

## *Salomon* Redux: The Moralities of Business

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“A good reputation is more valuable than money.”  
—Publilius Syrus

### I. INTRODUCTION

Trade and commerce are as old as human society itself. People have bartered and sought to enrich themselves for millennia, and they have sought more efficient and profitable ways to do so by devising various schemes and structures. Commonly, for example, traders and entrepreneurs banded together in partnerships with the hope of obtaining a collective advantage. The idea of a “corporation” as we know it today was a long time coming. The corporation, which is derivative of the Latin *corporare* for “form into a body,” has roots in Roman law and the state-sponsored colonial organizations such as The East India Company and the Hudson’s Bay Company of the seventeenth century.<sup>1</sup> But recognizing the distinct identity and legal persona of a collective entity or institution, independent of its participating members, is a recent development.

In the British Commonwealth, many consider the nineteenth century case of *Broderip v. Salomon* to have cemented the modern corporation at the centre of today’s social and commercial life.<sup>2</sup> The *Salomon* case began in the filthy backstreets of Dickensian London, where the Salomon family struggled to keep its boot-making business afloat. From these humble beginnings, the laws of corporate governance now facilitate the immense growth and influence of today’s mega-corporations. Many attribute *Salomon* to establishing the corporation as a legal entity separate

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1. ALLAN C. HUTCHINSON, *THE COMPANIES WE KEEP: CORPORATE GOVERNANCE FOR A DEMOCRATIC SOCIETY* 39–58 (2005).

2. At first instance and the court of appeal, the *Salomon* case is reported as *Broderip v. Salomon*, [1895] 2 Ch. 323. The final appeal at the House of Lords is reported as *Salomon v. A. Salomon & Co.*, [1897] A.C. 22 (H.L.).

from its owners and imposing a veil between the corporation and its shareholders.<sup>3</sup> At least, that is how traditional scholarship would have it.

Yet, upon closer inspection, the whole *Salomon* saga is revealed to be about much less and much more. For all but the corporate lawyer, *Salomon* is more helpfully understood as a decision that is less about the legal status of a corporate entity and more about the morality of business practices, including but not limited to, incorporation. In its commercial and social context, the case has little to say about incorporation and its legal consequences; the issue was more merely a pretext for the litigation than anything else. Rather, the case speaks more to the underlying issue of what counts as fair business dealing between people. The fact that the judicial inquiry into the Salomon business centered on the legal dimensions of incorporation does not detract from the essentially ethical basis of the decision about whether Aron Salomon acted with appropriate decency to people with whom he did business, especially his creditors. When understood in this way, *Salomon* opens up a very different range of topics for discussion. Rather than being reducible to a series of dry legal questions about the early history of modern incorporation, the case obliges us, as contemporary commentators, to confront the most basic of moral dilemmas: how do we handle keeping our moral obligations to others when doing so will result in catastrophic consequences for ourselves?

In this Essay, we revisit the *Salomon* case and its related litigation not only from a legal standpoint but also from a broader moral perspective.<sup>4</sup> In the second Part, we offer a detailed context for and account of the *Salomon* litigation. The third Part focuses on the historical roots of the corporation and the judicial arguments in *Salomon*. In the fourth Part, we explore the moral and legal consequences of the *Salomon* decision. Throughout the Essay, our ambition will be not only to give the *Salomon* case a more contextual and richer spin but also to tackle the relationship between legal principles and moral obligations in the commercial world. Taking our cue from Ambrose Bierce, we explore whether the corporation is merely “[a]n ingenious device for obtaining profit without indi-

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3. *Salomon* is most commonly cited as confirming the discrete legal persona of the corporation. See, e.g., *McClurg v. Canada*, [1990] 3 S.C.R. 1020, 1056 (Can.) (La Forest, J., dissenting); A. DOUGLAS HARRIS ET AL., CASES, MATERIALS AND NOTES ON PARTNERSHIPS AND CANADIAN BUSINESS CORPORATIONS 73 (4th ed. 2004); Paddy Ireland, *The Triumph of the Company Legal Form, 1856-1914*, in ESSAYS FOR CLIVE SCHMITTHOFF 29, 57–58 (John Adams ed., 1983).

4. In our historical overview of the case and legislative history, we owe a special debt to two sources on which we have heavily drawn. The record regarding the Salomons and their story is sparse, and so our account of the case and its major players is particularly rooted in G. R. Rubin, *Aron Salomon and His Circle*, in ESSAYS FOR CLIVE SCHMITTHOFF, *supra* note 3, at 99, and Ireland, *supra* note 3.

vidual responsibility,” or whether it can be appreciated as something in which individual responsibility and profit-making can be combined.<sup>5</sup>

## II. COMING OF AGE

### *A. A Foul Drain*

Whitechapel, in the East End of London, is still a hubbub of commercial enterprise marked by both ethnic diversity and commercial ingenuity. But in the later decades of the nineteenth century, it was also a site of devastating poverty and dire squalor. If the old saw of “where there’s muck, there’s money” has any truth to it, then Whitechapel was a very rich place. For all its industrial wealth, it was more a cesspit than a Silicon Valley. It brimmed with breweries, tanneries, sweatshops, and abattoirs. The streets stunk with all manner of industrial effluence and moral decay: drunkards, prostitutes, and urchins, but also traders, entrepreneurs, and Salvationists. Alexis de Tocqueville’s words hit the mark: “From this foul drain the greatest stream of human industry flows out to fertilize the whole world. Here humanity attains its most complete development and its most brutish, here civilization works its miracles and civilized man is turned almost into a savage.”<sup>6</sup> At this time, residents of Whitechapel and a cast of local characters fed off each other. For example, the gruesome murders by Jack the Ripper baffled the authorities and plagued the nightmares of local denizens, the carnivalesque exploitation of Joseph “Elephant Man” Merrick captured public attention, and the socialist political beginnings of George Bernard Shaw and the Fabians and the revolutionary education of the exiled Vladimir Ilyich Ulyanov (Lenin) were fostered. It was a time of great historical consequence, but for many in Whitechapel, the constant grind of daily life muted the excitement.<sup>7</sup>

One unheralded member of this group of East Enders was Aron Salomon. In 1859, Salomon was a young man in his early twenties when he arrived in this latter-day Gomorrah from Velbert in Prussia (near today’s Dusseldorf). As an Orthodox Jew, he soon became part of Whitechapel’s strong religious neighbourhood and married a local girl. Around this time, Jews were no longer encumbered with any particular legal or

5. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 52 (1911).

6. ALEXIS DE TOCQUEVILLE, *JOURNEYS TO ENGLAND AND IRELAND* 108 (Transaction Publishers 1979) (1835).

7. Articles published during Aron Salomon’s time reveal some interesting takes on Whitechapel life. See E. Dixon, *A Whitechapel Street*, 77 *ENGLISH ILLUSTRATED MAG.* 355 (1890); *The Siege of Whitechapel*, 48:1236 *SATURDAY REV. POL., LITERATURE, SCI. & ART* 19 (July 1879); *Thirty Years in Whitechapel*, 1687 *SUNDAY AT HOME: FAMILY MAG. FOR SABBATH READING* 549 (1886); *Whitechapel as a Portent*, *SPEAKER: LIBERAL REV.*, Mar. 7, 1891, at 279.

formal prohibitions on carrying out business or participating in the community; the first Jewish Lord Mayor of London, David Salomons, was elected in 1855, and Lionel de Rothschild was permitted to take his elected seat in the House of Commons in 1858 when the oath of office was amended to include non-Christians. Nevertheless, there was still a strong current of anti-Semitism in London that pervaded business and, especially, the legal community elite. Aron Salomon was to be painted by some as the stereotypical “grasping merchant.”

