ASKING THE JEWISH QUESTION: THE IMPORT OF JEWISH HISTORY TO CORPORATE LAW

by
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This paper brings Jewish American history to bear upon the analysis of three major milestones in the development of corporate law's fiduciary duties jurisprudence: Meinhard v. Salmon *(N.Y. 1928),* Bayer v. Beran *(N.Y. 1944), and* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. *(Del. 1986). Bringing to the fore the background of the Jewish litigants and the Jewish lawyers who represented them, I use* Meinhard*,* Bayer*, and* Revlon *to explore changing cultural attitudes toward Jewish Americans' participation in corporate America (as investors, managers, or their legal representatives). I argue that these cases demonstrate how our ideas about the appropriate purpose of corporations and the duties of those who manage them, at least in part, were shaped by the judiciary's commitment to combating the corporate elite's exclusionary practices. Viewed through the lenses of Jewish history,* Meinhard*, a case addressing the duties of a manager toward his co-adventurer, tells the story of first-generation Jewish Americans using business and investment to assimilate into New York society. Then-Chief Judge Benjamin Cardozo, who wrote the majority opinion, offers a scathing rebuttal of the manager's willingness to forsake his compatriot for the sake of profit.* Bayer*, explicating the standard of review applicable in cases involving the directors' duty of loyalty, becomes a narrative about how the midcentury New York courts attempted to support first- and second-generation Jewish American entrepreneurs seeking to become members of the managerial class. I argue that Justice Bernard Shientag, who wrote the opinion, sought to balance boosting entrepreneurial freedom with assurances to individual shareholders, who were typically invested for steady income and who had little control over the affairs of their companies, that their investments would yield profit. Finally,* Revlon*, a case that symbolizes the end of managerialism and the triumph of the shareholder wealth maximization norm, becomes a narrative about second- and third-generation Jewish*

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Americans (in this case Ronald Perelman, Michael Milken, and Joseph Flom) who turned to the stock market to claim a place for themselves among the corporate elite. The wave of hostile takeovers seeking to unseat the corporate establishment that these newcomers helped bring about drove the Delaware Supreme Court to overhaul directors' fiduciary duties jurisprudence. Taken together, these cases demonstrate the role litigation has played in facilitating the integration of Jewish entrepreneurs into the ranks of the corporate elite.

INTRODUCTION

Meinhard v. Salmon (1928),[1] *Bayer v. Beran* (1944),[2] and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* (1986)[3]—three canonical corporate law cases—offer some of the most intricate legal stories in Corporations casebooks. Co-adventurers, friendship, and betrayal (in *Meinhard*);[4] a famed opera singer and a corporate advertising campaign seeking to influence the fashion industry, not to mention federal regulation (in *Bayer*);[5] and imperial CEOs and the personal animosities that at times motivate them to self-mutilate their corporations (in *Revlon*).[6] Each is also a critical milestone in the evolution of the directors' and executives' duty of loyalty. *Meinhard* articulates the early-20th century prohibition against conflict-of-interest transactions; *Bayer* offers a window into the midcentury shift from a rule

[1] Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

[2] Bayer v. Beran, 49 N.Y.S.2d 2 (N.Y. Sup. Ct. 1944).

[3] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[4] *See* discussion *infra* Part I.

[5] *See* discussion *infra* Part II.

[6] *See* discussion *infra* Part III.

of prohibition toward one of balance, allowing corporate directors to engage in self-dealing transactions provided that the transactions pass muster under a test of fairness; while *Revlon* will forever be remembered as pronouncing the late-20th century's equation of loyalty with a duty to maximize shareholder wealth.

If Hollywood-style stories and significant doctrinal milestones were not enough to make *Meinhard*, *Bayer*, and *Revlon* best sellers, this Article offers another reason. Using historical data and narrative, I call attention to an aspect of these cases that is often missed or perhaps ignored in discussions of corporate law (and law, more broadly). All three cases involve Jewish plaintiffs and defendants, typically represented by Jewish lawyers; and Jewish judges—Benjamin Nathan Cardozo and Bernard Lloyd Shientag—wrote the decisions in two of the cases (*Meinhard* and *Bayer*, respectively).[7]

Do the identities of the litigants, lawyers, and judges matter? This Article argues that they do; indeed, it suggests that the omission of litigants' identities from discussions of corporate law reinforces a particular vision of business and markets as separated from society and immune to the influences of cultural, social, and even personal interests. Recalling the Jewish background of those involved in these three cases not only offers a deeper understanding of the development of the duty of loyalty, but also helps connect corporate law to broader social and cultural narratives, specifically Jewish American history and the struggle of Jewish people to integrate into American society. As the stories unfold, corporate law becomes an extension of private interactions among individuals, and corporate litigation—the site where ideas about exclusion and inclusion within the business community are processed and at times challenged.

The impact of Jewish Americans on the legal profession and the contributions of notable Jewish jurists to American law are well documented.[8] So is the influence of Jewish Americans on business; as historian Hasia Diner writes, "[m]ost Americans, across the centuries and the geographic breadth of the nation, met Jews in the realm of business. . . . as the people from whom they bought goods of one kind or another."[9] Through these interactions and, more broadly, "the realm of commerce, Jews made an impress on American life."[10] The identity and history of Jewish Amer-

[7] *See* discussion *infra* Sections I.B, II.B, and III.C.

[8] *See, e.g.*, JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION (First Midland Book ed. 1993); ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988); JEWS AND THE LAW (Ari Mermelstein, Victoria Saker Woeste, Ethan Zadoff & Marc Galanter eds., 2014); DAVID G. DALIN, JEWISH JUSTICES OF THE SUPREME COURT: FROM BRANDEIS TO KAGAN (2017).

[9] Hasia R. Diner, *Editorial Introduction*, *in* DOING BUSINESS IN AMERICA: A JEWISH HISTORY ix, ix (Steven J. Ross, Hasia R. Diner & Lisa Ansell eds., 2018).

[10] *Id.*

icans were intertwined with their impact on the American economy; perhaps because of that, in business and the professions, Jewish Americans also faced some of the harshest, if subtle, forms of antisemitism as the business elite and their legal representatives sought to protect their turf—their cultural and social status.[11]

With this history as background and using *Meinhard*, *Bayer*, and *Revlon* as examples of three different historical moments, I examine the so-far unexplored intersection of corporate law with Jewish American history. Each part of this Article (*Upward Mobility*, *Assimilation*, and *Makeovers*) is devoted to one of these three cases. Each part begins with the doctrinal significance of the case to the evolution of the duty of loyalty and corporate law. I then draw upon Jewish American history—I ask the Jewish question[12]—to shed a different and more nuanced light on the case. Focusing on the ethnic and cultural background of the litigants and lawyers involved in these cases, I explore each case as a significant moment in the integration of Jewish Americans into mainstream American society, particularly into the ranks of the business elite, while also demonstrating the role that courts played in facilitating the inclusion of Jewish Americans; each case's interpretation of the scope of the directors' duty of loyalty affected who might have a place and a say in corporate America. As the Article moves from *Meinhard* to *Bayer* to *Revlon*, entrepreneurship and investment in securities emerge as means of economic assimilation while the courts, at times inadvertently, help amplify the voices of those traditionally excluded from the corporate elite.

I should state at the start that there is no evidence that antisemitism was the cause of the litigation, or that the ethnic and cultural background of the litigants influenced the judges who wrote the decisions in these cases (some of whom, as already noted, were Jewish). My goal in this Article is simply to call attention to the relationship between these cases and Jewish American history. By focusing on the cultural experiences of those most affected by the litigation (and least visible in discussions of legal doctrine), I hope to illustrate the importance of recognizing the litigants to the development of doctrine and to shed light on subtle forms of exclusion that have helped shape the contours and character of corporate law. For too long, corporate law has been the citadel of the corporate elite—white, Anglo-Saxon, male, and Protestant. Bringing to the fore the cultural and ethnic background of

[11] *See, e.g.*, ABRAHAM K. KORMAN, THE OUTSIDERS: JEWS AND CORPORATE AMERICA (1988) (exploring the role that Jewish Americans, as a minority, played in corporate America and the discrimination they faced).

[12] Asking the Jewish question draws on feminist theory, calling attention to the importance of asking the woman question. *See, e.g.*, Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990). On the importance of raising the race question, see, for example, Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 5 (2019); Steven A. Dean, *Filing While Black: The Casual Racism of the Tax Law*, 2022 UTAH L. REV. 801, 801.

those involved in business and law is a first step toward achieving a more inclusive corporate law doctrine and more inclusive professions.

I. 1900s–1930s: UPWARD MOBILITY

A. Meinhard v. Salmon[13]

Meinhard v. Salmon, an often-cited case about the fiduciary duties of co-adventurers, is a favorite of many a corporate law professor. In 1902, Salmon signed a 20-year lease on the Hotel Bristol in New York City.[14] To finance the renovation of the building, which he planned to turn into an office building, Salmon entered into a joint venture with Meinhard according to which both were to share in the expenses of renovating and managing the building and in the profits the venture would generate.[15] Twenty years later, as the lease was about to expire, Salmon negotiated a new lease with the owner of the reversion on the property.[16] The new lease anticipated a substantial redevelopment of the property as well as adjacent ones; Salmon signed the new agreement in his individual capacity without telling Meinhard.[17] When Meinhard found out, he sued, arguing that the new lease was an extension of the old one.[18] Then-Chief Judge Cardozo, writing the majority opinion for the New York Court of Appeals, held for Meinhard, famously describing the duties of co-adventurers toward each other as "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[19]

Meinhard is typically cited, narrowly, for the proposition that a fiduciary cannot usurp a corporate opportunity and, more broadly, for emphasizing the fiduciaries' undivided loyalty.[20] Neither reference explains Cardozo's strong rhetoric or why he "treated the case as presenting a major issue of fiduciary conduct" and "departed from his usual practice of limiting statements of principle to particular factual settings" to state a broader rule.[21] "For each the venture had its phases of fair weather

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[13] Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

[14] *Id.* at 545.

[15] *Id.* at 546.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See, e.g.*, Robert B. Thompson, *The Story of* Meinhard v. Salmon*: Fiduciary Duty's Punctilio*, *in* CORPORATE LAW STORIES 105, 121 (J. Mark Ramseyer ed., 2009); Nicholas L. Georgakopoulos, Meinhard v. Salmon *and the Economics of Honor*, 1999 COLUM. BUS. L. REV. 137, 139–40.

[21] ANDREW L. KAUFMANN, CARDOZO 239 (1998).

and of foul," Cardozo wrote early in the decision, adding for good measure a reference to matrimonial duties: "The two were in it jointly, for better or for worse."[22] And then again: "[T]he level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court. . . . Loyalty and comradeship are not so easily abjured."[23]

How future co-adventurers and fiduciaries should interpret Cardozo's strong rhetoric and imagery was not clear (what does "punctilio of an honor most sensitive" even mean?). As Robert Thompson notes: "[t]he punctilio phrasing provides a standard rather than a rule, a clear statement as to tone and direction, but little in the way of specific guidance for resolving hard questions."[24] For one, was Salmon's duty mainly one of disclosure? How far—in time and space—would the duty extend? Could parties contract to opt out from such a duty?[25] All are questions with which corporate law scholars have since grappled.

An unclear standard of behavior further confounded the lack of a defined duty. Cardozo's decision offered no rules or even standards that fiduciaries should follow. Instead, Cardozo extended a simple advice, one that appeared to draw on David Hume's understanding that all humans shared certain feelings, such as shame[26]:

> A managing coadventurer appropriating the benefit of such a lease without warning to his partner might fairly expect to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor, if the partner were to surprise him in the act of signing the new instrument. Conduct subject to that reproach does not receive from equity a healing benediction.[27]

Reproach, shame, anger. But, why?

The reasons for Cardozo's apparent wrath, let alone his obscure standard of behavior are not immediately obvious. Justice Andrews, in dissent, concluded that the original agreement between Salmon and Meinhard was "merely a joint venture

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[22] *Meinhard*, 164 N.E. at 546.

[23] *Id.* at 546–47.

[24] Thompson, *supra* note 20, at 126.

[25] *Id.*

[26] DAVID HUME, A TREATISE OF HUMAN NATURE 368 (Ernest C. Mossner ed., Penguin Books 1969) (1739) (noting that "'tis obvious, that nature has preserv'd a great resemblance among all human creatures . . . . and this resemblance must very much contribute to make us enter into the sentiments of others, and embrace them with facility and pleasure."); *see also* Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465, 484–85 (1997) (noting that "Hume . . . observed a world in which a person's conception of good behavior derived from the observed reaction of others not only to his own behavior, but to that of others as well," and that Cardozo's rhetoric "is nothing other than Hume's impartial spectator. The knowledge that one ought reasonably expect to be reproached if caught in *flagrante delicto* simply is a dramatization of our intuitive moral understanding that cheating on one's partner is wrong").

[27] *Meinhard*, 164 N.E. at 548.

for a limited object, to end at a fixed time. The new lease, covering additional property, containing many new and unusual terms and conditions, with a possible duration of 80 years, was more nearly the purchase of the reversion than the ordinary renewal."[28] Cardozo, too, accepted that Salmon was not

> guilty of a conscious purpose to defraud. Very likely he assumed in all good faith that with the approaching end of the venture he might ignore his coadventurer and take the extension for himself. He had given to the enterprise time and labor as well as money. He had made it a success. Meinhard, who had given money, but neither time nor labor, had already been richly paid. There might seem to be something grasping in his insistence upon more.[29]

Why, then, was Cardozo so excited or upset? Many corporate law scholars have tried to guess. The following Section I.B suggests that the reasons for Cardozo's ire and rhetoric might lie outside the typical scope of corporate law—in Jewish American history. By retelling the case of Salmon and Meinhard as a story about Jewish Americans' efforts at economic and social integration, as a narrative about overcoming exclusion and antisemitism, Section I.B offers a unique window into the litigation. In Section I.C that follows, I suggest that Cardozo's charged rhetoric might have reflected his concerns about the potentially detrimental impact of economic assimilation on communal values, specifically the traditional values of solidarity and care. Viewed through Jewish American history lenses, Cardozo's decision offers an outsider's view of the appropriate scope of fiduciary obligations.

B. The Story of Morton H. Meinhard and Walter J. Sal[o]mon

The story of Walter J. Salomon and Morton H. Meinhard was an immigration success story. Salomon's father, Rudolph G. Salomon, was born in Lunenburg, Hanover, Germany in 1846.[30] Soon after immigrating to the United States, Rudolph "engaged in the leather industry . . . and . . . was the first person in this country to convert the hide of sea porpoises into leather."[31] He was the "president of the National Association of Manufacturers, a member of the Newark Board of Trade and affiliated with the Morocco Manufacturers' National Association."[32] He was also "a Mason and a member of a New York lodge,"[33] suggesting that, at least socially, he was not bound by religious traditions. As Jean-Philippe Schreiber writes,

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[28] *Id.* at 550 (Andrews, J., dissenting).

[29] *Id.* at 548 (majority opinion).

[30] *Obituary: Rudolph G. Salomon*, N.Y. TRIB., Jan. 29, 1907, at 14.

