and contrary to Broyde and Resnicoff's assertion, shareholders are not the owners of the corporation. Broyde and Resnicoff's analogy of shareholders and corporate assets to the Jewish Law principle regarding a master's ownership of her slave's assets is simply inaccurate. A master owns her slave and therefore owns the slave's property. According to the team production description, shareholders

⁷⁷ *Id.*

do not own the corporation and therefore are not the owners of the corporation's assets.⁷⁸ Similarly, for purposes of Jewish Law and the Halakhic Entity, shareholders should not be considered the owners of the corporation's assets. Jewish shareholders are therefore neither responsible for the Jewish Law liabilities attached to the corporation's assets nor relieved of personal Halakhic obligations through the corporation's actions.⁷⁹

VIII. Conclusion

The ambiguity in Jewish Law regarding the precise legal status of the corporate entity and its shareholders raises important questions for adherents of Jewish Law.⁸⁰ The Halakhic Entity's attempt to clarify this ambiguity is undermined by its failure to adequately address, from a Jewish Law perspective, notions of shareholder primacy and shareholder control over corporate assets.⁸¹ Professors Broyde and Resnicoff argue that this failure is not fatal to the Halakhic Entity because, due to the widespread acceptance of the CSR theory, classical notions of shareholder primacy are becoming increasingly obsolete and are insignificant as a matter of Jewish Law.⁸² However, Broyde and Resnicoff's assertion regarding shareholder primacy is incorrect because it fails to appreciate the normative nature of the CSR theory and does not

⁷⁸ The syllogism expressed above *supra* note 66 can be modified as follows: Slaves are independent entities. Slaves may own assets. Masters own their slaves. Therefore, masters own their slave's assets. However, corporations are independent entities. Corporations own assets. Shareholders do not own a corporation. Therefore shareholders do not own a corporation's assets (or resulting Jewish Law liabilities).

⁷⁹ See *supra* Part I (explaining the Halakhic consequences of a determination that shareholders are not considered the owners of the corporate assets).

⁸⁰ See *supra* note 10.

⁸¹ Broyde and Resnicoff, *supra* note 1, at 1722-23.

⁸² *Id.*

reflect the realities of the existing corporate legal regime.⁸³ As an alternative to Broyde and Resnicoff, this Note argues that the team-production description of the corporation may provide a solution for the gap in the Halakhic Entity theory. This is because the team production model squarely addresses the issue of shareholder ownership and control in a manner that is consistent with both corporate reality and with Jewish Law.

This Note leaves many issues unexplored.⁸⁴ It is not intended to be comprehensive or conclusive. The complexities of a two thousand year old Jewish Law tradition and an evolving set of corporate law are not easily resolved. This Note merely highlights recent academic thinking and attempts to find a somewhat unexpected application in a highly disputed area of Jewish Law. It suggests that the fusion of modern academia with ancient legal principles may lead to surprisingly practical consequences.

⁸³ In fairness to Broyde and Resnicoff, it should be noted that their article, Broyde and Resnicoff, *supra* note 1, is fairly outdated as it preceded the passage of the aggressively pro-shareholder Sarbanes-Oxley Act of 2002 by nearly 5 years. *See, e.g.*, Karmel, *supra* note 74, at 1-2 (noting how the Sarbanes-Oxley Act of 2002 strengthened the shareholder primacy norm.).

⁸⁴ For example, this Note presupposes a public corporation that has widely dispersed shareholders facing practically insurmountable collective actions problems. Indeed, it is specifically in this context that the team production model is particularly appealing. *See generally*, Stout, *supra* note 50 (explaining how a team production analysis of the corporation is crucial to understanding why widely dispersed shareholders of public corporations cede control over their investments to a board of directors). *See also supra* note 58 (summarizing the team production dismissal of shareholder voting rights as evidence of shareholder control over the corporation). Virtually all Halakhic authorities hold that, for purposes of Halakhic obligations, control is an essential attribute of ownership. Broyde & Resnicoff, *supra* note 1, at 1124-26. The lack of shareholder control typical in a public corporation and the team production theory makes the public corporation a fitting candidate for the Halakhic Entity theory. However, the question arises, does the nature of the Halakhic Entity change in a context where shareholders wield considerable control? Examples of such shareholders include institutional investors or majority shareholders of a publicly held corporation. At first glance, it would seem that institutional investors pose less of a problem to the Halakhic Entity than does a majority shareholder. This is because the institutional investors themselves are legal entities with widely dispersed shareholders. Hence, this Note's analysis of the Halakhic Entity and the team production model applies to the institutional investors themselves. The Jewish shareholders of these institutional investors are therefore not responsible for the actions taken by institutional investor that implicate Jewish Law. *See supra* Part VII. However, a majority shareholder may be an individual person and the extent of her Halakhic obligations and liabilities incurred through the team-production-Halakhic-Entity's actions remains to be explored. *But see*, Broyde & Resnicoff, *supra* note 1, at 1812 (stating that "[t]he Israeli Rabbinical Court would still apply the [H]alachik [E]ntity theory to a voting shareholders with a significant voice in corporate governance").