Despite the tough circumstances, Aron established himself in the community and began to operate as a boot and leather merchant. By 1862, Aron and his wife, Schoontje, had their first child, Emanuel. The couple added to their family at regular intervals, and there was a brood of six children—four boys and two girls—by the mid-1870s. As his merchant business thrived, Aron brought his sons into the business as they grew up. As a testament to his improved standing in the local business community, Aron was able to obtain the sponsorship of four local worthies and become a naturalized citizen in 1873. Buoyed by government contracts, “Salomon & Sons” was now a reputed boot and leather merchant and had become a fixture of Whitechapel High Street; they were no fly-by-night operation.

Over the next twenty years or so, Salomon’s business went from strength to strength. Under the managerial initiative of Aron and his sons, it expanded and established itself in Northampton, the traditional center of England’s leather industry. Rather than trade under the Salomon name alone, the family developed a couple of local firms, Fitzwell and Davy Brothers. The exact connection between Fitzwell and Aron Salomon himself remains hazy, and Davy Brothers was the later incarnation of the Northampton factory that was run (and technically owned) by Aron’s son, David. The precise interrelationships of the family-owned group are unclear, but later suspicions of surreptitious money-shuffling complicated the controversy in which the Salomons would ultimately become embroiled.<sup>8</sup> By the 1890s, however, the family-named business alone was valued at over £10,000 (over \$1 million in U.S. dollars today).<sup>9</sup>

The business was probably so successful because the Salomons prided themselves on making high-quality products. In 1890, the firm

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8. For a detailed discussion of Davy Bros. and Fitzwell Ltd., see Rubin, *supra* note 4, at 112–16.

9. Lord Macnaghten at the House of Lords identified that “if Mr. Salomon had been minded to dispose of his business in the market as a going concern he might fairly have counted upon retiring with at least 10,000*l.* in his pocket.” *Salomon v. A. Salomon & Co.*, [1897] A.C. 22 (H.L.) 47 (appeal taken from Eng.).

won the highest award for their military apparel at the Royal Military Exhibition in Chelsea. Indeed, when another manufacturer was chosen to supply the East End Jewish Boot Fund, Aron wrote to the *Jewish Chronicle* to complain that if he had been invited to tender for the role, he would have provided a superior product at cost price.<sup>10</sup>

Moreover, in an age that was notorious for “sweat labour” (i.e., overworked and underpaid workers), the Salomon enterprises, while not without flaws or failings, stood somewhat apart from other exploitative employers in the leather trade because they did not overwork or underpay their employees. As devout Jews (and active in local synagogues), the Salomons made a practice of philanthropic giving to alleviate the tribulations of local indigents. Consequently, although the family was no friend at all to the nascent trade-union movement, Salomon & Sons could claim a sincere commitment to being an honorable and respected employer and merchant in its day. The Salomons were not just a business but active members of the community.

In early 1892, when Aron decided to incorporate the business and obtain the benefits of limited liability, he was scrupulous in following the formal requirements of the Companies Act 1862.<sup>11</sup> In all this discussion, it must be remembered that the whole transaction of incorporating a firm was artificial and somewhat silly—the law required documentation of ostensible “transactions” (between, effectively, Salomon and himself) where no funds ever changed hands and exchanges of value were of the most intangible form.<sup>12</sup> But more of a concern than the legal ramifications was the moral quality of such a manoeuvre. While Aron might well have had a legal right or entitlement to incorporate his business, it was important to understand his motivations for doing so. Did he do it to steal a march on his creditors? Was it to protect members of his family from claims against their future well-being? Was it to simply join a trend of incorporation that was becoming more common among small business? Was it a matter of commercial gain getting the better of his membership in a moral community?<sup>13</sup>

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10. Rubin, *supra* note 4, at 103–04.

11. Companies Act, 1862, 25 & 26 Vict., c. 89 (Eng.).

12. Although the soon-to-be-created company had a trustee, as Ireland points out, “Salomon, as its promoter, dictated the terms” of the sale. Ireland, *supra* note 3, at 51. The intangibility of these types of transactions was not limited to one-person companies such as Salomon’s. A. D. Tyssen complained that the debenture was “trifling,” merely “a piece of paper stamped with the seal of the company, and containing some special words,” and no more. A. D. Tyssen, *Company Law Reform*, 24 LAW. MAG. & REV. Q. REV. JURIS. 5TH SER. 271, 273 (1898–99). We discuss further the issue of debentures and debenture holders below.

13. Rubin is partially of the mind that Salomon could not shake his sense of obligation as a “provide[r]” for his family, and that ultimately, he “place[d] his children’s interests, as he perceived

Aron began the process by entering into an agreement with a trustee for the future company, Adolph Anholt, to purchase the business from Aron. For these purposes, the business was valued at a modest £40,000. The Companies Act 1862 required that a corporation have at least seven shareholders,<sup>14</sup> so Aron, his wife, and five of his children signed the memorandum of incorporation with each taking one £1 share. By way of compensation, Aron received £1000 cash,<sup>15</sup> was granted 20,000 shares of the new company (which meant he held 20,001 of the shares issued), and was approved for 100 £100 debentures for a total of £10,000. The company was incorporated on July 28, 1892 as “A. Salomon & Co. Ltd.” Aron was appointed managing director and his two sons, Emanuel and Salomon, became directors. The first meeting of the shareholders was held a few days later on August 2, 1892. All of the financial arrangements between Aron and the company were settled by the end of January 1893. Little else changed—the business was still entirely family-owned and run. But this was when things began to unravel.

As part of the general downturn in the economy, labor disruption, and the loss of some government contracts, A. Salomon & Co. Ltd. began to feel the squeeze: its unsold stock was accumulating and earnings were decreasing. But whether Aron saw this coming is of huge significance in the moral and legal scheme of things. There is certainly no evidence that the incorporation was an obvious first step in a larger fraudulent scheme to avoid creditors or accrue some speculative profit; after all, Aron was not involved in an unmitigated swindle. Importantly, all pre-incorporation debts had been paid in full. But there were clouds of ethical suspicion that gathered and swirled around the transaction, especially when it came time for Aron to take legal advantage of his manoeuvre. Most likely, Aron incorporated the business for a number of reasons. The most reasonable assumption seems to be that there were several factors—

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them, above whatever business reputation he might hope to have salvaged from the wreckage of the crash” of his company. Rubin, *supra* note 4, at 101.