[31] *Id.*

[32] *Id.*

[33] *Id.*

"Judaism allowed for a degree of freedom of conscience . . . . [and] there were therefore no real religious obstacles to becoming a Mason"[34] (so long as lodges in the United States admitted them). But joining "required . . . a preliminary social change, in the general context of Jewish integration into the surrounding society."[35]

Meinhard's father, Henry Meinhard, was born in 1830, also in Germany—in Burghaslach, Bavaria.[36] He immigrated to the United States when he was 21 years old, settling in Savannah, Georgia.[37] There, together with his brother, Isaac, Henry operated a wholesale dry goods company (selling shoes, boots, and clothing) "amounting to more than $1,000,000 annually."[38] In 1862, Henry entered the slave brokerage business; together, Henry and Isaac also enslaved 16 black people whom they utilized in their business.[39] Notably, as historian Mark I. Greenberg explains, "[s]lave ownership brought more than merely economic benefits,"[40] it was a rite of passage into Southern society:

> It marked Jews as part of the dominant group in a region whose economy, political ideology, and social order rested upon the subjugation of the black race . . . . The perennial outsider in European society, Jews in the South hoped to become insiders by positioning themselves relative to blacks. By possessing bondsmen Jews revealed their commitment to a mainstay of antebellum Southern life and thus were not perceived as a threat to established cultural patterns.[41]

Slave ownership also solidified Southern Jews' "whiteness."[42] Southerners considered manual labor "to be fit only for blacks."[43] Thus, as Greenberg writes: "Because Jews clustered in commercial ventures and purchased blacks rather than toiling as manual laborers, their 'whiteness' was rarely questioned, and they faced relatively less social ostracism than other immigrant groups."[44]

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[34] Jean-Philippe Schreiber, *Jews and Freemasonry in the Nineteenth Century: An Overview of Current Knowledge*, 43 ARCHIVES JUIVES, no. 2, 2010, at 30, 30.

[35] *Id.*

[36] *Henry Meinhard*, WE RELATE, https://www.werelate.org/wiki/Person:Henry_Meinhard_(1) (last visited Jan. 12, 2024); *Obituary: Henry Meinhard*, N.Y. TIMES, Dec. 17, 1906, at 11.

[37] *Obituary: Henry Meinhard*, N.Y. TIMES, *supra* note 36, at 11.

[38] ISAAC MARKENS, THE HEBREWS IN AMERICA 167 (1888).

[39] Mark I. Greenberg, *Becoming Southern: The Jews of Savannah, Georgia, 1830–70*, 86 AM. JEWISH HIST. 55, 61 (1998); For examples of Bills of Sale for Enslaved Persons involving the Meinhard brothers, see GA. HIST. SOC'Y, https://7063.sydneyplus.com/archive/final/Portal.aspx?lang=en-US (search "Meinhard Bros.").

[40] Greenberg, *supra* note 39, at 61.

[41] *Id.* at 61–62.

[42] *Id.* at 63.

[43] *Id.*

[44] *Id.*

A commitment to the Confederate cause was another means of gaining the acceptance of Southern society,[45] and Henry served as a Private in the 47th Georgia Infantry Regiment of the Confederate Army.[46] He remained in Savannah after the Civil War[47] and in 1867, as trustee (*Parnas*) of his congregation, Mickve Israel, Henry helped institute reforms such as the elimination of "the second day of the holy days" and the introduction of organ and choir to services.[48] He was also one of the founders and council members of The Savannah Hebrew Collegiate Institute, "which was open to students of all faiths."[49]

In 1894, a *New York Times* announcement celebrating the wedding of Miss Ida Meinhard, Henry's and Isaac's niece, described the Meinhard family as "one of the most influential and wealthy families in the South."[50] By then, though, Henry and Isaac were living in New York City, where they moved in 1876.[51] Henry became a successful banker and philanthropist, and he remained involved in a variety of Jewish charities. He also invested in local real estate.[52] Henry's obituary mentioned that he was a member of the Freundschaft Society,[53] one among many Jewish clubs established at the end of the 19th century.[54]

Born into the upper social and business echelons of New York City's Jewish community, it is not surprising that Walter Salomon and Morton Meinhard were friends. Both attended Temple Emanu-El, the first reform synagogue in New York City, and were members of the same tennis club;[55] they shared subscription seats

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[45] *Id.*

[46] *Henry Meinhard*, WE RELATE, *supra* note 36.

[47] *Obituary: Henry Meinhard*, N.Y. TIMES, *supra* note 36, at 11 (noting that Henry lived in Savannah until 1876, when he moved to New York City).

[48] ANTON HIEKE, JEWISH IDENTITY IN THE RECONSTRUCTION SOUTH 266–67 (2013).

[49] Deborah Dundas, The Cohen Family and the Jewish Community in Coastal South Carolina and Georgia: 1669–1915, at 54 (Spring 2012) (M.A. thesis, California State University Dominguez Hills).

[50] *Went to Savannah for a Bride*, N.Y. TIMES, Dec. 19, 1894, at 10. The family, and the very successful family business, left a lasting mark on Savannah, where Meinhard Road is a major thoroughfare, and a suburb is named Meinhard. Geoffrey P. Miller, *Meinhard v. Salmon* 9–10 (NYU Ctr. for L. & Econ., Working Paper No. 07-35, 2007).

[51] *Obituary: Henry Meinhard*, N.Y. TIMES, *supra* note 36, at 11; *Obituary: Henry Meinhard*, N.Y. TRIB., Dec. 18, 1906, at 7.

[52] *Obituary: Henry Meinhard*, N.Y. TRIB, *supra* note 51, at 7.

[53] *Obituary: Henry Meinhard*, N.Y. TIMES, *supra* note 36, at 11.

[54] Rudolf Glanz, *The Rise of the Jewish Club in America*, 31 JEWISH SOC. STUD. 82, 89 (1969). As Glanz elaborates, the society was German in orientation, with no mentioning of Jewish holidays. "[I]t was considered a piece of German idealism to offset the dollar-chasing American idealism." *Id.* at 90.

[55] Testimony ¶¶ 672–76, 732–36, Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). The information presented over the rest of this Section is taken from Dalia T. Mitchell, *Rewritten Meinhard*, *in* FEMINIST JUDGEMENTS: CORPORATE LAW REWRITTEN 202 (Anne M. Choike, Usha

for the opera[56] and dined together in the city three to four times a week, sometimes with other friends; for a few summers, they sublet an apartment ("roomed") together.[57] Salomon was an up-and-coming real estate developer and Meinhard was a merchant. Many first-generation Jewish Americans described the United States with its abundant business opportunities as "the golden land" (*di goldeneh medina*), a title expressing hopes if rarely a reality.[58] For Salomon and Meinhard, second-generation Americans, the promise of the golden land seemed within reach. Two thirty-something single men, born into wealthy Jewish families, they were ready to join New York City's business and social circles.

Many immigrants hoped that a successful business could bring not only economic success but also cultural assimilation into a rapidly changing American society. But discrimination based on religion and culture often devastated such hopes. For one thing, in the late-19th century, amidst the rapid expansion of business and growing social unrest, "the Populist party in the South and the Midwest claimed that greedy Jewish bankers and Wall Street tycoons had caused the country's economic misfortunes. . . . fann[ing] the flames of anti-Semitism among the poorer classes of Americans, particularly in the South."[59] In Eastern Europe, Jews often faced antisemitic violence that was "organized, systematic, and tolerated—maybe even encouraged—by governments."[60] In the United States, with its constitutional separation of church and state, Jews faced an American brand of antisemitism that was focused on exclusion rather than physical violence.[61]

R. Rodrigues & Kelli Alces Williams eds., 2023). I have omitted quotation marks when citing myself, but please note that several sentences are taken verbatim from my prior work and should be cited accordingly.

[56] CARRIE MEINHARD, ACROSS MY PATH 48 (1950). According to Meinhard's wife, Carrie, Walter and Morton agreed that "the tickets should belong to the man who married first," and since she and Morton married first, she "often told Morton [that] he married [her] to gain a pair of opera tickets." *Id.*

[57] Testimony, Meinhard v. Salmon, *supra* note 55, ¶¶ 672–76, 732–36.

[58] IRVING HOWE & KENNETH LIBO, HOW WE LIVED: A DOCUMENTARY HISTORY OF IMMIGRANT JEWS IN AMERICA 1880–1930, at 17–26 (1979); *see also* HASIA R. DINER, A NEW PROMISED LAND: A HISTORY OF JEWS IN AMERICA 42–43 (2000) (examining the mindset of Jewish immigrants at the turn of the 20th century); Selma C. Berrol, *Education and Economic Mobility: The Jewish Experience in New York City, 1880–1920*, 65 AM. JEWISH HIST. Q. 257 (1976) (exploring immigrants' description of New York City as the promised city); Diner, *supra* note 9, at xviii.

[59] DINER, *supra* note 58, at 64.

[60] *Id.* at 43.

[61] KORMAN, *supra* note 11, at 8. One haunting exception is the notorious lynching of Leo Frank in 1913. Leo Frank moved from New York to Atlanta, Georgia, where he opened a pencil factory. He was arrested for the brutal murder of 13-year-old Mary Phagan whose disfigured body was found in the basement of the factory, and, on trial, he was found guilty, although there was no evidence to connect Frank to the crime. When Governor John Slaton reduced Frank's death

In New York City, where thousands of Jewish immigrants from poor Eastern and Southern European towns settled from the 1880s to the 1910s, the rhetoric of antisemitism often focused on "keeping Jews on the outside."[62] In 1907, Salomon was the indirect cause of litigation involving prejudice against Jewish Americans. An individual, George H. Abbott, leased an apartment at the Hotel Renaissance. Then, having had a change of plans, he sought to sublet the apartment to Salomon only to be told that "the arrangement could not be made because the owner of the hotel, D. H. King, Jr., would not take Jews as tenants."[63] As Abbott could not find another tenant, the apartment remained vacant "and the suit for rental followed."[64] Justice Wauhope Lynn of the Municipal Court, labeling the owner's attitude "obnoxious," held that the hotel "should have been satisfied with [Abbott's] prospective tenant, Salomon" and directed judgment accordingly.[65] Not many, though, shared Justice Lynn's views; as Abraham Korman writes, "keeping Jews on the outside, as well as more direct forms of anti-Semitism, [were] common and had a major impact on the economic and social life of the country."[66]

As a result of overt and covert antisemitism, Jewish entrepreneurs often "made their mark in businesses that were new and expanding," clustering in "merchant banking and finance, retailing and wholesaling, consumer goods, [and] real estate."[67] Entrepreneurship allowed individual Jews to be their own boss and escape social discrimination. As Korman explains: "[s]uch freedom from the demands and evaluation of others had always been attractive to people who had learned over the years not to rely on others and who generally felt that they were outsiders."[68] This feeling and the prevalence of antisemitic attitudes, subtle as they might have seemed, also led many Jewish entrepreneurs to do business with each other and to rely on other Jews for credit and finance.[69]

In this vein, in the winter of 1902, Salomon and Meinhard decided to join together in a business venture: turning The Bristol Hotel at the northwest corner of Fifth Avenue and 42nd Street (one block away from their synagogue, Temple

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sentence to life imprisonment, indicating that he would pardon him, a mob of 25 men "kidnapped Leo Frank from his prison cell and hanged him from an oak tree near Mary Phagan's home." DINER, *supra* note 58, at 64–65.

[62] KORMAN, *supra* note 11, at 8.

[63] *Can't Bar Tenant Because of Creed*, N.Y. TIMES, Nov. 21, 1907, at 16.

[64] *Id.*

[65] *Id.* Salomon's experience resembled the more familiar story of the 1877 exclusion "by the Grand Union Hotel in Saratoga" of "Joseph Seligman, a wealthy New York Jewish businessman." KORMAN, *supra* note 11, at 8.

[66] KORMAN, *supra* note 11, at 8.

[67] Charles Dellheim, *The Business of Jews*, *in* CONSTRUCTING CORPORATE AMERICA 223, 233 (Kenneth Lipartito & David B. Sicilia eds., 2004).

[68] KORMAN, *supra* note 11, at 20.

[69] Diner, *supra* note 9, at xvii.

Emanu-El) into an office building.[70] The Hotel, one of New York City's landmarks, had opened in 1875 as a family hotel to cater to the needs of the city's wealthiest.[71] Almost three decades later, the owners wanted to transform the building into a combination of offices and stores so as to maximize its worth in what had become a prime business location—the intersection of New York City's two famous streets, home to hotels, office buildings, retail stores, and residential buildings. Not far from the Hotel, the new Grand Central Terminal was being built, with plans to move the railway tracks underground and connect the station to the subway system.[72]

The owner of The Bristol Hotel was Louisa Matilda Gerry (née Livingston), a wealthy New Yorker and a descendant, on her father's side, of Robert R. Livingston, who helped prepare the Declaration of Independence and administered the presidential oath of office to George Washington.[73] On her mother's side, Louisa was a descendant of Morgan Lewis, a jurist, a governor of New York, and the second son of Francis Lewis, a signer of the Declaration.[74] Louisa was married to Commodore Elbridge T. Gerry, a descendent of Elbridge Gerry, another signer of the Declaration, a governor of Massachusetts, and vice president to James Madison.[75] That Gerry ended up entering an agreement with Salomon, a Jewish real estate developer, is a testament both to Salomon's integration into the upper ranks of New York society and to the tolerant attitudes the New York elite exhibited.

Salomon brought the opportunity to Meinhard's attention as they were having dinner at Delmonico's café on Fifth Avenue and 44th Street, not far from where The Bristol Hotel was located. The opportunity to enter a lease with a member of one of the most culturally and politically prominent families in the city was enticing, but Salomon—perhaps because he was already leasing other buildings, including one he planned to remodel at the northwest corner of Sixth Avenue and 42nd

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[70] Testimony, Meinhard v. Salmon, *supra* note 55, ¶¶ 676–77, 683; Thompson, *supra* note 20, at 111.

[71] *Life in the Hotel Bristol*, N.Y. TIMES, Sept. 25, 1878, at 8 (labeling the hotel a "first class family hotel").

[72] Thompson, *supra* note 20, at 106–07.

[73] *Id.* at 106; *Mrs. Elbridge T. Gerry Dies*, N.Y. TIMES, Mar. 27, 1920, at 13.

[74] *New York's Four Signers*, N.Y. TIMES, Aug. 1, 1926, at E4; *Elbridge T. Gerry Dies in 90th Year*, N.Y. TIMES, Feb. 19, 1927, at 15. Louisa's maternal grandfather, Garrit Storm, bought the land on which The Bristol Hotel now stood in 1845; at the time, it was deemed worthless. *Garrit Storm—A Narrative*, PORTALS-TO-THE-PAST, http://www.portals-to-the-past.com/garritstormanarrative.html (last visited Jan. 9, 2024) (transcribing a narrative prepared by Garrit Storm, dated March 1, 1847, discussing his genealogy).

[75] *Mrs. Elbridge T. Gerry Dies*, *supra* note 73, at 13.

Street[76]—was concerned that the undertaking was "too large" and "the responsibility . . . too great."[77] In the spirit of friendship, Meinhard offered "to share the responsibility with him," encouraging Salomon not only to enter the lease on The Bristol Hotel but also to invest money in developing the building into a "first-class up to date office building" that would stand competition from other buildings in the neighborhood.[78] Salomon graciously accepted the offer, and the two "shook hands on it and went over and played [their] game of tennis."[79]

Salomon's and Meinhard's respective business positions were significant. The clothing industry, where Meinhard found his professional home, was a unique Jewish niche, bringing together Jewish business owners and workers, many of whom were women.[80] Together, they helped "[t]he ready-to-wear clothing industry spread its dresses and blouses, shirtwaists, hats, and undergarments around the nation and the world fueling American economic development."[81] As to Salomon—historically, not many Jewish businessmen were involved in real estate; but during the late-19th century, some began gravitating toward the field, typically in urban centers such as New York.[82] Often, real estate developers received financing from immigrant bankers and private individuals.[83] This seems to have been Salomon's and Meinhard's arrangement.