14. Companies Act, 1862, 25 & 26 Vict., c. 89 sch. 6 (Eng.).

15. This aspect of the transaction is a good example of its artificiality. As Salomon himself was the driving force behind the purchase of his own firm, this transfer would have amounted to a £1000 cash transfer from himself to himself, or in practice, from the new company’s coffers (which were practically identical to the old firm’s) to his own pocket. Additionally, the remaining nearly £8000 of what was ultimately a £39,000 purchase price was paid to Salomon in the form of pre-existing debt fulfillment. In effect, cash consideration owed to Salomon by the new corporation was satisfied by the new corporation (in practice, Aron himself) discharging the original Salomon firm’s old debts (which were eventually repaid in full). See *Salomon v. A. Salomon & Co.*, [1897] A.C. 22 (H.L.) 49 (appeal taken from Eng.) (discussing the repayment mechanics in the judgment of Lord Macnaghten); *Broderip v. Salomon*, [1895] 2 Ch. 323 at 324–27, 342–44; Daniel Teo Cheng Seong, *The Salomon Orthodoxy: Unravelling the Metaphorical Myth*, 21 SING. L. REV. 199, 199 (2000–2001). Those who are not corporate lawyers might be forgiven for their confusion and for failing to see beyond the artifice to some other legal “reality.”

including his desire for a more formal role for his children and for greater respectability—combined with a general foreboding about the general and particular economic pressures on A. Salomon & Co. Ltd. As with most such episodes, neither his motivations nor intentions were entirely apparent.<sup>16</sup>

At the beginning of 1893, in order to tide the struggling company over, Aron secured a £5000 personal loan from Edmund Broderip, another local merchant. Aron then loaned this amount to the company at a 10% annual interest. On February 5th, as security for the loan, Aron mortgaged his debentures (valued at £10,000) to Broderip. While Aron retained beneficial ownership of the debentures, he agreed that the company would pay 8% interest on the value of the debentures to Broderip. Unfortunately, the business quickly deteriorated. In September, the company defaulted on the interest payments to Broderip. As was his entitlement, Broderip indicated that he would call in the security principal. On October 11th, when he had not received further payment, Broderip commenced an action to enforce his security. Then, on October 25, 1893, A. Salomon & Co. Ltd. officially went into receivership. The business was ending, but the legal fun and games were just beginning.

### *B. A Company Is Born*

Now under the control of the receiver, A. Salomon & Co. Ltd. contested Broderip's claim to the principal on the debentures. If Broderip's claim were to be satisfied (as it eventually was), it would exhaust almost all of the remaining assets of the company, and only slightly more than £1000 would remain to satisfy the other creditors' claims, which had accrued to over £7500.

Perhaps more significantly, however, the receiver also brought an accompanying action against Aron Salomon himself, which was the basis of the *Salomon* case we discuss here. It was alleged that the creation of A. Salomon & Co. Ltd. was a sham, an elaborate and fraudulent scheme perpetrated by Aron to defeat the legitimate claims of the company's creditors. As such, the receiver insisted that the formation of the company should be ignored, and Aron made personally responsible for the company's debts. The claim would have greatly harmed Aron: he was being asked to give up his debentures and repay the company the almost

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16. But see *supra* note 13 and accompanying text; Marc T. Moore, 'A Temple Built on Faulty Foundations': *Piercing the Corporate Veil and the Legacy of Salomon v. Salomon*, 2006 J. BUS. L. 180, 200. Not insignificantly, the practice of small-firm incorporation was booming around this time, so this incorporation may have taken place simply as a matter of course. Aron's situation was hardly unique—many other small "private companies" were being and had been similarly incorporated. See Ireland, *supra* note 3, at 40–41, 54.

£30,000 in value that he had received as cash and shares after the company was incorporated.

Not only did Aron not have such funds (valued by today's purchasing power in the millions of dollars) but he also continued to insist that he had not acted at all inappropriately, let alone fraudulently. As such, he not only resisted the receiver's claim for indemnity but also maintained that, as a debenture-holder, he had his own claims against the company that outranked the other trade creditors. This obduracy did not impress the business community and also called into doubt Aron's original motives for incorporating his family business. In slightly condescending and anti-Semitic terms, the *Shoe and Leather Record* opined that Aron should cease to engage in "financial juggling with a vengeance"<sup>17</sup> that placed in jeopardy his "unblemished reputation . . . as one of the best men in the Jewish community."<sup>18</sup> His attempt to enforce his strictly legal entitlements was characterized as resulting from "evil counsels."<sup>19</sup> Undeterred, Aron continued to insist that he had done nothing wrong and he was seeking only to preserve his family's name and well-being. Having hired Ralph Raphael as his solicitor, he set about defending his money and his name.

So the scene was nicely set to determine whether Aron was acting fairly and, if not, what his comeuppance should be. Although this ethical issue was the true heart of the dispute, both sides' lawyers framed the matter in stricter legal terms. Instead of addressing the moral issue of "fair dealing" directly, the lawyers were successful in persuading the courts to characterize it as being about the nature and extent, if any, of the separation between a company and its founding and directing personalities. If there was a true separation, then Aron was free and clear; if not, then Aron was on the hook for Broderip's and other creditors' claims.

A close reading of the various judgments in *Salomon* strongly indicates that the narrow legal issue of corporate personality was driven by a larger moral context.<sup>20</sup> In other words, the case was less about corporate personality and more about whether the corporation's benefits accrue to corporate leaders who bear dishonorable motivations. Such an interpreta-

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17. Rubin, *supra* note 4, at 111 (quoting SHOE AND LEATHER RECORD 1384 (Dec. 22, 1893)) (internal quotation marks omitted).

18. *Id.* at 109 (quoting SHOE AND LEATHER RECORD 828 (Oct. 13, 1893)) (internal quotation marks omitted).

19. *Id.* at 111 (quoting SHOE AND LEATHER RECORD 1384 (Dec. 22, 1893)) (internal quotation marks omitted).

20. Edward Cox, in lamenting increasing protection for corporations, suggested that what amounted to freedom from the "obligation to pay debts and perform contracts" represented "a principle immoral in itself." Edward Cox, *Preface* to THE NEW LAW AND PRACTICE OF JOINT STOCK COMPANIES (4th ed. 1857).



tion is given considerable traction by the fact that the principle of “separate corporate personality” had already been in play in English company law for a half-century or so since the decision in *R v. Arnaud* in 1846.<sup>21</sup> Since that question had already been answered, the real issue here was whether incorporators could be reprimanded by virtue of their failure to engage in “fair dealing.” In an important sense, the more narrow legal issue was set within and driven by a larger moral context.<sup>22</sup> Accordingly, the pressing doctrinal issue might well have been whether the legal fiction of separate legal personality could and should be bestowed upon small family enterprises like that of the Salomons.<sup>23</sup> But the animating force behind the legal arguments and doctrinal posturing was the squarely moral one of what was to be the standard of fair dealing and good business practice for small traders and entrepreneurs.

None of this is to suggest that the resulting consequences of the court’s decision about the nature of the corporate personality were not important or profound. The general stakes were high because, without an authoritative affirmation of the corporation’s separate legal personhood, the growth of a more capitalized economy was, for better or worse, on the line.<sup>24</sup> The touted benefits of incorporation—continuing existence, transferable ownership, limited liability, fundraising capacity, professional management, and the like—all flow from such recognition. Nevertheless, *Salomon*’s contemporary significance was to be found in its institutional response to the ethical inquiry about fair dealing among traders. *Salomon* asked: were the advantages of incorporation available only to those who could claim to be acting fairly and honorably or, excepting outright fraudsters, were they open to all no matter how sundry? This was no small matter.

### III. LAW, MORALS, AND INCORPORATION

#### *A. The Early Days*

Of course, companies or corporations have existed for many centuries. In the early Middle Ages, chartered corporations were created to serve public goals. Established by towns, universities, trade guilds, and churches, the property and holdings of these not-for-profit corporations were separate from that of its members, like clergy and aldermen, who

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21. *R v. Arnaud*, [1846] 9 Q.B. 806 (U.K.).

22. See *supra* note 20.

23. Commentators suggest that whereas *Salomon* today stands for the more general corporate personality proposition, in its time it was relevant only to this narrower issue. See, e.g., HARRIS ET AL., *supra* note 3, at 73; Ireland, *supra* note 3, at 57–58.

24. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

often had only a limited liability for the overall debts and liabilities. Yet, a couple of centuries passed before the business community picked up this device and efforts were taken to deploy corporations for the purposes of trade and commerce.<sup>25</sup>

The immediate precursor of the modern corporation was the “joint stock company.” These were usually unincorporated entities (with no separate legal existence from its members) that served as a convenient conduit for profit-making investment by people with limited financial resources. In effect, it was simply one kind of partnership in which the shareholders, who could run into thousands, were jointly and severally liable for all the company’s debts and liabilities. It was not until the early nineteenth century that the British government began, by a series of legislative acts, to lessen some of the impediments that prevented joint-stock companies from developing into the legal and institutional devices that they have now become for private economic activity.

While eighteenth-century British investors accepted the public-purpose regulations inherent in their government charters, across the Atlantic, American entrepreneurs came to regard such rules as repressive and unrealistic. Indeed, the American War of Independence was, at least in small part, a backlash against the idea that there should be a direct connection between private enterprise and the public good. As such, the United States was more willing to relax the enabling requirement that a corporation must advance a specific public purpose before it could be incorporated. State legislatures had initially granted corporate charters to organizations involved in building roads, bridges, and the like, or in establishing a banking and insurance network. General and commercial companies were few and far between. Beginning with New York in 1811, however, some states began to permit companies to be established by providing only a general summary of their intended activities. By the 1840s, most states permitted a streamlined procedure of incorporation.

Beginning in the 1840s, the English also began to pursue a similar course. Most believed that England needed capital investment to fuel the Industrial Revolution, and that would require some protection for those vulnerable investors who stood to lose much more than their initial investment and become bankrupted if their firm failed. In 1844, Parliament passed an act which permitted companies to define their own purpose, and the power to micro-control economic activities passed from the gov-

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25. See TOM HADDEN, *COMPANY LAW AND CAPITALISM* 3–36 (2nd ed. 1977); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 51–52 (2003); *THE POLITICAL ECONOMY OF THE COMPANY* (John Parkinson et al. eds., 2000).

ernment to the boardroom and was occasionally policed by the courts.<sup>26</sup> Further, in 1855, Parliament awarded shareholders limited liability so that their broader personal assets were protected from corporate misfeasance.<sup>27</sup> These piecemeal reforms culminated in the much-heralded and radical omnibus Companies Act 1862 by William Gladstone's Liberal government. Revered and reviled in almost equal measure, the introduction of "limited liability" was both condemned as a special favor to the rich and celebrated as a stepping stone for a new entrepreneurial class.

In a few short years, the formation of private incorporated companies had gone from being a quasi-criminal activity to a government-promoted endeavor. As Robert Lowe, the 1855 Act's main sponsor, put it, "To 1825, the law prohibited the formation of joint-stock companies. From then to now it was a privilege. We hope to make it a right."<sup>28</sup> The prevailing view, however, was that small or one-person firms were not supposed to fall within the scope of the Act. Some, like Edward Cox, a prominent lawyer and author of the influential *The Law and Practice of Joint Stock Companies and Other Associations*, disagreed and saw no problems with such a legal manoeuvre.<sup>29</sup> But the historical record demonstrates that the intention of Parliament (with which, insofar as it could be ascertained from the statutory text, the *Salomon* courts would later be concerned) was clear: incorporation was not intended for small or one-person firms.<sup>30</sup>

The issue over the applicability to small or one-person firms aside, there were many important and telling consequences for corporate governance in these historic reforms. Incorporation was such a sought-after process because of the substantial advantages it offered the growing entrepreneurial class: raising capital became much easier and less risky; it created desirable economies of scale in the production of goods and services; it reassured and protected investors; and it permitted shareholding investors to enjoy the passive benefits of ownership without assuming the active burdens of management. Nevertheless, incorporation also brought certain challenges. The main problem was that as the ranks of shareholders became more expansive and diffuse, the gap between management and ownership widened. This increased the risk of inefficient

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26. Joint Stock Companies Act, 1844, 7 & 8 Vict., c. 110 (U.K.).

27. See Joint Stock Companies Act, 1856, 19 & 20 Vict., c. 47 (U.K.); Limited Liability Act, 1855, 18 & 19 Vict., c. 133 (U.K.); Ireland, *supra* note 3, at 32–33.

28. MICKELTHWAIT & WOOLRIDGE, *supra* note 25, at 51.

29. Ireland, *supra* note 3, at 36–37. According to Ireland, although Cox was opposed to the spreading limitation of liability, he felt that if it was going to apply, it was only right that it extend to smaller firms. Accordingly, he promoted how such firms might use the relevant legislation to become incorporated.

30. *Id.* at 33–38.

management and possible self-dealing, which increased the shareholders' costs of monitoring management. Also, despite legislative impediments, incorporation permitted some corporate ne'er-do-wells to raise capital for an undercapitalized (and debt-laden) enterprise and hide behind the protection of limited liability.

By far and away, however, the most significant effect of all these mid-nineteenth-century reforms was to legitimate an entrepreneur's private pursuit of profit through commerce and business as an end in itself. Still, it is worth noting that, although there was an ideological shift from public initiative to private enterprise, the corporation remained (and still remains today) a state-created and state-sanctioned institution. Despite the continuing efforts of dewy-eyed apologists, the Victorian birth of the modern corporation was a distinctly political event; the company is no more a natural entity and its creation is no more a natural process than industrial production itself. As Chief Justice John Marshall stated in the early-nineteenth-century case of *Trustees of Dartmouth College v. Woodward*, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the [law] confers upon it, either expressly, or as incidental to its very existence."<sup>31</sup>

While the modern English corporation was born in 1862, the concept did not mature for a few decades. In the following decades, thousands of companies were created and around one-third went almost immediately bankrupt. This was an era, particularly in the United States, in which restrictions on the legitimacy of one company holding stock in another were removed and in which mergers and acquisitions began to proceed apace: big business began to establish itself, and the megacorporation, like America's Standard Oil and Britain's Lever Brothers, took shape. Moreover, many small businesses began to avail themselves of incorporation's benefits. The Salomon family's boot-making business was one of them. The much-heralded *Salomon* decision casted the corporate die for today and beyond. But it also managed to suggest, if not set, an ethical standard of business dealings that continues to this day.