Having agreed to be joined together, Salomon and Meinhard met for lunch the following day to discuss the terms of their adventure and decided that they would equally bear the expenses and losses, but that Salomon, because he was to supervise the renovations, would receive 60% of the profit for the first five years, while Meinhard would be entitled only to 40%. After five years (later extended to

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[76] *In the Real Estate Field: Official Records Show Business of Unprecedented Volume,* N.Y. TIMES, Apr. 6, 1902, at 19.

[77] Testimony, Meinhard v. Salmon, *supra* note 55, at ¶ 686.

[78] *Id.* ¶¶ 714, 764.

[79] *Id.* ¶ 686.

[80] Diner, *supra* note 9, at xxi. Jewish involvement in the garment industry was horrifically witnessed during the 1911 Triangle Shirtwaist Factory Fire, one of the deadliest industrial disasters in American history. Many of the victims were young Jewish women. Treva Walsh, *Jewish Women, Labor Leaders: After the Triangle Shirtwaist Fire*, MUSEUM OF JEWISH HERITAGE (Mar. 25, 2021), https://mjhnyc.org/blog/jewish-women-labor-leaders-after-the-triangle-shirtwaist-factory-fire. *See generally The Triangle Shirtwaist Factory Fire*, OSHA, https://www.osha.gov/aboutosha/40-years/trianglefactoryfire (last visited Jan. 12, 2024).

[81] Diner, *supra* note 9, at xxi; *see also* KORMAN, *supra* note 11, at 21 (noting that "Jews have probably made their most prominent entrepreneurial contributions" to the clothing/fashion industries).

[82] Dellheim, *supra* note 67, at 234; *see also* Rebecca Kobrin, *Jewish Immigrant Bankers, New York Real Estate, and American Finance, 1870–1914*, *in* DOING BUSINESS IN AMERICA, *supra* note 9, at 49, 54 (noting that "[s]tarting at the end of the nineteenth century, real estate emerged as the ideal industry for ambitious immigrants who lacked capital and were willing to take risks").

[83] Kobrin, *supra* note 82, at 54.

six years), they would each equally share in the expenses, losses, and profits derived from the office building.[84] Confident in his friend's financial assistance, on April 10, 1902, Salomon, who by then had received $5,000 from Meinhard,[85] entered a lease on The Bristol Hotel with Louisa M. Gerry, who was represented by Elbridge T. Gerry, her husband and attorney.[86] The lease commenced on May 1, 1902, for a period of 20 years; for the first 3 years, Salomon's father guaranteed his son's performance.[87] Salomon planned to "remodel the building, converting the lower floors into stores and the upper ones into offices and lofts,"[88] and entered a separate agreement with Gerry to that effect.

Shortly after signing the lease, Salomon asked Meinhard to memorialize in writing their agreement regarding expenses, losses, and profits, should either of them die.[89] Excited about their new venture and trusting his friend, Meinhard signed the Memorandum of Agreement ("Memorandum") that Salomon's attorney had drafted, giving it only a cursory reading.[90] The Memorandum, dated May 19, 1902, ensured that Salomon would have "full power to manage, lease, underlet and operate the said premises . . . just as if this agreement had not been made and executed."[91] Salomon's "full power" included the power to request that Meinhard "pay one-half of any sum" required to fulfill the lease obligations.[92] It was also understood that if Salomon died before the termination of the Memorandum, "no disposition shall be made of the lease" without first consulting Meinhard, who would have the right of first refusal regarding any such disposition.[93]

Salomon and Meinhard sublet an apartment together in the summer of 1902, during which the alterations of The Bristol Hotel were taking place, and naturally they often discussed them.[94] In 1906, both men married into prominent Jewish

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[84] Testimony, Meinhard v. Salmon, *supra* note 55, ¶¶ 688–94; Referee's Report, Findings of Fact ¶¶ 261–62, Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (noting that in an amendment dated February 23, 1905, the time during which Meinhard "was to receive forty per cent of the profits was extended for one year more, after which time the profits were to be divided equally"); Complaint at Exhibit C, Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) [hereinafter *Meinhard* Complaint].

[85] Testimony, Meinhard v. Salmon, *supra* note 55, ¶¶ 956–74.

[86] *Mrs. Elbridge T. Gerry Dies*, *supra* note 73, at 13.

[87] *Meinhard* Complaint, *supra* note 84, at Exhibit A.

[88] *In the Real Estate Field: Interesting Deals on Middle and Upper Fifth Avenue—Hotel Bristol Leased—Other Business,* N.Y. TIMES, Apr. 18, 1902, at 14.

[89] Testimony, Meinhard v. Salmon, *supra* note 55, ¶ 822.

[90] *Id.* ¶¶ 767, 822–23.

[91] *Meinhard* Complaint, *supra* note 84, at Exhibit B.

[92] *Id.*

[93] *Id.*

[94] Testimony, Meinhard v. Salmon, *supra* note 55, ¶¶ 673, 707–08.

families: Morton Meinhard married Carrie Wormser, daughter to a successful merchant,[95] and Walter Salomon married Elsie May, the daughter of Emita and the late Lewis May[96]; Emita was "well-known in Jewish society circles of the city"[97] and Lewis had been the President of Temple Emanu-El and head of a large banking house.[98] Rev. Dr. Joseph Silverman of Temple Emanu-El officiated at both weddings; Salomon was an usher at Meinhard's,[99] and Meinhard was Salomon's best man.[100] A few years later, however, Salomon and Meinhard were no longer in contact. Their only connection remained their joint adventure, which after initial losses became rather profitable; on an investment of $40,000, each had ultimately made a profit exceeding $500,000.[101]

Details about their estrangement are scant.[102] Disagreements about the expenses associated with managing the Bristol building and who was responsible for them initially marred their business relationship, but by 1908 they appeared to resolve these matters.[103] Deeper differences—those grounded perhaps in the different experiences and attitudes of first-generation Jewish Americans—can be gleaned from the evidence and from their life stories.

In the years following the formation of their venture, Meinhard developed Morton H. Meinhard & Co., a business he had formed in 1898, into a major textile factoring and commission business.[104] He also became known for his commitment

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[95] *Miss Wormser Attacks Burglar in Her Room*, N.Y. TIMES, Feb. 8, 1906, at 16.

[96] *A Day's Wedding: Salomon–May*, N.Y. TIMES, Sept. 4, 1906, at 9.

[97] *Mrs. Lewis May Married,* N.Y. TIMES, Nov. 27, 1902, at 9.

[98] *A Brilliant Jewish Wedding,* N.Y. TIMES, Mar. 26, 1880, at 8.

[99] *Weddings of a Day: Meinhard–Wormser*, N.Y. TIMES, May 1, 1906, at 9; *A Day's Wedding: Salomon–May*, *supra* note 96, at 9.

[100] MEINHARD, *supra* note 56, at 58. *But see A Day's Weddings: Salomon–May*, *supra* note 96, at 9 (stating that Ferdinand Salomon was best man).

[101] Meinhard v. Salmon, 229 N.Y.S. 345, 348–49 (N.Y. App. Div. 1928).

[102] Carrie Meinhard suggested that the reason was "foolish . . . . When Walter went abroad on his wedding journey he wanted to meet [the Meinhards] in Italy, but [they] did not care to be saddled with anybody and refused to make known [their] plans. This caused a rift which was never cemented." MEINHARD, *supra* note 56, at 58.

[103] Meinhard v. Salmon, 229 N.Y.S. at 348. Once the quarrel was resolved, Salomon agreed "'to devote such time and attention as may be necessary for furthering our *joint interests* in the building' and . . . stated that 'this agreement shall bind both of us for the remainder of our *ownership of the lease* of the said premises.'" *Id.*

[104] In 1919, the American Association of Woolen and Worsted Manufacturers appointed Meinhard its representative on the Board of Governors of the Mutual Adjustment Bureau of the Cloth and Garment Trade. *Cloths*, WOMEN'S WEAR, Mar. 26, 1919, at 8.

to Jewish charities.[105] In 1914, he founded the Henry Meinhard Memorial Neighborhood House, a settlement house and a tribute to his father.[106] It was located on the Upper East Side in a predominantly Jewish neighborhood and offered different programs for children and young people.[107]

As to Salomon—between 1907 and 1916, he suffered successive personal losses: Elsie May died in 1907,[108] shortly after giving birth to Walter J. Salomon, Jr., and Salomon's second wife, Lois May (Elsie's younger sister), who in 1910 gave birth to their daughter, Lois, died in 1916.[109] Still, Salomon was able to create a real estate empire, leasing and improving several buildings in midtown Manhattan.[110] He also developed a penchant for horse breeding and racing, ultimately establishing Mereworth Farm near Lexington, Kentucky, so he could breed Thoroughbreds.[111] By 1919, twice a widower, Salomon changed the spelling of his last name to Salmon[112] and married Elizabeth J. Davy, of a prominent Episcopalian family. The wedding announcement noted that the bride was the "granddaughter of the late Justice John M. Davy of the Court of Appeals of New York" and the groom "a prominent real estate man, [who] was recently elected President of the New Symphony Orchestra."[113] The following year, they welcomed a son, Burton. Salmon's social and cultural assimilation into the higher echelons of American society appeared complete.

A few years later, on January 25, 1922, three months before the original lease was to expire, Midpoint Realty Co., Inc., a corporation Salmon owned and managed,[114] entered a new lease with Elbridge T. Gerry, now owner of the property;

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[105] *Have Plan to Unite All Jewish Charity*, N.Y. TIMES, June 24, 1916, at 11.

[106] *Meinhard Memorial House*, N.Y. TIMES, Jan. 29, 1914, at 8; *Morton H. Meinhard Testimonial Dinner Speakers Announced*, WOMEN'S WEAR DAILY, Apr. 30, 1928, at 8.

[107] *Morton H. Meinhard Testimonial Dinner Speakers Announced*, *supra* note 106.

[108] *Obituary*, N.Y. TIMES, June 30, 1907, at 7.

[109] *Obituary*, N.Y. TIMES, Mar. 2, 1916, at 11.

[110] *Walter J. Salmon, Realty Man, Dead*, N.Y. TIMES, Dec. 26, 1953, at 13.

[111] *See, e.g.*, John Leo Coontz, *Science to Aid Fast Steppers*, WASH. POST MAG., July 22, 1928, at 1 ("Mereworth Farms, near Lexington, Ky., owned by Walter J. Salmon, prominent breeder, of New York"); *Careful is Beaten After Seven Victories*, N.Y. TIMES, June 17, 1920, at 13; *Walter J. Salmon's Stable Wintering at Belmont Park*, WASH. POST, Dec. 30, 1921, at 12; *Notables of Society Attend Horse Show*, N.Y. TIMES, Nov. 17, 1920, at 20.

[112] MEINHARD, *supra* note 56, at 58 ("[F]or Walter, who wanted to be in the swim, took the name of a big fish.").

[113] *Salmon–Davy Wedding Today*, N.Y. TIMES, Mar. 26, 1919, at 15.

[114] As the Referee found, "[a]ll of the capital stock of said Midpoint Realty Co., Inc. was . . . owned by the defendant Salmon. Said Salmon [had] at all of said times nominated and dominate[d] the Board of Directors and officers thereof, and [was] in full and complete control of said Midpoint Realty, Co., Inc." Referee's Report, Findings of Fact, *supra* note 84, ¶ 273. The New York Court of Appeals considered Midpoint Realty Co., Inc. Salmon's alter ego and deemed

Louisa had passed away in 1920.[115] The new lease, which, like the old lease, initially extended for a twenty-year term "commencing on the first day of May, 1922, and ending on the thirtieth day of April, 1942," covered "street numbers 500, 502, 504 and 506 Fifth Avenue, and Numbers 1, 3, 5, 7 and 9 West Forty-second Street," an area that included the Bristol building.[116] With the new Grand Central Terminal having been completed in 1913, the lease covered some of the most highly valued properties in New York City and the rental amount, which under the original lease was only $55,000, was fixed at $350,000 to $400,000 for the first three years and $475,000 for the remainder of the term.[117] Salmon agreed to tear down the Bristol building and build a much higher building on the larger parcel, and the lease could extend for three additional periods of 20 years through the end of the 20th century.[118]

Fully assimilated and faced with an extremely profitable lease, Salmon, the wealthy real estate developer and investor, no longer needed Meinhard's financial assistance. Keen perhaps on shedding cultural and social bonds of which Meinhard was a reminder, it was easy for Salmon to forget Meinhard's affection of youth, his joining in the adventure into the wilderness, into a land that was not sown.[119] As Cardozo surmised, Salmon—assuming that he alone, through his "time and labor," had made the enterprise a success, and that Meinhard, "who had given money, but neither time nor labor, had already been richly paid"[120]—never told Meinhard about the new lease. Meinhard learned about it when he saw a notice of the accomplished fact in a newspaper.[121]

Feeling hurt and betrayed by his cultural compatriot and business co-adventurer, Meinhard made demand on Salmon that the lease be held in trust as an asset of the venture, making an offer upon the trial to share the personal obligations incidental to the guaranty.[122] Former Supreme Court Justice Abel E. Blackmar, acting as referee, limited Meinhard's interest in the new lease to 25%.[123] "The limitation

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the new lease as though signed by Salmon himself. Meinhard v. Salmon, 164 N.E. 545, 551 (N.Y. 1928) (Andrews, J., dissenting).

[115] *Mrs. Elbridge T. Gerry Dies*, *supra* note 73, at 13. Elbridge died in 1927 and the lease was bestowed to his estate. *Elbridge T. Gerry Dies in 90th Year*, supra note 74, at 13.

[116] *Meinhard* Complaint, *supra* note 84, at Exhibit C.

[117] *Id.*; Thompson, *supra* note 20, at 117.

[118] *Meinhard* Complaint, *supra* note 84, at Exhibit C.

[119] *See Jeremiah* 2:2, "Go and cry in the ears of Jerusalem, saying, Thus saith [Jehovah]; I remember thee, the kindness of thy youth, the love of thine espousals, when thou wentest after me in the wilderness, in a land [that was] not sown."

[120] Meinhard v. Salmon, 164 N.E. 545, 548 (N.Y. 1928).

[121] *Meinhard* Complaint, *supra* note 84, at ¶ 12; *see also Fifth Avenue Deal: Elbridge T. Gerry Leases 42d Street Corner for Long Term*, N.Y. TIMES, Jan. 27, 1922, at 28.

[122] Meinhard v. Salmon, 229 N.Y.S. 345, 351–52 (N.Y. App. Div. 1928).

[123] *Id.* at 353.

was on the theory that the plaintiff's equity was to be restricted to one-half of so much of the value of the lease as was contributed or represented by the occupation of the Bristol site."[124] Upon cross-appeals to the Appellate Division, Meinhard's equitable interest was increased to include "one-half of the whole lease."[125] Salmon appealed that judgment, offering an opportunity to Cardozo to address the matter.[126] As the following Section I.C suggests, in deciding the case, Cardozo had to address his own ambivalence about the appropriate balance between particularism and universalism, between affinity to one's history and interest in one's future.