### *B. The Salomon Crucible*

The *Salomon* case first came before the Queen's Bench Division in early November 1894. The presiding judge was Roland Vaughan Williams. Appointed by Lord Halsbury (for whom he had "devilled" or acted a junior barrister in his early years), he went on to the court of appeal a

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31. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819); see Seong, *supra* note 15.

few years after the *Salomon* case. His judicial reputation was of being something of a stickler for technicalities, a defender of the common law's grounded pragmatism, and a rather all-around eccentric figure. He had been an esteemed lawyer, an expert in commercial law, and the author of *The Law and Practice of Bankruptcy*. Doing little to hide his well-known opposition to incorporation that he considered almost tantamount to fraudulent conversion at its core, it came as little surprise that his 1895 Valentine Day's judgment went against Aron.<sup>32</sup> Although Williams found that there was no fraud on the creditors, he relied on the novel argument (suggested by him to the company's lawyers) that the company was acting as an agent for Aron and that Aron was therefore the responsible principal throughout. Aron was required to indemnify the company for all its debts, and his debentures were declared to be unenforceable.<sup>33</sup> In larger terms, this meant that Vaughan Williams had refused to accept that A. Salomon & Co. Ltd. was a separate legal entity for all practical business purposes; the veil of incorporation was pulled back with little ceremony or compunction.

Aron took his case to the court of appeal. Through his barrister, the established (and talented sportsman) Montague Muir Mackenzie,<sup>34</sup> it was contended that Aron had acted entirely in accordance with the letter and underlying policy of the Companies Act. The court heard the appeal on May 7, 1895 and handed down the judgment on May 28, 1895. While all three judges rejected Williams's line of reasoning, they still unanimously found against Salomon. The prominent Lord Justice Lindley, who was already a reputed jurist and went on to become a leading Law Lord, delivered the leading judgment.<sup>35</sup> He was hard on Aron and opined that the incorporation "scheme [was] a device to defraud creditors"<sup>36</sup> and "not permitted by law."<sup>37</sup> The other two took a similar line. Lord Justice Lopes characterized the other family members as "six mere dummies" and concluded that "[t]o legalize such a transaction would be a scan-

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32. See P. A. Landon, *Williams, Sir Roland Lomax Bowdler Vaughan (1838–1916)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Steve Hedley reviser, online ed. 2004), <http://www.oxforddnb.com/index/101036928/Roland-Vaughan-Williams>; see also Ireland, *supra* note 3, at 50–51.

33. *Broderip v. Salomon*, [1895] 2 Ch. 323 at 332–33.

34. See *Montague Muir Mackenzie*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Montague\\_Muir\\_Mackenzie](http://en.wikipedia.org/wiki/Montague_Muir_Mackenzie) (last visited Apr. 22, 2012).

35. See Gareth H. Jones & Vivienne Jones, *Lindley, Nathaniel, Baron Lindley (1828–1921)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (online ed. 2004), <http://www.oxforddnb.com/index/101034535/Nathaniel-Lindley>.

36. *Broderip*, [1895] 2 Ch. at 339.

37. *Id.* at 338.

dal.”<sup>38</sup> Lord Justice Kay was less scathing and would have allowed Aron to repay the full purchase price of the company but with credit for the debentures (for which he had never received any money).<sup>39</sup> So the upshot was that companies like A. Salomon & Co. Ltd. were a separate legal entity in name only and did not shield their beneficial owners and continuing controllers from liability, especially if there was a whiff of fraud about the initial incorporation. Importantly, neither the court of first instance nor court of appeal was willing to observe only the letter of the law. Instead, the courts based their rulings on the very real situation of an independent trader availing himself of some rather impressive paperwork and abandoning his moral responsibilities to his business community.

For his part, Aron was now in a real bind. He had lost not only his company but also almost all of his money. The plight of impoverished persons in Whitechapel was not at all attractive; there was the grinding poverty on his doorstep and the unedifying prospect of the Poor House (a government-run workhouse) if things went from bad to worse. To say that Aron and his family might literally have been lining up for gruel and cleaning hospital refuse in exchange for filthy shelter would involve little exaggeration.<sup>40</sup> Indeed, membership in the ranks of the homeless and destitute was especially harsh for those, like Aron, who had fallen back down farthest. Such a fate was not unheard of; formerly wealthy, he would now be “[a]mong the very dregs of the outcast crowd.”<sup>41</sup> So, with a certain moral resolve and a little-else-to-lose mentality, an impecunious Aron made a successful bid to appeal to the House of Lords *in forma pauperis* (i.e., he was excused from paying legal fees if he lost). To do so, he had to swear that he had no funds or assets at all except £5 and the clothes that he was wearing.<sup>42</sup> By this point, success in litigation would

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38. *Id.* at 341. Peta Spender questions the use of the “mere dummies” terminology, given that the Salomon family was clearly legitimately and independently invested in the economic enterprise. She discusses this issue within the larger context of how, especially in relation to the law, “[f]amilial ideology constructs the family in a way which assumes a commonality of interests of family members which is subsumed in the interest of the patriarch.” See Peta Spender, *Resurrecting Mrs. Salomon*, 27 FED. L. REV. 217, 222 (1999).

39. *Broderip*, [1895] 2 Ch. at 347.

40. Of course, we do not know enough about the Salomons’ exact circumstances to know what other personal support they may have had, nor the extent to which the entire family would have been affected by Aron’s misfortune. But the threat of actual poverty in Whitechapel was very real, and the living and working conditions of the poor frighteningly grim. See, e.g., JACK LONDON, *THE PEOPLE OF THE ABYSS* 101–11 (1903); Ireland, *supra* note 3, at 48; *Thirty Years in Whitechapel*, *supra* note 7, at 551.

41. *Thirty Years in Whitechapel*, *supra* note 7, at 551.

42. *In re Raphael*, [1899] 1 Ch. 853 at 856.

be unlikely to restore Salomon's reputation in the industry, which had already passed its judgment,<sup>43</sup> but it just might save his personal pride.

The case was heard over three days in June 1896. The heavyweight legal team of McCall, Buckley, and Cohen QCs, as well as Mackenzie, represented Aron. Their basic argument was that, apart from compliance with all legislative requirements, the family business was in decent shape when incorporation occurred and that Aron had acted in good faith at all times. In response, the company's barristers, Farwell and Theobald, insisted that the whole incorporation was a scam and that Aron, as the company's chief executive, should be brought to personal account.<sup>44</sup>

Five months later on November 16, 1896, the six judges of the House of Lords gave their opinions. In an abrupt and unanimous about-turn, they decided that there was nothing improper about Aron's actions, that the incorporation of A. Salomon & Co. Ltd. was entirely valid, and that Aron could hold on to whatever money that he still had. In effect, the House of Lords decided that once the formalities of the Companies Act 1862 had been followed, the incorporation of the company was complete, and it created a new entity separate from its founders and continuing owners. It was a resounding success for Aron and other similar family ventures. Henceforth, companies and their owners were not one and the same in law, no matter how identical they were in practice. Reinforcing a "corporate veil" between the company and its members, the Law Lords confirmed that not only an association of businesspeople could become a truly chartered and free-standing corporation but so could a one-person<sup>45</sup> or family undertaking.

Lord Halsbury delivered a strong opinion. He was considered to be no great legal mind, but he exerted strong institutional influence through his political connections.<sup>46</sup> As the Lord Chancellor, the country's chief law officer, he was also a member of the government's executive and legislative branches. Finding no provisions in the Companies Act about the need for a shareholder to be "an independent and beneficially interested person,"<sup>47</sup> he saw nothing wrong with what Aron had done: "Whether such a result be right or wrong, politic or impolitic, . . . we

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43. No doubt legal victory would have been irrelevant to the moral verdict of his peers, and as Rubin notes, "his business reputation [was] not merely tarnished but demolished." Rubin, *supra* note 4, at 101.

44. *Salomon v. A. Salomon & Co.*, [1897] A.C. 22 (H.L.) 27–29 (appeal taken from Eng.).

45. But this applied only to a de facto one-person corporation, as the statute still required that de jure, there be at least seven signatories to the articles of incorporation.

46. See G. R. Rubin, *Giffard, Hardinge Stanley, First Earl of Halsbury (1823–1921)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (online ed. 2004), <http://www.oxforddnb.com/index/101033395/Hardinge-Giffard>.

47. *Salomon*, [1897] A.C. at 32.

have nothing to do with . . . if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it.”<sup>48</sup> He was joined in this opinion by Lords Watson, Herschell, Morris, and Davey. Recurring throughout the judgments was identification that, paradoxically, if the receiver was right that no company was ever properly formed, then there was no company that could legally sue Salomon.

As strong as Lord Halsbury’s opinion was, Lord Macnaghten gave the most uncompromising and declaratory judgment. An Irishman and former Conservative Member of Parliament, he was held in high regard by the bench and bar alike; he had a wry turn of phrase and the ability to give the most arcane arguments a stylish spin.<sup>49</sup> And these qualities stood in him in good stead in this case. As much as he was ambivalent towards Aron’s situation, he was persuaded that Aron had acted in good faith. He opined that the other creditors had been careless and “have only themselves to blame for their misfortunes.”<sup>50</sup> In a resounding statement of legal principle, he stated:

The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.<sup>51</sup>

*Salomon*’s decisive affirmation that a company’s “separate legal personality” was effected organically through the judge-made common law. It demonstrated the serendipitous nature of the process as each court was unanimous but in a different direction with different rationales. Nevertheless, *Salomon* reflected broadly the received understandings of the time about the need to insulate capitalist speculation from managerial activity even if they were, in this particular case, both embodied in one and the same person. This decision heralded in the twentieth century and set the substance and tone for much of the “corporate capitalism” that dominated the century.

So how did the House of Lords’ decision impact Aron, Broderip, and the other creditors? The fact is that we are not sure; there is insufficient evidence available to reach any definite conclusions. Broderip was

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48. *Id.* at 34.

49. See J. A. Hamilton, *Macnaghten, Edward, Baron Macnaghten (1830–1913)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Hugh Mooney reviser, online ed. 2004), <http://www.oxforddnb.com/index/101034803/Edward-Macnaghten>.

50. *Salomon*, [1897] A.C. at 53.

51. *Id.* at 51.



out of the picture; he had been paid off and his debentures returned to Aron.<sup>52</sup> While Aron would have been able to exercise his rights under the debentures, it is simply unknown if he did. He might have abandoned his claim, enforced it, or received a pro rata share along with the other creditors.<sup>53</sup> Apart from completing the story, evidence of what happened might shed some light on his original motivations and their moral quality, not to mention his perception in the business community. But the fact that he died not as a pauper, but with an estate of £503, suggests that he likely did receive something one way or another from the company's bankrupt remains. In which case, the other creditors would be left with nothing.

#### IV. THE BUSINESS OF ETHICS

##### *A. Behind the Veil*

For all of its importance (or perhaps because of it), the *Salomon* decision was met with as much condemnation as praise.<sup>54</sup> On the one hand, some worried about the ease with which the benefits of incorporation, particularly limited liability, could be obtained by all manner of businesses or traders; it was now a relatively simple matter for families and one-person firms to shield their assets from legitimate creditors. This led to efforts to offer better protection to creditors by placing more onerous requirements (e.g., a debenture registry and increased regulatory oversight) on the formation of companies.<sup>55</sup> On the other hand, others celebrated the fact that the benefits of incorporation were now more broadly available and would better grease the wheels of commerce at all levels. Indeed, the decision rightly weakened the hand of creditors and obliged the more dubious among them to take greater responsibility for their often extortionate activities.

Most significantly, Parliament stayed quiet and took no immediate steps to alter the thrust or effects of the Law Lords' robust decision. It was another example of the power of courts to develop and, on some interpretations, change legislative policy and practice. It was only in the

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52. It is unclear exactly how or when this occurred, but by the time of the court of appeal decision, *Salomon* had "paid Broderip's mortgage debt on the debentures." *Broderip v. Salomon*, [1895] 2 Ch. 323 at 345 (Kay, L.J.).

53. Rubin, *supra* note 4, at 119–20.

54. See, e.g., Ireland, *supra* note 3, at 56–57; *In the City*, 17:418 NAT'L OBSERVER & BRITISH REV. POL., ECON., LITERATURE, SCI., & ART 9 (21 Nov. 1896); O. Kahn-Freund, *Some Reflections on Company Law Reform*, 7 MOD. L. REV. 54 (1944).

55. See *In the City*, *supra* note 54; Tyssen, *supra* note 12; Kahn-Freund, *supra* note 54.

1900s that Parliament began to reassert itself and introduce important distinctions between so-called private and public corporations.<sup>56</sup>

But perhaps the most telling insight from the initial response to the *Salomon* opinion was that it was not treated as a decision about whether companies had separate legal identities as modern accounts would have it. This seemed already accepted by most lawyers and commentators; the Law Lords' decision simply acted as an authoritative confirmation of this principle. The more pressing result of *Salomon* was considered to be its more controversial effect of extending the benefits of incorporation to a much broader class of entrepreneurial ventures and, as importantly, detaching matters of legal correctness from ethical soundness. Henceforth, small or family businesses like Aron Salomon's that could not be viewed as genuinely associative entities (like the original joint-stock companies) were welcomed, albeit begrudgingly by some, into the broader community of corporate business. The decision spoke more concretely to the legitimacy of certain incorporations than to the fact that incorporation was not fraudulent in itself. But *Salomon* also raised an issue that continues to dominate company law today—what consequences follow from incorporating a business? In particular, legislators and judges have struggled to determine the precise contours of the continuing relationship between the original and continuing owners of the business and the new legally separate company's creditors and other stakeholders.