C. Benjamin N. Cardozo: A Jewish Judge and the Judicial Process

According to his biographer, Cardozo's family was "rooted in New York's old Sephardic Jewish community, and he took pride in the fact that his ancestors had arrived in America before the Revolution."[127] By the time Cardozo was born, his family "lived in a fashionable neighborhood just off Fifth Avenue, and had links with the political and mercantile powers of the city."[128] Like many Sephardic Jews, they considered themselves "the elite of American Jewry."[129] And although shortly after his Bar Mitzvah, Cardozo stopped attending services, "he kept his personal and public identity as a Sephardic Jew" and his Sephardic heritage continued to influence him throughout his life.[130]

Until he became a judge, Cardozo's circle of friends was small and primarily Jewish. After his election to the New York Supreme Court "through reform politics in 1913 at the age of forty-two,"[131] he broadened his circle. For one, with the support of his non-Jewish friends he was admitted to the exclusive (and at times antisemitic) Century Club.[132] "Cardozo cherished his new non-Jewish friends, and he used the Century often to meet them for lunch," his biographer writes.[133] "At the same time, he did not neglect his old Jewish friends and his Jewish connections."[134] He was typically non-confrontational and "did not act or speak publicly against

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[124] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[125] *Id.*

[126] *Id.*

[127] KAUFMANN, *supra* note 21, at 3.

[128] *Id.* at 6.

[129] *Id.* at 7.

[130] *Id.* at 7, 24.

[131] PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 255–56 (2d ed. 2018).

[132] KAUFMANN, *supra* note 21, at 169.

[133] *Id.* at 170.

[134] *Id.*

anti-Semitism," but "did comment privately, sometimes satirically" about the subject.[135] In 1928, Cardozo supported Herbert Hoover's Democratic opponent, writing that in the Republican Party "will be found all the narrow-minded bigots, all the Jew haters, all those who would make of the United States an exclusively Protestant government."[136]

Cardozo was "an outspoken critic" of the notion that his Jewish background might have influenced his decisions, "self-consciously engaging in faithful adherence to principled consideration of law and public policy."[137] And yet, Cardozo's jurisprudence reflected the themes legal historian Morton Horwitz has attributed to early-20th century Jewish scholars. Engulfed in the Jewish community's attempts to mediate the conflicting demands of particularism and universalism, these scholars combined, Horwitz writes, "a pre-modern, prophetic, and essentialist moralistic passion for social justice with critical modernist sense of the socially constructed character of social categories and institutions."[138] They brought moral judgment to bear upon legal analysis.[139] Read, for example, Cardozo's statement in *The Nature of the Judicial Process*:

> [T]he judge is under a duty . . . to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience. . . . The constant insistence that morality and justice are not law has tended to breed distrust and contempt of law as something to which morality and justice are not merely alien, but hostile.[140]

The Nature of the Judicial Process, initially given as the Storrs Lectures at Yale University, was "a remarkable contribution to legal thinking. . . . [offering] a frank and accurate picture of how contemporary ideas, the pressure of external interest groups, personal inclinations, and the precedents of the law came together in judges' minds."[141] Cardozo's vision, articulated in *The Nature of the Judicial Process* and in his decisions, was imbued by what Horwitz has labeled "Jewish moralism"—"highly distinctive—passionate, emotional, and ultimately critical of the existing order."[142] In the words of Justice Bernard Shientag, one of Cardozo's close friends:

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[135] *Id.*

[136] *Benjamin Cardozo*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/benjamin-cardozo (last visited Jan. 13, 2024)

[137] Samuel J. Levine, *Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study in the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation*, *in* JEWS AND THE LAW, *supra* note 8, at 37, 58.

[138] Morton J. Horwitz, *Jews and Legal Realism*, *in* JEWS AND THE LAW *supra* note 8, at 309, 314.

[139] *Id.* at 314–15.

[140] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 133–34 (1921).

[141] HOFFER ET AL., *supra* note 131, at 256.

[142] Horwitz, *supra* note 138, at 315–16.

> Of [Cardozo's opinions] it may be said: "Love of the good of others is something that shines in every page with splendor. How entirely limpid is his sympathy with life—a sympathy uncontaminated by dogma or pedantry or snobbery or bias of any kind. . . . And yet, in spite of this extreme sensibility, not the least wobbling, no deviation from a just severity of judgment, from an uncompromising distinction between white and black."[143]

Seeking to join together the particularity of experience with the universality of law, Cardozo, "brought his Jewish moralism to the fore," concluding that "the force which in our day and generation is becoming the greatest [influence] of them all, [is] the power of social justice."[144] With the goal of social justice, judges were to "decide cases to promote justice and the common good rather than apply precedents protecting an outmoded status quo."[145] As legal historian William Nelson elaborates, "[t]he nub of Cardozo's jurisprudence lay in his image of society as a cohesive entity progressing collectively toward social justice."[146] Cardozo aimed to "push legal doctrine in the novel directions demanded by [a] . . . conception of social justice."[147] This was the vision Cardozo used to evaluate Salmon's actions.

Meinhard, Nelson writes, "reflected a prevalent ethos . . . . that those in power should not exploit those they were serving."[148] And its implications were significant. As Nelson elaborates, Cardozo did not explicate "the exact limitations of . . . a [fiduciary] relationship"; rather, his concept of honor:

> "embrace[d] both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another," including relationships "between close friends" or "based upon prior business dealings." . . . "[W]here one party to a transaction has superior knowledge, or means of knowledge, not open to both parties alike, he is under a legal obligation to speak and his silence constitutes fraud."[149]

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[143] Bernard L. Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo*, 30 COLUM. L. REV. 597, 604 (1930).

[144] Horwitz, *supra* note 138, at 315 (alteration in original) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65–66 (1921)); *see also* WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980, at 24 (2001); Mortimer J. Cohen, *Benjamin N. Cardozo*, 31 JEWISH Q. REV. 307, 307 (1941) (book review) (stating that "Cardozo poured the rich Jewish heritage within him into American life and thought").

[145] NELSON, *supra* note 144, at 24.

[146] *Id.*

[147] *Id.* at 25.

[148] *Id.* at 61.

[149] *Id.* (alterations in original). It is important to note that not everyone accepted Cardozo's vision. *See, e.g.*, *id.* at 25 (noting that "[r]eformers and conservatives had sharply competing visions of a just society").

Was the ethos also personal? While there is no evidence to suggest that Cardozo knew the litigants (most of Cardozo's personal letters were destroyed after his death), it is quite plausible that he had heard of them and, at the very least, knew them to be of Jewish descent. Cardozo must have also known that while commerce united many Jews, intra-Jewish conflicts and competition were also growingly common. It is hard to imagine Cardozo did not realize the case was about economic and cultural assimilation as much as it was about the duty of loyalty. Was Cardozo critical of Salmon's name change, or of Salmon's rejection of faith and friendship? Cardozo's rhetoric and palpable anger seem to suggest so. At the very least, Cardozo reproached businessowners and business managers lest they forgot that business depended on relationships, lest they neglected those who had helped them succeed, lest they turned their backs on the communities from which they came. As Richard Friedman writes, Cardozo's "celebrated prose style, featuring archaic expressions and unexpected inversions, seemed to come from another time and place."[150] In *Meinhard*, Justice Shientag wrote at the time, Cardozo "reache[d] a point of exaltation in his 'yearning for what is fine or high.'"[151]

Cardozo's "opinions on the relationship between trustee and beneficiary are notable for their strong and delicate sense of moral values and for their insistence upon undivided loyalty," Justice Shientag wrote in 1930.[152] Against the ideals of autonomy and the pursuit of individual ends that were rapidly conquering American economy and society, Cardozo wanted to enforce undivided loyalty. Salmon acted without intent to defraud; in fact, he made a rational business decision in his best interest. But for Cardozo, the matter was not a matter of fault, but of status. Salmon, Cardozo wrote:

> had put himself in a position in which thought of self was to be renounced, however hard the abnegation. He was much more than a coadventurer. He was a managing coadventurer. For him and for those like him the rule of undivided loyalty is relentless and supreme.[153]

Salmon could not ignore the duties that his position entailed; and perhaps, too, he could not forget his status as a second-generation Jewish American. "Remember the former things of old" the prophet Isaiah told the Israelites;[154] remember where you came from, Cardozo seemed to suggest; remember your status.

The decision's rhetoric reflected a yearning perhaps for a simpler, more interconnected world, a longing for a community in which friends did not betray each other and in which friends and businesspeople stuck together. As Cardozo's imagery

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[150] Richard D. Friedman, *Cardozo the [Small r] realist*, 98 MICH. L. REV. 1738, 1743 (2000) (book review).

[151] Shientag, *supra* note 143, at 626.

[152] *Id.* at 625.

[153] Meinhard v. Salmon, 164 N.E. 545, 548 (N.Y. 1928) (citation omitted).

[154] *Isaiah* 46:9.

seemed to suggest, the Memorandum between Salomon and Meinhard was not the result of an arms-length transaction between competing individuals engaged in strategic behavior, carefully delineating their rights in writing. Rather, Salomon and Meinhard were friends, they discussed the project as friends, and Meinhard gave money to Salomon before any agreement was signed. As friends, we would expect them to show compassion and understanding, to communicate, to listen and cooperate, to care. Cardozo made such expectations apply to their business relationship. As he wrote, "[f]or each the venture had its phases of fair weather and of foul. The two were in it jointly, for better or for worse."[155]

In his examination of the ways in which Savannah Jews "became Southern," Mark Greenberg has called attention to "their commitment to the honor ethic . . . . [clinging] to a value system within which a man possessed only as much worth as the community conferred upon him."[156] Cardozo brought a similar concept to bear upon his analysis of Salmon's choices. Salmon's status—as a person, a friend, a cultural compatriot, a co-adventurer—was front and center in Cardozo's decision. One who forgot his status, one who turned his back on his friend, his cultural compatriot, his co-adventurer, should feel shame, and, according to Cardozo, writing for the court, "[c]onduct subject to that reproach does not receive from equity a healing benediction."[157]

Meinhard won, but the legal victory came at a price. By November 1929, tenants in the Hotel Bristol were evicted and the building demolished.[158] In its stead, the Salmon organization commissioned a 60-story Art Deco buildling—500 Fifth Avenue; it opened in March 1931,[159] "a most businesslike business building."[160] At the time the tallest skyscraper on Fifth Avenue and one of the largest in the city, 500 Fifth Avenue was designed by Shreve, Lamb & Harmon, the architectural firm that also designed the Empire State Building, which opened shortly thereafter and quickly overshadowed 500 Fifth Avenue both physically and culturally.[161] When the litigation was pending, Meinhard accepted responsibility "for half of the obliga-

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[155] *Meinhard*, 164 N.E. at 546.

[156] Greenberg, *supra* note 39, at 57–58.

[157] *Meinhard*, 164 N.E. at 548.

[158] *Hotel Bristol, Fifth Avenue*, GEOGRAPHIC GUIDE, https://www.geographicguide.com/united-states/nyc/antique/hotels/bristol/bristol.htm (last visited Jan. 13, 2024).

[159] *New Uptown Skyscraper,* WALL ST. J., July 18, 1929, at 19; *New Salmon Building Opened*, WALL ST. J., Apr. 4, 1931, at 12.

[160] Christopher Gray, *A Businesslike Tower, Overshadowed by a Famous Sibling*, N.Y. TIMES (Sept. 30, 2007), https://www.nytimes.com/2007/09/30/realestate/30scap.html; *New Uptown Skyscraper*, *supra* note 159, at 19.

[161] Gray, *supra* note 160. When 500 Fifth Avenue opened, "only a handful of floors" were rented. Thompson, *supra* note 20, at 130.

tions of the lease"; with the 1929 stock market crash and the following Great Depression, "this obligation took on a much different appearance."[162] Meinhard died two years later, while on an around-the-world cruise with his wife, Carrie.[163] With liabilities under the lease of $845,571, the estate's assets "were insufficient to provide for all the bequests specified in the will."[164] Further litigation concerning the building ended in a settlement, according to which Salmon purchased Meinhard's interest.[165] In her memoir, Carrie Meinhard wrote that the decision in *Meinhard* was a "pyrrhic victory. Five Hundred Fifth Avenue has cost the estate a fortune."[166]

Almost a year after 500 Fifth Avenue opened, on February 15, 1932, President Hoover appointed Cardozo to the U.S. Supreme Court.[167] "The Senate hearings were brief and laudatory, and he was confirmed unanimously without debate."[168] To this day, many law professors and judges use Cardozo's powerful rhetoric in *Meinhard* to "instill[] confidence in every student who doubts the propriety of [our] breed of capitalism. Generations of corporate lawyers have been schooled in its memorable language finding broad fiduciary obligations on managers of other peoples' money."[169] Yet, as the following Part II suggests, changes taking place in the midcentury have, for the most part, obliterated Cardozo's concerns about solidarity and his passion for justice. While Cardozo turned to communal bonds to balance the excesses of upward economic mobility, beginning in the 1940s, judges, including those who followed in Cardozo's footsteps, focused on enabling successful economic assimilation of second- and third-generation Americans. As Jewish Americans found different ways to assimilate, the ideals of solidarity and community were rapidly forsaken and deemed irrelevant to corporate law's fiduciary duties jurisprudence. *Bayer v. Beran* embodied this transformation.

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[162] Thompson, *supra* note 20, at 131.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] MEINHARD, *supra* note 56, at 121.

[167] KAUFMANN, *supra* note 21, at 467.

[168] HOFFER ET AL., *supra* note 131, at 255.

[169] Georgakopoulos, *supra* note 20, at 137.

II. 1940s–1960s: ASSIMILATION

A. Bayer v. Beran[170]

Bayer v. Beran was a derivative litigation against the Celanese Corporation of America ("Company"); it was instigated by two of the Company's public shareholders,[171] Seymour Bayer and Benjamin F. Steinberg, who challenged actions by the Company's board and sought to recover $1,350,000 for the Company.[172]

Bayer's and Steinberg's complaint focused on an approval of a radio advertising campaign in which Jean Tennyson, a professional opera singer and the wife of the Company's president, Camille Dreyfus, was sometimes featured.[173] The Company initiated the campaign after the Federal Trade Commission issued a new rule, requiring Celanese to be labeled rayon.[174] The campaign's implicit goal seemed to have been to convince consumers that Celanese was indeed better than rayon. The shareholders argued, first, that the directors were negligent in approving the campaign and, second, that they approved the campaign to further the career of the president's wife.[175] (The shareholders' other complaint focused on "certain payments of $30,000 a year made to Henri Dreyfus," Camille's brother and one of the Company's "vice-presidents and a director, pursuant to a contract of employment entered into with him by the corporation.")[176]

After a careful analysis of the facts, Justice Bernard Lloyd Shientag for the Supreme Court of New York, New York County, dismissed the complaint on the merits, holding that "the directors acted in the free exercise of their honest business judgment and their conduct in the transactions challenged did not constitute negligence, waste or improvidence."[177] As to the accusation of self-dealing, Shientag noted that directors' "dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation are challenged the burden is on the director not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and

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[170] Bayer v. Beran, 49 N.Y.S.2d 2 (N.Y. Sup. Ct. 1944).

[171] At the time of the trial, there were 1,376,500 shares outstanding. The Company's founders, the Dreyfus brothers, and their families owned about 135,000 shares of common stock, the other directors about 10,000 shares, and the rest of the shares were publicly held. *Id.* at 4, 9.

[172] *Singer's Career Issue in Suit for $1,350,000*, N.Y. TIMES, Mar. 11, 1943, at 22. Abraham M. Glickman represented Steinberg, and A. Lincoln Lavine, a Professor of Law and Chairman of the Law Department of St. John's University School of Commerce, represented Bayer. *Bayer*, 49 N.Y.S.2d at 4.