The corporate veil is the fourth wall of company law's primary legal fiction: the corporate players and the social audience suspend their disbelief to the alleged benefit of all. But the permeability of the corporate veil is morally contingent—the actors sometimes need a reminder that their play can be stopped if the show gets out of hand. It has been the burden of company law to determine when and to what extent the fiction is to be honoured, and it has historically fallen to judges to decide when should courts peer behind (or as jurists would have it, “pierce”) the veil of incorporation. Despite a century of efforts and a host of proposals, it would be fair to say that the courts have not managed to fashion or pursue a readily discernible set of operating principles. The only reliable observation is that there has been a marked reluctance on the part of judges to look behind the veil of incorporation except in the most flagrant instances of intentional wrongdoing; the corporation's separate personality is close to inviolate and treated as almost real. But the absence of a juristic consensus<sup>57</sup> regarding the doctrinal basis for piercing the veil demonstrates that the issue is not a doctrinal one at all. Like the various

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56. See Ireland, *supra* note 3, at 42–43, 49.

57. See, e.g., Seong, *supra* note 15, at 208–09.

levels of courts in *Salomon*, contemporary courts tend to look at whether, on a very basic level, what happened between litigating parties was *fair*. The corporate veil remains unturned perhaps because its durability results from the robustness of neither the doctrine nor the fiction—it is rather an indicator that today, we think quite a lot of self-interested business dealings are fair. Importantly, the House of Lords in *Salomon* did not simply stop at declarations of black-letter law and judicial deference. Lord Macnaghten waded into the contestable waters of responsibility and fairness:

The unsecured creditors of A. Salomon and Company, Limited, may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon, and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognisant of the memorandum and of the articles of association.<sup>58</sup>

The legal validity of the incorporation was the very thing that Salomon's unsecured creditors were challenging, so it is somewhat harsh to suggest that their knowledge of the incorporation is enough to make them blameworthy. They can hardly be chastised for finding the Salomon incorporation suspect. Indeed, two different courts confirmed the unsecured creditors' suspicions. But more striking is Lord Macnaghten's almost offhanded dismissal of the creditors' reliance on Aron's history of trustworthy dealing, as though years of trust built between trading partners do not form the basis for a reasonable expectation that debts will be repaid. On Lord Macnaghten's account, it was Salomon and not the creditors who had "been dealt with somewhat hardly."<sup>59</sup> And while he did voice his own view that the legal priority of debenture-holders over unsecured creditors was a "scandal" that he did not have the power to change,<sup>60</sup> his moral objections did not in any way attach to the erection of an entirely fictitious wall of insulation between existing trading partners.

The court's moral attitude of *caveat dantis*—lender beware—exemplifies the turning point that *Salomon* represents in corporate law. Parliament did not expect their law to apply to the likes of Salomon and neither did his creditors.<sup>61</sup> Salomon's industry peers were shocked by his conduct. Lord Halsbury accused the lower courts of Monday-morning

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58. *Salomon v. A. Salomon & Co.*, [1897] A.C. 22 (H.L.) 53 (appeal taken from Eng.).

59. *Id.* at 47.

60. *Id.* at 53.

61. See Ireland, *supra* note 3, at 33–38.

legislating,<sup>62</sup> but the reality is that the House of Lords made a similar manoeuvre; they decided that the corporate veil was no longer a practical tool but a moral reality. Accordingly, the genealogy of the corporate veil reveals the inevitable circularity of Milton Friedman's now-hoary adage that "if it is legal, then it is moral." In ascertaining when they might peer behind the veil, courts have been *creating* the law, not relying on it. The general principle that the veil will remain unbreached "so long as the corporation is not being used as a cover for deliberate wrongdoing"<sup>63</sup> is of limited use since in a sense any corporation, by its very nature as "a legal fiction, is necessarily a sham, alter ego, simulacrum, or façade."<sup>64</sup> If all that is legal is moral in business, and all that is moral, for the purposes of the veil, is legal in corporate law, then legality and morality are both up in the air. *Salomon*'s significance comes from the court's willingness to decide what, in effect, was moral business.

In an immediate sense, *Salomon* did indeed decide the issue of one-person companies. Subsequently, courts have drawn no general distinction between small firms and other more populous associations. The statutory distinctions have remained similarly limited, and most allow for one person alone to form a corporation.<sup>65</sup>

For all of its decisiveness, *Salomon* left a tangle of significant issues in its wake that have occupied the law's collective imagination and resolve. Every one of these, ultimately, is rooted in the same basic question of fairness that the courts and the litigants grappled with in 1896. Some questions include the following:

- *Can shareholders ever be liable for the company's antics?* Shareholders can be held liable in exceptional circumstances when there is an obvious fraud and the company is merely a sham or façade to cover or facilitate such wrongdoing.<sup>66</sup> Courts have also been prepared, as Vaughan Williams in *Salomon* proposed, to imply a principal-agent relationship between a parent company and its subsidiary;<sup>67</sup>
- *When do the company's board of directors take personal responsibility for their decisions and actions on behalf of the company?* Directors can occasionally be civilly or criminally li-

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62. *Salomon*, [1897] A.C. at 34.

63. 1 CANADIAN ENCYCLOPEDIA DIGEST, Business Corporations (Ontario), tit. 2(b)(ii), § 25 (Ont. 4th).

64. *Id.* § 28.

65. Companies Act, 2006, c. 46, sch. 7(1) (U.K.); Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 5(1).

66. *See, e.g.,* Gilford Motor Co. v. Horne, [1933] Ch. 935 (U.K.); Terra Farm Ltd. v. Park Stud Inc., 2010 ONCA 422, ¶ 34 (Can.).

67. *See* Moore, *supra* note 16, at 183–84.

able for some decisions that they make outside their formal decision-making authority as directors. Of course, if directors are also shareholders (as many are), then such liability can be understood as a way of circumventing their limited liability as shareholders;

- *What is the priority of claims between debenture-holders and unsecured creditors?* The relative priority of different creditors' claims against companies is a complex and regulated matter that is governed by a jurisdiction's bankruptcy law. In general, debenture-holders, like Aron Salomon, still have prior rights over ordinary trade creditors and shareholders. But many, including Lord Watson, maintained that *Salomon* was as much about this delicate issue as corporate personality itself;<sup>68</sup>
- *Must a corporation have a certain level of capitalization?* This requirement varies considerably from one jurisdiction to another. A few impose a minimum amount of capitalization so as to cover foreseeable claims against the company, but many impose no requirements in regard to capitalization other than prohibitions against fraudulent dealing;
- *Can a corporation be found guilty of criminal conduct?* The price of corporate personality is that criminal liability can be imposed on companies. But this still serves to protect the individuals (e.g., directors and managers) who are responsible for the offending company's decisions and actions. Of course, there are serious challenges to identifying the requisite level of "guilty intent" and to imposing an appropriate punishment; and
- *Do companies receive the benefits or protections of any constitutional rights?* In many jurisdictions, corporations have managed to secure for themselves certain rights or at least avail themselves of rights accorded to real persons (e.g., search and seizure and free speech). But this conferral on private corporations of the power to withstand legislative or executive supervision, while not being vulnerable to constitutional claims, is highly controversial.

As a contemporary example of the force of "separate personality," the 1991 decision of the court of appeal in *Adams v Cape Industries plc* is typical.<sup>69</sup> Adams worked for an American subsidiary of Cape Industries that was an English firm in the business of marketing asbestos. Ad-

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68. *Salomon v. A. Salomon & Co.*, [1897] A.C. 22, 40 (H.L.) (appeal taken from Eng.); see also *In the City*, *supra* note 54.