[173] *Bayer*, 49 N.Y.S.2d at 7.

[174] *Designation of Rayon by FTC Is Challenged,* N.Y. TIMES, June 4, 1943, at 28.

[175] *Bayer*, 49 N.Y.S.2d at 7.

[176] *Id.* at 4.

[177] *Id.* at 15.

those interested therein."[178] In *Bayer,* the directors did not breach their duty of loyalty; as Shientag explained:

> The president undoubtedly knew that his wife might be one of the paid artists on the program. The other directors did not know this until they had approved the campaign of radio advertising and the general type of radio program. The evidence fails to show that the program was designed to foster or subsidize 'the career of Miss Tennyson as an artist' or to 'furnish a vehicle for her talents.' That her participation in the program may have enhanced her prestige as a singer is no ground for subjecting the directors to liability, as long as the advertising served a legitimate and a useful corporate purpose and the company received the full benefit thereof.[179]

For many a corporate law scholar, Shientag's decision in *Bayer* exemplified the transition that took place in the 1930s and 1940s from a strict rule of prohibition against self-dealing transactions (as expressed in *Meinhard*) to a rule of balance. Recognizing the needs of businesses and their managers, courts adopted fairness, a balancing test, to allow directors to engage in transactions and situations that had thus far been prohibited as violations of their duty of loyalty. For one, a contract between a corporation and its director could be valid if a disinterested majority of the directors approved it, and it was not "unfair or fraudulent."[180] In time, courts also held that transactions between a corporation and any or all of its directors were not "automatically voidable," whether or not a disinterested majority of the board authorized them.[181] Instead, courts subjected such transactions to scrutiny under a test of fairness, a standard that one commentator described as "measured by the 'Chancellor's foot.'"[182]

In part, the courts simply legitimated changes that corporations had begun to put in place through charter provisions permitting self-dealing transactions subject to requirements of independent authorization or absence of fraud. (Ultimately, state laws would also validate transactions between a corporation and its director, or a

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[178] *Id.* at 7 (quoting Pepper v. Litton, 308 U.S. 295, 306 (1939)).

[179] *Id.* at 10.

[180] Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 39–40 (1966); *see also* Note, *The Fairness Test of Corporate Contracts with Interested Directors*, 61 HARV. L. REV. 335, 336 (1948) (noting that "the courts seized upon the board of directors' ability to act through a majority" to approve otherwise voidable self-dealing transactions).

[181] Marsh, *supra* note 180, at 43.

[182] *The Fairness Test of Corporate Contracts with Interested Directors*, *supra* note 180, at 337. The difference between trust and fairness was significant. When focusing on trust, courts voided transactions between the corporation and a director or an officer simply because they involved the self-interest of the latter. In turn, the fairness standard of review allowed courts to validate such transactions, even though they involved the self-interest of the fiduciary, if the result of such transactions was fair to the corporation.

corporation in which said director was interested, if a majority of the disinterested directors or the shareholders approved it or if it was fair to the corporation.)[183]

In part, the rise of the large publicly held corporation, the passing of control from directors to managers, as well as the rapid pace and "brutal" temper of business ventures made a concept of trust appear "threadbare."[184] Trustees were also typically the legal owners of the trust res, while the corporation owned the corporate property, not directors.[185] In addition, the argument that directors were trustees relied upon the possibility of federal common law, which was shattered in 1938 with *Erie Railroad Co. v. Tompkins*[186] and the migration of corporate law to state courts. Cases thus rejected the idea that directors were trustees for the corporation, its shareholders (specifically its minority shareholders), or the community.

Still, Shientag appeared of two minds when it came to directors' duties; his decision in *Bayer* wavered between offering freedom to corporate managers and protecting shareholders' interests. While freeing directors to engage in self-dealing transactions, Shientag emphasized that such transactions had be fair to the corporation and seemingly evaluated fairness by reference to the profitability of the Company under the reign of its current board.[187] Moreover, while derivative litigation had been criticized as a nuisance hindering managers' ability to run corporations, Shientag opened his decision with a strong statement in its favor:

> Despite abuses that have developed in connection with the derivative stockholders' suit, abuses which should be dealt with promptly and effectively, it must be remembered that such an action is, at present, the only civil remedy that stockholders have for breach of fiduciary duty on the part of those entrusted with the management and direction of their corporations. We cannot therefore allow the prevailing mood of justifiable dissatisfaction with some of the temporary incidents of such suits to cause us to lose sight of certain deep-rooted, traditional concepts of the obligations of directors to their corporation and its stockholders.[188]

Why? If the shift from a strict rule of prohibition toward fairness was intended to free directors and executives from traditional constraints on their power, why did Shientag choose to begin his decision with a strong statement in favor of derivative litigation? As with *Meinhard*, asking the Jewish question regarding *Bayer* could offer an insight into the causes of the litigation and Shientag's mindset. Section II.B argues that *Bayer* illustrates how in the midcentury, Jewish Americans continued to

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[183] *E.g.*, *id.* at 339.

[184] Gerald T. Dunne, *Justice Story and the Modern Corporation—A Closing Circle?*, 17 AM. J. LEGAL HIST. 262, 265 (1973).

[185] *Id.* at 263.

[186] Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[187] Bayer v. Beran, 49 N.Y.S.2d 2, 11 (N.Y. Sup. Ct. 1944).

[188] *Id.* at 4–5.

use entrepreneurship and investment as means of upward mobility; often, midcentury derivative litigation thus pitted first- and second-generation Jewish Americans against each other as the courts attempted to mediate their interests. Section II.C examines *Bayer* in the context of growing antisemitic vitriol against derivative litigation. Like Cardozo, Shientag rejected any suggestion that Judaism influenced his decisions; yet, his opening paragraph, defending derivative suits, suggests at least an awareness of the potential relationship between antisemitism and the attack on plaintiff lawyers and their turf. In a short paragraph, Shientag spoke volumes.

B. The Duty of Loyalty against Antisemitism

Like *Meinhard*, *Bayer*'s origins were immigration success stories, although in different social and cultural contexts. The inter-wars years changed Americans, especially Jewish Americans. As immigration was brought to a standstill with the Johnson-Reed Act of 1924,[189] "Jewish people in the United States became more and more *American* Jews, comfortable with a modern, urban way of life."[190] Jews began moving out of the immigrant neighborhoods they inhabited earlier in the century; in New York they moved from the Lower East Side to Brooklyn and the Bronx. And while many Jews continued to live in "predominantly Jewish neighborhoods" through the 1940s, these new Jewish neighborhoods "lacked the intense Jewish street life associated with immigrant times."[191]

New employment patterns contributed to geographic mobility. As second- and third-generation Americans, "[t]he daughters and sons of garment workers and pushcart peddlers[,] became schoolteachers, social workers, bookkeepers, accountants, clerks, and salespeople," they were able to move away from working class neighborhoods.[192] Entrepreneurial roles remained particularly attractive[193] and among the few professions open to Jews, as "industrial companies which controlled more than half of corporate wealth and perhaps 35 to 45 percent of total business wealth" were largely closed off to Jews.[194] Jews were also not "admitted to such basic sectors of the economy as commercial banking, insurance and public utilities."[195] Thus, Jewish Americans "were left to practice free enterprise, if they could, in soft goods, retail trade, the amusement industry, communications, and some marginal industries with large risk factors."[196] By the 1930s, "nearly 40 percent [of the Jewish

[189] Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

[190] DINER, *supra* note 58, at 69.

[191] *Id.* at 71.

[192] *Id.* at 72.

[193] KORMAN, *supra* note 11, at 20.

[194] *Id.* at 44.

[195] *Id.*

[196] *Id.*

people employed] owned commercial enterprises, approximately three times the figure for the general population."[197]

Economic success did not entail acceptance. Jews succeeded in fields that were open to them and "created a considerable economic upper class and a prosperous middle class."[198] Yet, the industrial corporations' closed doors "depressed the employment opportunities of young Jewish men and women to whom even low-level clerical jobs were closed off," a pattern that continued through the late-20th century.[199] Jews achieved "high levels of success as entrepreneurs and as professionals,"[200] but "remained absent . . . from managerial and executive positions in much of corporate America."[201] As Anthony Mayo, Nitin Nohria, and Laura Singleton write:

> Jewish business leaders evolved into [a] category of "outsider insiders" over time. They had played a role in New York City financial circles from the city's earliest days, and this activity had resulted in social acceptance for prominent Jews by the mid-nineteenth century . . . . [Yet, a] trend of increasing prejudice against Jews began in the late nineteenth century as new waves of immigration, particularly from Eastern Europe, swelled the Jewish population of New York City . . . . [Thus, in] the early part of the twentieth century . . . while some Jewish leaders enjoyed the benefits of family success, all faced a social insularity that was based on their religion and served to cut them off from access to broader opportunities.[202]

Excluded from positions in corporate America, some Jewish Americans, like members of other underrepresented groups, found a back door to upward mobility in investment in securities.[203] Notably, for a large part of American history, responsible citizenship was associated with ownership of productive property, not idle money. Even after the growth of corporations and the gradual abolition of property requirements for suffrage began to transform the cultural and legal understanding of proprietorship and citizenship, financial speculation remained an anathema to republican values.[204] But the tide began to shift at the turn of the 20th century as

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[197] GERALD SORIN, TRADITION TRANSFORMED: THE JEWISH EXPERIENCE IN AMERICA 162 (1997).

[198] KORMAN, *supra* note 11, at 44.

[199] *Id.*

[200] *Id.* at 48.

[201] *Id.*; *see also* ANTHONY J. MAYO, NITIN NOHRIA & LAURA G. SINGLETON, PATHS TO POWER: HOW INSIDERS AND OUTSIDERS SHAPED AMERICAN BUSINESS LEADERSHIP 102 (2006) (noting that Jewish Americans often became leaders in family businesses).

[202] MAYO ET AL., *supra* note 201, at 103–04.

[203] *See, e.g.*, Kobrin, *supra* note 82, at 54 (quoting a report of the Senate Commission on Immigration calling attention to the fact that immigrant bankers favored "real estate, first and second mortgages and speculative securities").

[204] JULIA C. OTT, WHEN WALL STREET MET MAIN STREET 12–14 (2011).

the financing of the railroads introduced public security financing of industry and helped change public opinion.[205] Beginning in the merger wave of the 1880s, rapid industrial and business growth increased the demand for capital.[206] Seeking to maximize their own profits, entrepreneurs found ways to convince the American public to invest in their enterprises, first in railroad bonds and industrial preferred stock and, then, by the second decade of the 20th century, in common stock.[207]

Investment in stock was described as well-suited to those without the time, the knowledge, or the ability to manage a business. Employees found that investment in their employer's business was a way to capture the profits to which they contributed.[208] Many women—who after the Civil War were gradually allowed to control their own property but continued to have limited employment opportunities—found investment in stock to be a means of receiving regular income and supporting their families.[209] So did immigrants, especially after the Liberty Bonds drives of World War I helped associate investment in securities with modern citizenship and the American democratic ideal.[210] Low-wage employees, women, and recent immigrants were presumably all welcomed into and included within a new nation of investors.[211]

For Jewish Americans, though, investment was a double-edged sword, offering a share in corporate America and the potential of economic success, on the one hand, while reinforcing well-established antisemitic tropes that had accused Jews of controlling Wall Street, on the other. "In a society of Jews and brokers, a world made-up of maniacs wild for gold, I have no place," Henry Adams wrote to his

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[205] *See* STAFF OF H.R. COMM. ON INTERSTATE & FOREIGN COM., 78TH CONG., REP. ON SEC. & EXCH. COMM'N, PROXY RULES 3–4 (Comm. Print 1943) (statement of Paul W. Frum, Special Couns. to the Sec. Acts Subcomm., H. Comm. on Interstate & Foreign Com.).

[206] *Id.*

[207] OTT, *supra* note 204, at 132.

[208] *See, e.g.*, ROBERT F. FOERSTER & ELSE H. DIETEL, EMPLOYEE STOCK OWNERSHIP IN THE UNITED STATES (1926) (analyzing employee ownership plans and their impact).

[209] *See generally* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515 (2022) (exploring the role women investors played in the first half of the 20th century as well as the discriminatory attitudes they faced).

[210] OTT, *supra* note 204, at 54–56; *see also* Janette Rutterford & Dimitris P. Sotiropoulos, *The Rise of the Small Investor in the United States and the United Kingdom, 1895 to 1970*, 18 ENTER. & SOC'Y 485, 490–91, 501–02 (2017) ("In the United States, early common stock investors were primarily bankers and industrialists. It was not until after the merger boom, from 1897 to 1904, that common stocks, and in particular preference shares, were issued to fund the large corporations being formed, and began to be held by a broader spectrum of investors, albeit a relatively small number in total.").

[211] KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 180–81 (2009); OTT, *supra* note 204, at 56; Rutterford & Sotiropoulos, *supra* note 210, at 492–93.

brother, Brooks Adams, in 1893.[212] Eager to defend their elite status, both Henry and Brooks Adams (and many of their contemporaries) were quick to blame Jews for the eclipse of their social and cultural universe, accusing them of being money obsessed.[213] Thirty years later, Henry Ford's *Dearborn Independent* reiterated such accusations with gusto; as Steve Fraser writes, Ford strove to demonstrate that "Wall Street, or at least its Jewish segment . . . was the fount of pervasive hedonism that threatened to destroy the moral fiber of the nation."[214]

Politicians decried antisemitism to no avail. Woodrow Wilson and William Howard Taft, among others, denounced Ford's 1920s series of articles (later published as a book "under the inflammatory title of 'The International Jew'"), forcing Ford to retract his statements and withdraw the book from circulation.[215] But in the 1930s, the Jewish community's support for Franklin D. Roosevelt's economic and social policies, not to mention the fact that two of Roosevelt's advisors were Jewish, elicited the description of the New Deal as "Jew Deal,"[216] while "[d]emagogues like Huey Long and Father Coughlin . . . mobilized impassioned followers by summoning up kindred images of fat-cat parasites, gold-obsessed eastern bankers, and usurious Wall Street Jews."[217]

Antisemitism's impact was widely felt. Polls conducted in the 1930s and 1940s revealed that "over half the general public thought Jews were greedy and dishonest, had too much power, were a greater threat to the country than any other religious or racial group, and should face various restrictions in their activities."[218] "Newspaper advertisements . . . discouraged Jews from applying for jobs, especially in large corporations and chain stores," and they were similarly not welcome "in iron and steel manufacture, machine tool production, or the petroleum and automobile industries."[219] The author of a 1942 paper entitled "The Origin of the Anti-Semitic Attitude," argued that:

> The practices of the Orthodox Jewish faith, by emphasizing the different culture of the Jew, enhances anti-Semitism . . . . The "only way" to counter anti-Semitism . . . would be for Jews to surrender their religion, their customs, and anything else that marked them off from others and disappear into the crowd.

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[212] STEVE FRASER, EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE 228 (2005).

[213] *Id.* at 228–30.

[214] *Id.* at 368.

[215] *Id.* at 367, 370; HENRY FORD, THE INTERNATIONAL JEW: THE WORLD'S FOREMOST PROBLEM (1920).

[216] RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, DIVERSITY IN THE POWER ELITE 16–17 (3d ed. 2018).

[217] FRASER, *supra* note 212, at 444.

[218] ZWEIGENHAFT & DOMHOFF, *supra* note 216, at 17.

[219] SORIN, *supra* note 197, at 183.

> "Responsible" Jewish leaders . . . should not only urge "immediate cultural and final racial assimilation" but also do what they could "to discourage the entrance of Jews into those businesses and professions which are now 'over-populated.'"[220]

Bayer and Steinberg, the plaintiffs in *Bayer*, likely were Jewish;[221] and the Celanese Corporation of America was founded by Dr. Camille Dreyfus, a Jewish immigrant and chemist from Switzerland.[222] Dr. Dreyfus developed a variety of cellulose-based products and, with his brother, Henri, set up "three great enterprises,"[223] namely British Celanese Ltd., Canadian Celanese Ltd., and, in 1918, the company that would become Celanese Corporation of America.[224] Camille was president and member of the board of the Company[225] as well as "managing director of the British company and president of the Canadian."[226] Henri was vice president and member of the board of the Company.[227] Together, Camille and Henri owned a majority of the issued and outstanding stock of the Company.[228]

Did the litigants' cultural and ethnic background matter? The following suggests that it did. At the very least, recalling the litigants' background helps bring to the fore the ways that different groups have experienced entrepreneurship and investment as well as the limits and perils of economic assimilation. Beyond uncovering antisemitism in business, recalling the litigants' cultural and ethnic background can also help provide a more nuanced understanding of the development of corporate law's duty of loyalty. Many assume that in relaxing the standard of review applicable to self-dealing transactions, the courts sought to empower corporate managers to run corporations as they deemed fit. Asking the Jewish question suggests alternative explanations for the transformation from a rule of prohibition to a balancing test of fairness.

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[220] KORMAN, *supra* note 11, at 10 (quoting CHARLES E. SILBERMAN, A CERTAIN PEOPLE: AMERICAN JEWS AND THEIR LIVES TODAY 56–57 (1985)).

[221] While I was unable to find historical documents confirming the plaintiffs' cultural or religious background, their surnames are common Jewish names. They were also represented by lawyers with traditional Jewish surnames, Abraham M. Glickman and A. Lincoln Lavine.

[222] *Camille Dreyfus of Celanese Dies,* N.Y. TIMES, Sept. 28, 1956, at 27.

[223] *Id.*

[224] *Id.*; *The Beginnings*, CELANESE, https://www.celanese.com/about-us/who-we-are/the-beginnings (last visited Jan. 13, 2024).

[225] Notice of Motion and Complaint ¶ 5, Bayer v. Beran, 49 N.Y.S.2d 2 (N.Y. Sup. Ct. 1944) (No. 4517).

[226] *Camille Dreyfus of Celanese Dies*, *supra* note 222, at 27.

[227] Notice of Motion & Complaint, *supra* note 225, ¶ 6.

[228] *Id.* ¶ 8. Common and preferred stock of the Celanese Corporation of America began trading on the New York Stock Exchange in 1930. *The Birth of Celanese*, CELANESE, https://www.celanese.com/en/About-Us/History/1921-1950 (last visited Jan. 13, 2024).

For one thing, it is impossible to imagine that the midcentury New York courts were unaware of the prevailing antisemitic attitudes described above. While not addressing antisemitism directly, the courts often aimed to remove obstacles preventing second- and third-generation Americans, including Jewish Americans, from achieving economic success. As legal historian William Nelson argued in his thorough examination of politics and ideology in New York courts, the struggle of Jewish Americans (and other underrepresented minorities) to integrate into American society affected the courts' examination of fiduciary duties. The shift from a rule of prohibition to a rule of balance in the New York courts' analyses of the duty of loyalty was thus a means to promote upward mobility.[229] According to Nelson, the law of fiduciary obligations was historically a tool "to protect property rights and the existing distribution of wealth, on the one hand, and to uphold moral values, on the other."[230] In the midcentury years, judges relaxed the strict requirements applied to fiduciaries so as to enable new entrepreneurs, who were often descendants of turn-of-the-20th century Jewish immigrants from Southern and Eastern Europe, to enter the mainstream of American life.[231] Accordingly, Judges "fostered . . . upward mobility" when holding

> that a corporate officer or director, if acting in good faith, may profit from dealings with the corporation if the corporation also profits; . . . that honest reliance on advice of counsel protected directors from personal liability; that "policies of expansion" justified nonpayment of dividends . . . . and that, in the absence of loss of corporate funds or of personal profit to itself, management could authorize a corporation to purchase its own stock in the open market in order to perpetuate management's control.[232]

As was likely the case in *Bayer*, often, not only the defendants but also the plaintiffs, the shareholders who sought stricter application of fiduciary obligations, were first- and second-generation Americans.[233] Judges were thus pressed to develop pragmatic solutions that would address the needs of both fiduciaries and beneficiaries. To that end, as courts moved away from strict enforcement of trust toward the more relaxed standard of fairness, judges also opined about the directors' duty to ensure that corporations remained profitable for the benefit of their shareholders.[234]

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[229] NELSON, *supra* note 144, at 178.

[230] *Id.* at 60.

[231] *Id.* at 178; *see also* William E. Nelson, *The Law of Fiduciary Duty in New York, 1920–1980*, 53 SMU L. REV. 285, 285–86 (2000) (describing the increased freedom given by judges to money managers to facilitate the mobility of new entrepreneurs).

[232] Nelson, *supra* note 231, at 297–98.

[233] *See supra* note 221.

[234] NELSON, *supra* note 144, at 178 ("In particular, the courts grew more tolerant of higher-risk investment practices of entrepreneurial fiduciaries who were seeking to increase income or grow principal and less concerned with insuring the security of investments.").

In this vein, and perhaps because he dismissed the minority shareholders' complaint, Justice Shientag, an Orthodox Jew, who was known for his "broad humanitarian sympathies,"[235] emphasized two factors related to the responsibility of directors and officers to maximize shareholders' value.[236] First, Shientag elaborated on the standard of fairness that courts should use to evaluate transactions involving directors' or officers' conflict of interest. Ms. Tennyson advised Dreyfus and helped create the advertising campaign, which consisted of a radio program offering classical music; she was also one of the singers on the program.[237] Yet, while the advertising campaign was tainted with a conflict of interest, Shientag found it to be fiscally fair to the corporation.[238] As he pointedly noted, "It would be far-fetched to suggest that the directors caused the company to incur large expenditures for radio advertising to enable the president's wife to make $24,000 in 1942 and $20,500 in 1943."[239]

Second, as to the claim that the directors did not meet to approve the campaign and thus failed to fulfill their duty of care, Shientag pointed out that the directors, all of whom were also executives, were sufficiently informed.[240] Supporting his conclusion, Shientag, again, commented on the corporation's financial success:

> While a greater degree of formality should undoubtedly be exercised in the future, it is only just and proper to point out that these directors, with all their loose procedure, have done very well for the corporation. Under their administration the company has thrived and prospered. Its assets increased from $44,500,000 in 1935 to upwards of $103,000,000 in 1942. Its net profits, after taxes, doubled during that period, rising from $4,000,000 in 1935 to $8,000,000 in 1942; its net sales rose from $27,000,000 to upwards of $86,000,000; and its dividend disbursements to stockholders exceeded $29,500,000.[241]

While irrelevant to the legal analysis of directors' duties, profit mattered. Other midcentury cases, addressing a variety of duty-of-loyalty and duty-of-care claims

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[235] James McGurrin, Letter to the Editor, *Tribute to Justice Shientag*, N.Y. TIMES, May 29, 1952, at 26.

[236] The information presented over the rest of this Section has been taken from Dalia T. Mitchell, *Shareholder Wealth Maximization: Variations on a Theme*, 24 U. PA. J. BUS. L. 700 (2022). I have omitted quotation marks when citing myself, but please note that several sentences are taken verbatim from my prior work and should be cited accordingly.

[237] Bayer v. Beran, 49 N.Y.S.2d 2, 9 (N.Y. Sup. Ct. 1944).

[238] *Id.*

[239] *Id.*

[240] *Id.* at 11 ("The same informal practice followed in this transaction had been the customary procedure of the directors in acting on corporate projects of equal and greater magnitude. All of the members of the executive committee were available for daily consultation and they discussed and approved the plan for radio advertising.").

[241] *Id.*

similarly balanced the interests of managers and shareholders, shielding the former from liability while assuring the latter that their corporations were profitable.[242]

In short, if *Bayer* was a milestone in the development of directors' and officers' duty of loyalty, it was also an illustration of how litigation became a site where litigants and judges mediated access to business—in *Bayer*, the access of Jewish entrepreneurs and investors—amidst growing antisemitism and status panic within the ranks of the corporate elite. And there is more that probing the Jewish question can reveal in *Bayer*. As the following Section II.C explores, Shientag's opening statement about the significance of the derivative suit was a direct response to antisemitic attitudes that, in the early 1940s, plagued the New York Bar, affecting it and corporate law to this day.

C. Antisemitism and the Investor's (Plaintiff's) Lawyer

Minority shareholders have always been in a precarious situation. As Naomi Lamoreaux and Jean-Laurent Rosenthal documented, in the 19th century, those in control "negotiated contracts with other companies in which they had a financial interest, elected themselves to corporate offices at lucrative salaries that they themselves set, arranged mergers that earned themselves impressive capital gains while leaving other shareholders in the lurch, and engaged in a wide variety of other actions" benefiting themselves at the expense of other corporate constituencies.[243] And minority shareholders had few if any effective tools to protect their interests against the control group's abuse of power. Voluntary dissolution was not available and, typically, minority shareholders did not own enough stock to elect a new slate of directors. If the company was publicly traded, shareholders might have been able to sell their shares but generally "at a price discounted to reflect the majority's behavior."[244] If the company was closely held, as it often had been, "the only buyers for their shares were the same majority shareholders with whom they were in conflict."[245] As Lamoreaux and Rosenthal concluded, controlling shareholders were "effectively dictators."[246]

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[242] *See, e.g.*, Litwin v. Allen, 25 N.Y.S.2d 667, 677–78 (N.Y. Sup. Ct. 1940) (associating the duty of care with profitability); Turner v. Am. Metal Co., 268 A.D. 239, 272–73 (N.Y. App. Div. 1944) (justifying a dismissal by reference to the corporation's profitability).

[243] Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of Minority Shareholders in the United States Before the Great Depression* 3–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10900, 2004), http://www.nber.org/papers/w10900.

[244] *Id.* at 4.

[245] *Id.*

[246] *Id.* Commonly, the power struggle at the time was between minority and controlling shareholders, and "[t]his struggle, furthermore, took place in corporations that had far fewer shareholders than the publicly traded leviathans of the twentieth century." Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1036 (2015).

The derivative suit was recognized as a means of empowering minority shareholders as early as 1832 in New York (and in 1856 by the U.S. Supreme Court).[247] Yet, because during the 19th century most corporations were closely held and controlled, with a few, if any, public shareholders, the derivative action was rarely used.[248] In the 20th century, as individual shareholders found themselves holding stock in larger and larger corporations, "[t]he derivative action [became] the only legal remedy then available to shareholders" and its use rapidly increased.[249] Minority shareholders, not infrequently also of minority social and cultural status or women, who viewed investment in corporate stock as a means of economic as well as social and cultural advancement, brought derivative suits not necessarily to enrich their pockets but rather to ensure that corporate managers acted in their best interest, to ensure, perhaps, their place in corporate America.

Notably, much of the litigation took place in the New York courts,[250] where minority shareholders were often represented by Jewish lawyers who were descendants of recent immigrants.[251] Their commitment to the protection of minority shareholders was borne out of their experiences of discrimination and exclusion in

[247] Lamoreaux & Rosenthal, *supra* note 243, at 22, 22 n.19; s*ee also* Robinson v. Smith, 3 Paige Ch. 222, 232–33 (N.Y. Ch. 1832) (holding that the corporation was a necessary party in a lawsuit brought by its stockholders against its directors); Dodge v. Woolsey, 18 U.S. (1 How.) 331, 341 (1855); JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION 33 (2015); Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1141 (2020); George D. Hornstein, *Problems of Procedure in Stockholder's Derivative Suits*, 42 COLUM. L. REV. 574, 574 (1942) ("For more than a hundred years it has been established that . . . [w]here a corporation has been injured and should sue, but refuses or neglects to do so, a stockholder may maintain a suit in equity on its behalf."); John Matheson, *Restoring the Promise of the Shareholder Derivative Suit*, 50 GA. L. REV. 327, 344 (2016) ("This recognition of the derivative suit solidified the concept of holding directors and officers of corporations accountable for their actions."); Wells, *supra* note 246, at 1048, 1055.

[248] Lamoreaux & Rosenthal, *supra* note 243, at 29;

[249] COFFEE, *supra* note 247, at 33; *see also* Naomi R. Lamoreaux & Laura Phillips Sawyer, *Voting Trusts and Antitrust: Rethinking the Role of Shareholder Litigation in Public Regulation, from the 1880s to the 1930s*, 39 L. & HIST. REV. 569, 577–83 (2021) (discussing the use of derivative suits against anticompetitive mergers).

[250] Dalia T. Mitchell, *Legitimating Power: A Brief History of Modern of U.S. Corporate Law*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 510, 520 (Harwell Wells ed., 2018).

[251] At the time, "[t]he plaintiff's bar . . . consisted of solo practitioners and very small firms." COFFEE, *supra* note 247, at 38. Abe Pomeranz was an exception. *Id.*; *see also* Spencer Klaw, *Abe Pomerantz Is Watching You*, FORTUNE, Feb. 1968, at 144.

American society.[252] Seeking economic success and "excluded from . . . the elite corporate bar," these lawyers "turned instead to other forms of legal practice, including challenging corporations through derivative litigation" to make a living.[253]

Jewish lawyers' career paths reflected the Jewish community's economic successes as well as the persistence of antisemitism. By the 1940s, historian Gerald Sorin writes, Jews became middle-class; they were involved "in business, white-collar jobs, and the professions" decades earlier than other immigrant groups.[254] And while initially, they "rose by their labor, self-exploitation, and business acumen," before long they were able to send their children to college, turning to education as a means of upward mobility.[255] "[A]chievement measured by academic performance reflected a deeply treasured cultural value," supported by tradition and the potential reward of social and economic mobility.[256] "By the 1940s . . . nearly 80 percent of Jewish students in New York completed high school, compared to less than 35 percent of the general population . . . . [And] the Jewish rate for completing college was almost three times greater than the rate for non-Jews."[257] Similarly, Jewish Americans' applications to medical and law schools far exceeded their percentage in the population. In the mid-1930s, 50 percent of the applicants for medical and law schools were Jewish and, despite antisemitism and discrimination in the form of quotas that universities and colleges adopted in the interwar years, "[i]n 1937 in New York City, Jews, who constituted 25 percent of the population, made up 65 percent of lawyers and judges."[258]

Yet, despite their large numbers, Jewish lawyers were denied access to the higher echelons of the New York Bar. Rather, Jewish lawyers "crowded the lower

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[252] Lawrence E. Mitchell, *Gentleman's Agreement: The Antisemitic Origins of Restrictions on Stockholder Litigation*, *in* JEWS AND THE LAW *supra* note 8, at 141, 165.

[253] *Id.* at 162.

[254] SORIN, *supra* note 197, at 160.

[255] *Id.* at 163.

[256] *Id.* at 162.

[257] *Id.* at 163.

[258] *Id.* at 163. Notably, a 1939 study by the Conference on Jewish Relations found

> that almost 50 percent of the Jewish lawyers in New York City . . . graduated either from Brooklyn Law School or New York University, and that if the number of St. Johns and Fordham graduates is added to the above, over 75 percent of . . . Jewish lawyers graduated from law schools where tuition is relatively low and where part-time courses are offered.