69. *Adams v Cape Industries plc*, [1990] Ch. 433 (A.C.) (appeal taken from Eng.).

ams became ill due to his exposure to asbestos dust. When he sought to sue the American subsidiary, he discovered that it had no assets to speak of. He therefore brought an action against Cape Industries directly and contended that the two companies should be treated as being part of one and the same economic enterprise. The courts decided that the action must fail, as the two companies were entirely separate as a matter of law, even though it was accepted that the corporate structure between Cape Industries and its American subsidiary was designed to minimize legal liability and taxation. The road from *Salomon* is not difficult to trace, but it continues to be contentious in its direction and destination.

In recent years, scholars have proposed stronger normative guidance. Marc Moore has proposed what he calls the “genuine ultimate purpose” or GUP test that he suggests would have resulted in a different outcome in *Adams*.<sup>70</sup> This test, which he also argues is doctrinally the most consonant with *Salomon*, would require that a corporation have in place a distinct motivation for its existence, in effect “a strategy determining the general direction of the business, the existence of which both *precedes* and also *exists independently* of the specific activity that gave rise to the dispute at hand.”<sup>71</sup> This proposition grasps for more certain outcomes, but it is clearly rooted in the same idea that we need something more than mere incorporation to justify the limitation of liability.

### B. A Modern Resonance

In important ways, it was the ethical dimension of *Salomon* that had the more lasting, if indirect, effect. The effect of the House of Lords’ decision was to give the act of incorporation a seal of moral approval. While the reliance on incorporation for overtly fraudulent purposes would still be treated as improper and unacceptable, the decision to incorporate would not necessarily be considered unethical even if, as in Aron Salomon’s situation, it brought hardship on the company’s creditors. *Salomon* ensured that the nature of business was business, that business ethics merely meant that the companies not act fraudulently or illegally, and that traders and other business people were responsible for only their own interests. *Salomon* effectively quashed the idea—if it ever existed—that entrepreneurs should do more than pursue profit. Since then, the whole debate around the corporate veil has pushed aside issues of ethics and propriety to the margin. On some accounts, it has succeeded in ignoring them entirely.

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70. Moore, *supra* note 16, at 201.

71. *Id.* at 199.

In historical terms, the early years of the twentieth century, especially in the United States, witnessed the heyday of laissez-faire capitalism supported by a dog-eat-dog mentality. Monopolies and cartels dominated the economy. But a combination of factors—corporate greed, the rise of trade unions, the economic depression of the 1930s, and World War II, to name the more prominent—resulted in a demand for greater governmental regulation of private enterprise in the name of public morality.

Yet, few changes were made in corporate law. Indeed, although countries in the 1970s and 1980s began to address corporate excesses or failures through environmental and labour legislation, there was no real drive to effect substantive reforms to the basics of corporate governance. By the 1980s, under the neo-liberal patronage of Ronald Reagan and Margaret Thatcher, privatization was back in vogue and, along with it, deregulation and globalization. In short, compounded by the increase in the sheer size and accumulated power of private corporations like General Motors, Microsoft, and Lever Brothers, the realm of business is seen to be more of an ethical free-for-all than a bastion of fair dealing. At least in the British Commonwealth, *Salomon* takes some of the credit and blame for that.

Sadly, the relation between business and ethics is distant at best. It would seem that Milton Friedman's philosophy of "if it is legal, it is moral" has prevailed. Friedman took the view that corporate executives have a duty "to make as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom."<sup>72</sup> He went on to say, however, that

the only entities who can have responsibilities are individuals . . . . A business cannot have responsibilities. So the question is, do corporate executives, provided they stay within the law, have responsibilities in their business activities other than to make as much money for their stockholders as possible? And my answer to that is, no, they do not.<sup>73</sup>

This is less an ethical stance than an abdication of the whole idea that there is anything that resembles ethics in business. *Salomon* can be viewed as the precursor of such a lamentable attitude.

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72. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, available at <http://www-rohan.sdsu.edu/faculty/dunnweb/rprnts.friedman.html>.

73. Milton Friedman Responds—An Interview with Friedman, 84 BUS. & SOC'Y 5 (1984).

*C. Aron's Aftermath*

While we cannot really know for sure, it could not have been easy for Aron Salomon to turn his head and ignore his community's calls for him to live up to his moral reputation. As Rubin notes, Aron's reputation was absolutely "demolished" during this whole affair.<sup>74</sup> After thirty years of being "so honorably known,"<sup>75</sup> he was thrust into a dilemma that any one of us would dread. And for him, there would be no happy ending. Sadly, Aron suffered a stroke and was dead within months of the final decision in *Salomon*. He was sixty and died intestate (without a will) on May 13, 1897. As so often occurred, the children carried a heavy burden in continuing the family's commercial ventures, as the name "Salomon" was hardly a synonym for a solid investment opportunity. The family business in Northampton had failed around the same time as the family-named company went into liquidation. In 1912, the Salomon brothers resurrected A. Salomon & Co. Ltd., which had been formally dissolved in 1907, but the business failed once more in 1915 along with the rest of their ventures including a decade-long liquidation process for Fitzwell. The veil of incorporation may have parried some of the commercial blows that struck the family's footwear business, but it could not save it entirely from a continued economic onslaught. The idea of the company still lives on, but this particular company soon received the proverbial boot.

But the *Salomon* litigation did not die with Aron. His lawyer, Ralph Raphael, brought an action for unpaid legal bills against Aron's estate. *In re Raphael* was heard and decided in February 1899.<sup>76</sup> Aron's son, Emanuel, took up the litigation cudgels on his father's behalf. He argued that, as a pauper, Aron should not be required to pay. Mr. Justice Kekewich did not agree and ordered Raphael to be paid out of whatever was left in Aron's estate. He reasoned that the upshot of *Salomon* was that "though [Aron] was not thereby made a wealthy man, he was rehabilitated, and removed from the list of paupers."<sup>77</sup> So Aron's triumph in *Salomon* was rendered somewhat Pyrrhic. He died much as he came to Whitechapel, with little wealth to his name. The fact that Aron's reputation lives on through legal history as the patron saint of all one-person companies would likely have been of little comfort to him and his family. Like so many others, he remains both hero and villain of this particular piece.

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74. Rubin, *supra* note 4, at 101.

75. *Id.* at 111 (quoting SHOE AND LEATHER RECORD 1383-84 (Dec. 22, 1893)) (internal quotation marks omitted).

76. *In re Raphael*, [1899] 1 Ch. 853 at 856.

77. *Id.*



## V. CONCLUSION

It would be heartening if we could conclude that *Salomon* no longer inhabits the boardrooms and backrooms of business. But the fact is that business ethics is more about business than ethics. Although many critics discuss the need for a higher moral obligation in business dealings, there is little on display to support that. The recent shenanigans on Wall Street and in London offer ample evidence of the unsettling reality behind the empty rhetoric. Although “corporate social responsibility” is the new buzzword of the corporate marketplace, there is little substantive effort to transform business conduct and its controlling standards. Like “Hell’s Angels” and “airline schedules,” “business ethics” is another candidate for the dictionary of oxymorons. *Salomon*’s Law Lords might be less sanguine about the wisdom of their decision if they had known the kind of business ethics their decision has created.