Melvin M. Fagen, *The Status of Jewish Lawyers in New York City: A Preliminary Report on a Study Made by the Conference on Jewish Relations*, 1 JEWISH SOC. STUD. 73, 83 (1939).

stratum of the bar, competing fiercely for clients and a livelihood."[259] As "desirability of access increased" so did "barriers to access."[260] In the 1920s, for example, an influential member of the ABA commented that "the legal profession was a means by which Jews, immigrants, and city-dwellers might undermine the American way of life."[261] Given that antisemitic attitudes and statements were commonplace, it is not surprising that in 1939, a study by the Conference on Jewish Relations found that:

> a. Jewish lawyers have a greater tendency to practise law on an individualistic basis, as single practitioners.
>
> b. Jewish lawyers have difficulty in obtaining employment in law firms.
>
> c. Membership in law firms is rarer among Jewish lawyers than it is for the profession generally.[262]

Jewish lawyers and members of the white Anglo-Saxon Protestant firms thus lived parallel professional lives. Typically, Jewish lawyers represented wage earners and individual clients. Only 14% reported representing corporations, compared to large New York law firms that derived most of their work from corporations.[263]

Derivative litigation was one of the few places where Jewish lawyers interacted with members of New York's elite corporate bar. The white Anglo-Saxon Protestant firms represented the defendant corporation and its directors, while the sole practitioner or small Jewish firms represented the plaintiff, at the time typically a minority, individual shareholder.[264] It was an encounter that kept breathing antisemitism into corporate law. For one thing, in the early 1940s, growingly concerned about the threat that plaintiffs' lawyers posed to its elite status,[265] the Chamber of Commerce of the State of New York commissioned a study of a decade of derivative

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[259] Eli Wald, *The Jewish Law Firm: Past and Present*, *in* JEWS AND THE LAW *supra* note 8, at 65, 70.

[260] *Id.* (quoting JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 25 (1976)).

[261] J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844–1944, at 42 (1993) (quoting Robert Stevens, *Two Cheers for 1870: The American Law School*, *in* LAW IN AMERICAN HISTORY 405, 463 (Donald Fleming & Bernard Bailyn eds., 1971)).

[262] Fagen, *supra* note 258, at 100.

[263] Mitchell, *supra* note 252, at 157.

[264] *Id.* at 157–58.

[265] As Lawrence Mitchell notes, by the 1940s, the White Anglo-Saxon Protestant elite had lost the hegemony it had in the 1920s, "defeated by the liberalism of the New Deal, by the loss of their power in Washington, and by the booming economic success of immigrant groups. . . . [They] retreat[ed] into private and exclusive clubs, resorts, [and] suburban enclaves." *Id.* at 161.

litigation in New York courts to determine potential abuses of the tool.[266] Franklin Wood, who conducted the study and wrote a report based upon it (the "Wood Report") concluded that derivative actions were filed by nominal shareholders "having no real financial interest in the corporation."[267] Accordingly, "the only one likely to profit substantially in the event of success is the [plaintiff's] attorney."[268] A majority of the plaintiffs listed in the Wood Report had Jewish surnames.[269]

Wood's attention focused on publicly held corporations. Wood was not concerned about shareholder suits in closely held corporations. Suits involving the latter were "usually brought by minority shareholders with a significant stake who alleged misbehavior by the majority."[270] Instead, he focused on individual shareholders in publicly held corporations. His goal was to demonstrate that many derivative suits were "brought primarily for their nuisance value."[271] The Report recommended limiting standing in derivative litigation "to shareholders who owned stock at the time of the alleged wrongdoing, and to require the shareholder plaintiff to post security for costs in the event the litigation were found to have been meritless."[272] In 1944, convinced by the Report, the New York legislature passed Section 61-b,[273] "the nation's first security for expenses statute."[274]

Criticisms of the Report were mounted as soon as it was published,[275] but the impact of the legislation was limited.[276] At the time, "judges were probably more

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[266] Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 149 (2004). The report covered the years 1932 to 1942. *Id.*

[267] FRANKLIN S. WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS 112 (1944).

[268] COFFEE, *supra* note 247, at 38–39.

[269] Mitchell, *supra* note 252, at 150. As Mitchell further notes, "the marginalization of Jews at the lowest levels of the bar . . . set the stage for the suspicion and hostility that led to restrictions on stockholder litigation and to negative attitudes toward the corporate plaintiffs' bar." *Id.* at 156.

[270] David A. Skeel, Jr., *The Accidental Elegance of* Aronson v. Lewis, FAC. SCHOLARSHIP AT PENN CAREY LAW 9 (Oct. 29, 2007), https://scholarship.law.upenn.edu/faculty_scholarship/182.

[271] Erickson, *supra* note 247, at 1141.

[272] Skeel, *supra* note 270, at 9.

[273] Act of Apr. 9, 1944, ch. 668, § 61-b, 1944 N.Y. Laws 1455.

[274] Skeel, *supra* note 270, at 9. Several states enacted similar restrictions, and by 1949, the U.S. Supreme Court held that "these state procedural statutes applied in federal court as well to corporations incorporated in these states." COFFEE, *supra* note 247, at 40–41; *see also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555–57 (1949) (holding that a New Jersey statute requiring shareholder plaintiffs to post security for litigation costs applied in federal courts).

[275] George D. Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 *passim* (1944) (criticizing the validity and accuracy of the Wood Report).

[276] Skeel, *supra* note 270, at 10 ("Although derivative litigation may indeed have been chilled for a time, the prophesies of its demise were greatly exaggerated.").

prepared to question managerial decisions than at any time before or since."[277] And while individual shareholders, like Bayer and Steinberg, rarely won a case, the questions their derivative litigation raised provided fertile ground for judges not only to develop the law of fiduciary duties but also to express their opinions about derivative litigation and the hidden antisemitic attitudes its critics espoused. As Justice Shientag pointedly put it: "We cannot therefore allow the prevailing mood of justifiable dissatisfaction with some of the temporary incidents of such suits to cause us to lose sight of certain deep-rooted, traditional concepts of the obligations of directors to their corporation and its stockholders."[278]

The balance, and economic assimilation, seemed attainable: the courts welcomed derivative suits, the shift toward a test of fairness offered flexibility to entrepreneurs from traditionally underrepresented groups, while investors—particularly those outside the ranks of the corporate elite—were promised that corporations were acting in their best interests. Perhaps ironically, this attainable balance rapidly helped secure managerialism (that is, the trust in corporate managers because of their expertise to run corporation) as corporate law's dominant norm.[279] The business judgment rule embodied managerialism, and the corporate elite became the custodian of corporate America's values.[280] By the 1980s, however, the tables were turned. Amidst a blitz of hostile takeovers, the Delaware Supreme Court overhauled its fiduciary duties jurisprudence, seemingly doing away with managerialism and in its stead embracing shareholder wealth maximization as corporate law's governing norm.[281] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* was a significant milestone in this transformation. As the following Part III explores, *Revlon* was also a milestone in the history of Jewish Americans' ongoing struggle to be admitted into the higher ranks of the corporate elite.

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[277] COFFEE, *supra* note 247, at 36. Notably, several of the judges in the New York courts were Jewish (i.e., Bernard Shientag, Albert Cohn, and Irving Lehman). For an attempt to "discern common themes in the judicial careers" of Jewish judges who served on state courts, see Jeffrey B. Morris, *The American Jewish Judge: An Appraisal on the Occasion of the Bicentennial*, 38 JEWISH SOC. STUD. 195 (1976).

[278] Bayer v. Beran, 49 N.Y.S.2d 2, 4–5 (N.Y. Sup. Ct. 1944).

[279] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 444 (2001) (explaining that managerialism held "that professional corporate managers could serve as disinterested technocratic fiduciaries who would guide business corporations to perform in ways that would serve the general public interest"). The term managerialism was likely coined in the 1940s. For its origins, see JAMES BURNHAM, THE MANAGERIAL REVOLUTION (1941); H.S. Person, *Capitalism, Socialism and Managerialism,* 8 S. ECON. J. 238 (1941) (book review).

[280] *See, e.g.*, Dalia T. Mitchell, *From* Dodge *to* eBay*: The Elusive Corporate Purpose,* 13 VA. L. & BUS. REV. 155, 187–94 (2019).

[281] *Id.* at 203–04.

III. 1970s–1980s: MAKEOVERS

A. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.[282]

A confluence of events engendered the 1980s hostile takeover blitz. In the 1960s, the merger movement was "led by conglomerates, which used their highly priced stock to acquire new companies"; by the end of the decade, however, "[t]he bubble burst . . . as it became clear the conglomerates could not generate the earnings promised."[283] The experience halted mergers for a while and "the stock market slumped."[284] By the early 1980s, as the Reagan administration lessened restrictions against horizontal and vertical mergers and was less likely to intervene in antitrust cases,[285] and with stocks falling "to five or six times earnings and often traded for less than a company's book value," hostile takeovers became feasible.[286] Raiders could offer premium above market price and "[t]he outlay could be recouped in a half-dozen years—or even sooner, by selling off some of the acquired assets."[287] As Jeff Madrick writes, "low stock prices were simply too tantalizing to be ignored for long by ambitious Wall Street bankers, increasingly desperate for profitable opportunities."[288] Seizing the opportunity, investment bankers were quick to justify hostile takeovers by spinning "a compelling narrative of how in the postwar era an elite, complacent, and self-serving managerial class squandered corporate resources extravagantly on themselves or on ill-advised expansions."[289] Accordingly, a primary goal of the takeover movement was "'unlocking' the value of 'underperforming' stock prices" to the benefit of the victims in this narrative—the shareholders.[290]

Ronald Perelman's battle to acquire Revlon was the epitome of the hostile takeover decade. Perelman, controlling shareholder of Pantry Pride—a company with "assets of $407 million . . . a net worth of about $145 million. . . . [and] a huge tax-loss carryforward of over $300 million"—wanted to purchase Revlon, a company with "over $2.3 billion in assets and net worth in excess of $1 billion."[291] Revlon

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[282] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[283] JEFF MADRICK, AGE OF GREED: THE TRIUMPH OF FINANCE AND THE DECLINE OF AMERICA, 1970 TO THE PRESENT 72 (2011).

[284] PAUL HOFFMAN, THE DEALMAKERS: INSIDE THE WORLD OF INVESTMENT BANKING 143 (1984); MADRICK, *supra* note 283, at 72.

[285] MARK S. MIZRUCHI, THE FRACTURING OF THE AMERICAN CORPORATE ELITE 208–09 (2013).

[286] HOFFMAN, *supra* note 284, at 143.

[287] *Id.*

[288] MADRICK, *supra* note 283, at 73.

[289] HO, *supra* note 211, at 130.

[290] *Id.*

[291] CONNIE BRUCK, THE PREDATORS' BALL: THE INSIDE OF DREXEL BURNHAM AND THE RISE OF THE JUNK BOND RAIDERS 193 (1988).

"was a sitting duck because its stock was cheap in comparison with the company's earning power or its worth if broken up and resold."[292] Perelman's ability to buy it rested on "a new breed of bond investors . . . . [who] back[ed] aggressive corporate executives . . . by buying high-yield securities, known as 'junk bonds,'"[293] which horrified Michel Christian Bergerac, Revlon's CEO. "Can you imagine this guy, saying he's going to make me a rich man?" Bergerac reportedly commented after meeting Perelman.[294] So they went to war.

Perelman, frustrated that his attempts at a friendly transaction were not reciprocated, made a hostile tender offer to Revlon's shareholders.[295] Revlon responded by implementing a poison pill and a defensive stock repurchase plan, involving an exchange of notes for shares of Revlon's stock.[296] The notes included serious limitations on Revlon's ability to incur additional debt (a majority of the independent directors on the Revlon board could waive these restrictions).[297] When Perelman did not back down and continued to bid on Revlon's stock, the Revlon board responded by negotiating a merger agreement with their chosen knight (Forstmann Little & Co.); it included Revlon's promise to remove the notes' covenants.[298] When angered noteholders threatened suit, Revlon solicited Forstmann's support for the notes' value and, in exchange, granted Forstmann an option to purchase certain Revlon assets at "some $100–$175 million" below their value if "another acquirer got 40% of Revlon's shares" and a $25 million dollar cancellation fee "if another acquiror got more than 19.9% of Revlon's stock."[299] Perelman went to court, "challenging the lock-up, the cancellation fee . . . and the Notes covenants."[300]

Revlon followed on the heels of *Unocal v. Mesa Petroleum Co.*, the first Delaware case to address a board's duties when faced with a hostile takeover.[301] Mesa, "the owner of approximately 13% of Unocal's stock," initiated "a two-tier 'front loaded' cash tender offer for . . . approximately 37% of Unocal's outstanding stock at a price of $54 per share. The 'back-end' was designed to eliminate the remaining publicly held shares by an exchange of [highly subordinated] securities purportedly worth $54 per share."[302] The Unocal board determined that the price Mesa offered was inadequate and "that Unocal should pursue a self-tender to provide the stockholders

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[292] Robert J. Cole, *High-Stakes Drama at Revlon*, N.Y. TIMES, Nov. 11, 1985, at D1.

[293] *Id.*

[294] BRUCK, *supra* note 291, at 194.

[295] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).

[296] *Id.* at 176–77.

[297] *Id.* at 177.

[298] *Id.* at 177–78.

[299] *Id.* at 178–79.

[300] *Id.* at 179.

[301] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985).

[302] *Id.*

with a fairly priced alternative to the Mesa proposal."[303] Mesa was not permitted to tender its stock into Unocal's self-tender.[304]

Unocal was one of a few mid-1980s cases in which the Delaware Supreme Court, uncharacteristically, reversed the Chancery Court's decision. The Delaware Chancery Court—concerned that the *Unocal* directors' actions could amount to a violation of the duty of loyalty—"temporarily restrained Unocal from proceeding with the exchange offer unless it included Mesa."[305] The Delaware Supreme Court chose a different approach. Writing for the court, Justice Andrew G.T. Moore adopted what has since been known as the *Unocal* test, applicable to directors' responses to hostile takeovers.[306] According to Moore, in the latter situations, the court had to evaluate two questions: first, whether the directors "had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and, second, whether the defensive tactic the board adopted was "reasonable in relation to the threat posed."[307] In *Unocal*, Moore concluded that "the selective exchange offer [was] reasonably related to the threats posed."[308]

Having concluded that the Unocal directors met the *Unocal* standard, Moore also noted that the exchange offer was "consistent with the principle that 'the minority stockholder shall receive the substantial equivalent in value of what he had before.'"[309] As Moore explained:

> the board's decision to offer what it determined to be the fair value of the corporation to the 49% of its shareholders, who would otherwise be forced to accept highly subordinated "junk bonds", is reasonable and consistent with the directors' duty to ensure that the minority stockholders receive equal value for their shares.[310]

Revlon's directors believed that their response to Perelman's acquisition bid was reasonable; they followed *Unocal*'s decree as they did not think Perelman's initial bid provided fair value to their shareholders. But Justice Moore saw matters differently. Moore began his decision by noting the differences between *Unocal* and *Revlon*. Unlike *Unocal*, where directors aimed to defend the corporation and its shareholders, "[t]he Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was

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[303] *Id.* at 950.

[304] *Id.* at 950–51.

[305] *Id.* at 952.

[306] *Id.* at 955.

[307] *Id.* As the court further emphasized, if a majority of the independent directors endorsed the defensive tactic, then the board's action would likely meet the burden of the test. *Id.* at 958.

[308] *Id.* at 956.

[309] *Id.* (quoting Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952)).

[310] *Id.* at 957.

for sale."[311] This difference altered directors' obligations: "[t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."[312] No longer "defenders of the corporate bastion," the directors were to be "auctioneers charged with getting the best price for the stockholders at a sale of the company."[313]

As Moore saw it, the Revlon directors failed to fulfill these auctioneer obligations because their actions were not aimed at maximizing value for the shareholders but rather at supporting the value of the notes.[314] And while one could view the Revlon directors' decisions as motivated by a desire to protect the corporate community, including the noteholders (who, incidentally, were former shareholders who participated in Revlon's exchange offer), Moore rejected the idea, explaining:

> The impending waiver of the Notes covenants had caused the value of the Notes to fall, and the board was aware of the noteholders' ire as well as their subsequent threats of suit. The directors thus made support of the Notes an integral part of the company's dealings with Forstmann, even though their primary responsibility at this stage was to the equity owners. . . . [W]e must conclude that under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment, and followed a course that ended the auction for Revlon, absent court intervention, to the ultimate detriment of its shareholders.[315]

In short, in entering the deal with Forstmann, the Revlon directors failed to fulfill their duties to their shareholders; the court thus invalidated Revlon's defensive tactics, enabling Perelman's acquisition.[316]

Since *Revlon*, Justice Moore's conclusion has become a staple of corporate law, begetting what some label "Revlon duties," that is, the idea that when a "company was for sale. . . . directors[] . . . [were] charged with getting the best price for the stockholders."[317] By 1994, "a sale" was interpreted to include a change in control[318] and by 2009, with the development of the standard of good faith, the directors' charge became not to "utterly fail[] to attempt to obtain the best sale price."[319] For many, shareholder wealth maximization has become corporate law's purpose. As Leo Strine, former Chief Justice of the Delaware Supreme Court, wrote three decades after the decision, "in the discussion of what directors must focus on as their central

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311 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

312 *Id.*

313 *Id.*

314 *Id.*

315 *Id.* at 182, 185.

316 *Id.* at 185.

317 *Id.* at 182.

318 Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 n.10 (Del. 1994).

319 Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 244 (Del. 2009).

goal, within the limits of their legal discretion, *Revlon* is central, and clearly states a board can only consider the interests of other constituencies if 'rationally related benefits accru[e] to the stockholders.'"[320]

But, why? Why did Justice Moore reject managerialism, a theory that dominated corporate law for at least five decades prior to *Revlon* and that he fully endorsed in *Unocal* just a few months earlier? Why didn't he apply the business judgment rule to the directors' actions, especially given that their defensive tactics helped secure a much higher value for Revlon's shareholders? And why did he, at least seemingly, embrace a corporate purpose focused on shareholder wealth maximization?

I have previously suggested that *Revlon* did not alter corporate law's purpose or Delaware's commitment to managerialism.[321] Rather, the decision was the culmination of 18 fateful months in the mid-1980s, during which the Delaware Supreme Court overhauled its fiduciary duties jurisprudence, substituting fairness—specifically fair dealing—for business judgment as the standard by which directors' actions were to be reviewed.[322] Rather than emphasizing directors' discretion, à la managerialism, the court required directors to demonstrate that they followed procedures the court deemed to constitute fair dealing; fair dealing was presumed to ensure fair price but *Revlon* did not impose a general duty on directors to maximize shareholder price.[323] As I argued, by the 20th century's end, proceduralism—that is, the idea that certain procedures ensure maximization of value, and that corporate law should focus on incentivizing corporate directors and executives to follow these procedures—replaced business judgment and managerialism as the legitimating principle for managerial power.[324]

My goal in the following Sections III.B and III.C is to add a new layer to these analyses, to bring Jewish American history to bear upon corporate history. In what follows, I will suggest that *Revlon* was the culmination of a longer than 18 months history; it embodied Jewish Americans' century-long struggles to be admitted within the higher ranks of the corporate elite. When the dust settled, the outsiders found a seat at the table.

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[320] Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 766–67 n.20 (2015) (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986)) (alteration in original).

[321] Dalia T. Mitchell, *Proceduralism: Delaware's Legacy*, 2 U. CHI. BUS. L. REV. 333 (2023).

[322] *Id.*

[323] *Id.* at 336.

[324] *Id.* (examining Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), and Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)).

B. "The More Things Change, the More They Stay the Same"[325]

Jewish Americans felt "ever more comfortably integrated at home in the post-war United States."[326] As Gerald Sorin explains:

> This was true partly as a result of the further Americanization some 550,000 Jewish Americans experienced serving in the armed forces; partly because the United States had, after all, fought a successful war against the common Nazi enemy; and partly because after 1944 anti-Semitism was beginning a steep decline.[327]

In part, antisemitism declined because more individuals encountered Jews in their suburban neighborhoods, public schools, and the workplace.[328] Jews were also rapidly becoming "part of the mainstream American culture."[329]

Between the 1950s and 1960s, the Jewish community transformed itself. The urban Jewish neighborhoods of the interwar years were abandoned as decreased antisemitism allowed for greater geographic mobility and third- and fourth-generation Jewish Americans moved to the suburbs.[330] Synagogue membership grew "from approximately 20 percent of the Jewish population in 1930 to just under 60 percent by 1960";[331] it was not necessarily due to greater religiosity but because synagogues allowed Jewish Americans to solidify their status as a religious rather than an ethnic group at a time when "Americans were notably tolerant regarding religious differences, but . . . looked with some suspicion at the persistence of national or ethnic identities and hyphenated loyalties."[332] Not that Jewish Americans lost ties to their ethnicity and culture. As Sorin writes, "even the third- and fourth-generation descendants of immigrants . . . have remained tied to selective ethnic symbols, institutions, and values; and they have transformed these in dynamic and creative interaction with their American environments."[333]

The general social mood in the 1950s, as reflected in laws banning discrimination in employment, education, or real estate, was that "Americans should be judged as individuals, not by religion, national origin, or physical attributes. Their ethnic, religious, and racial identities were nobody's business."[334] This mood fit Jewish Americans' vision of themselves: "Their Jewishness they reserved for the private

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[325] KORMAN, *supra* note 11, at 11.

[326] SORIN, *supra* note 197, at 196–97.

[327] *Id.* at 197.

[328] DINER, *supra* note 58, at 107.

[329] *Id.*

[330] SORIN, *supra* note 197, at 197–98.

[331] *Id.* at 199.

[332] *Id.* at 200.

[333] *Id.* at 204.

[334] DINER, *supra* note 58, at 110.

world of the family, the synagogue, and other voluntary associations in the Jewish community."[335] In public, they were Americans.[336]

The postwar prosperity and the decline of antisemitism fostered greater economic opportunities. Following parents who were often independent businesspeople, third- and fourth-generation Jewish Americans "continued to be innovative in the areas of consumer goods and services."[337] As Sorin writes, "by the late 1960s almost 40 percent of Jewish Americans were employed as managers or administrators, a rate three times higher than for the general population";[338] 29 percent of Jewish men and 24 percent of Jewish women were professionals, and "[i]n the 1970s, 80 percent of college-aged Jews were in college, more than double the general population."[339] Hasia Diner similarly concludes:

> A great many American Jews had risen into the upper middle class. Lawyers, doctors, engineers, scientists, and academics, they had more education and earned higher incomes than almost any other group in the country. They had come remarkably far from the poor, excluded immigrants of the [19th] century.[340]

Yet, despite "sharp decreases in anti-Semitic attitudes"[341] and an increased number of Jewish Americans in positions of political power and in academia, Sorin notes that "[a]s late as 1989 . . . most Jews continued to feel that anti-Semitism was a serious problem in the United States."[342] Significantly, in his examination of Jews and corporate America, Abraham Korman summarizes the status of Jews in "the years since World War II and the . . . 1980s" as "[t]he more things change, the more they stay the same."[343] While the Jewish American community as a group became stronger and achieved economic successes and made important contributions to American economic enterprise, "money and success and prominence [were] not the same as social acceptance and the achievement of insider status. . . . There is much evidence that even individuals who are successful in the attainment of economic criteria are often no more accepted socially; sometimes, the opposite is the case."[344]

Comments by Jewish businesspeople who achieved success informed Korman's assessment. Skadden Arps's partner Stu Shapiro (who argued *Revlon* in court and

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[335] *Id.*

[336] *Id.*

[337] SORIN, *supra* note 197, at 206.

[338] *Id.*

[339] *Id.*

[340] DINER, *supra* note 58, at 124–25.

[341] SORIN, *supra* note 197, at 218 (noting that "fewer and fewer gentiles . . . believed that Jews were unscrupulous or had other objectionable traits").

[342] *Id.* at 220.

[343] KORMAN, *supra* note 11, at 11.

[344] *Id.*

whose father, Irving Shapiro, was one of the first Jewish Americans to become a CEO of an established American firm, DuPont)[345] remarked: "When I came to New York in the seventies, the WASP aristocracy still reigned . . . . Jews? They were not people you dealt with."[346] A 1984 study "focused on country club membership, traditionally viewed as of significant importance in determining the acceptability of individuals for executive roles," found that "non-Jews were four times more likely to be members of such clubs" and that top city clubs around the country had very few, if any, Jewish members.[347] The pattern persisted into the executive suite. In 1982, Jay Pritzker, "[a] prominent Chicago businessm[a]n and philanthropist[]," [348] commented that there were probably "no more Jews on boards in general than there were ten or twenty years ago, at least not in Chicago."[349] And Simon Rifkind, a New York corporate lawyer since the 1920s and a former federal judge who sat on the boards of both Revlon and MacAndrews, suggested that while "Jews have traditionally been successful bankers," there were no Jews on boards of commercial banks.[350] According to Rifkind, "[t]he same [was] true of the major insurance companies" and Fortune 500 companies that were not "of Jewish origin or Jewish dominated."[351] Sidney Brody of Los Angeles noted that the same was true on the West Coast.[352]

As the businessmen quoted in the preceding paragraph exemplify, when Jews attained top executive positions in corporations that traditionally were closed-off to them, they "followed paths that reflect[ed] an outsider status"; they became board members and CEOs, "hav[ing] been lawyers, sometimes investment bankers, and sometimes academics."[353] And, as the following Section III.C elaborates, in the 1980s, they also began taking over companies. Journalist John Weir Close writes:

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[345] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 175 (Del. 1986); MAYO ET AL., *supra* note 201, at 110.

[346] JOHN WEIR CLOSE, A GIANT COW-TIPPING BY SAVAGES: THE BOOM, BUST, AND BOOM CULTURE OF M&A 7 (2013).

[347] KORMAN, *supra* note 11, at 34 (quoting RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, JEWS IN THE PROTESTANT ESTABLISHMENT 49–50 (1982)).

[348] Stephen M. Bainbridge, *The Story of* Smith v. Van Gorkom, *in* CORPORATE LAW STORIES 197, 206 (J. Mark Ramseyer ed., 2009). Pritzker is memorialized in corporate law casebooks as the savvy businessman who purchased TransUnion in a case (Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)) that shocked the legal and business communities. *Id.* at 197, 206–07.

[349] KORMAN, *supra* note 11, at 57.

[350] *Id.*; BRUCK, *supra* note 291, at 207.

[351] KORMAN, *supra* note 11, at 57.

[352] *Id.*

[353] *Id.* at 85; *see also* G. William Domhoff & Richard L. Zweigenhaft, *Jews in the Corporate Establishment; Board Rooms, Clubs and Identity*, N.Y. TIMES, Apr. 24, 1983, at F2; ZWEIGENHAFT & DOMHOFF, *supra* note 216, at 23 ("[M]any . . . Jewish directors had attained skills in areas that subsequently became necessary to the corporations. Rather than merely figuring out ways to gain entry into the corridors of corporate power or waiting until the doors opened enough to let them

> [A]s happened so often in their history, the Jews somehow found their own methods to carry them past . . . barriers. They became expert in taking over companies against the will of their existing executives. . . . Again, the Jews found themselves in control of a monopoly that perpetuated their own stereotype, that of the omnipotent, conniving Machiavellian with hands sullied by the unsavory. But the business of takeovers paid the rent. And then some.[354]

Using *Revlon* as a prime example, the following Section III.C explores the significant role Jewish lawyers, financiers, and businesspeople played in the takeover movement. As the story unfolds, Ronald Perelman's struggle to acquire Revlon becomes the final milestone in the history of Jewish Americans' assimilation into corporate America.

C. Antisemitism, Revisited

Revlon's financial and legal battles, Connie Bruck wrote, embodied "a class war, between the corporate America and Wall Street elite, and the Drexel arrivistes."[355] It reflected "the age-old hatred for the outsider, always exacerbated when that undesirable other dares to venture beyond his confines and encroach upon the elite's preserve."[356] Michel Bergerac, Revlon's CEO, was "a French-born deal maker."[357] He "studied political science and law in Paris. He was awarded a Fulbright Scholarship to study business at the University of California, Los Angeles, where he earned an M.B.A. He became an American citizen in the early 1960s."[358] Described as "a great raconteur, who knew so much about so many things like wine and art," Bergerac managed Revlon since 1974 and expanded it "beyond its core cosmetics business, transforming it into a major player in the health care industry."[359]

Perelman, Bergerac's nemesis, was a third-generation Jewish American; born in North Carolina, not "with a silver spoon in his mouth. More like a sterling place setting for eight," he was raised in Elkins Park, Pennsylvania.[360] Perelman's father,

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in, many pursued less traditional areas, areas open to Jews, and the skills they developed later served as their entrée.").

[354] CLOSE, *supra* note 346, at 7–8.

[355] BRUCK, *supra* note 291, at 197.

[356] *Id.*

[357] Michael Corkery, *Michel C. Bergerac, Who Made Over Revlon, Dies at 84*, N.Y. TIMES, Sept. 18, 2016, at D7.

[358] *Id.*

[359] *Id.*

[360] RICHARD HACK, WHEN MONEY IS KING: HOW REVLON'S RON PERELMAN MASTERED THE WORLD OF FINANCE TO CREATE ONE OF AMERICA'S GREATEST BUSINESS EMPIRES, AND FOUND GLAMOUR, BEAUTY AND THE HIGH LIFE IN THE BARGAIN 1–2 (1996); Jacob Bernstein, *The Debt King*, N.Y. TIMES, https://www.nytimes.com/2022/01/07/style/ron-perelman.html (Jan. 11, 2022).

Raymond Perelman, was a businessman and philanthropist; he raised his son, Ronald, "to understand the intricacies of balance sheets and cash flow" and expected him to join the family growing business.[361] "By the time he was eleven, [Ronald] was sitting in on board meetings at his father's company," and while in college (undergraduate at Wharton), he helped his father secure a few profitable acquisitions.[362] The deals "provided [Ronald] with his first taste of that unique adrenaline rush on which entrepreneurs thrive. . . . [T]he victory was sweet—and highly addicting. Ronald Perelman was hooked."[363] And he was impatient. Having realized that his father "had no foreseeable desire to retire," Ronald Perelman decided to "jump[] ship"; he left the family business in Pennsylvania and "without preparation and with characteristic impatience and haste," moved to New York, "arriv[ing] in Manhattan without important connections or a game plan."[364]

Perelman's first acquisition, in May 1978, was the Cohen-Hatfield jewelry chain, the majority of its business he promptly sold to Sam Walton, chairman of Wal-Mart Stores, leaving the Cohen-Hatfield Industries with their "most profitable operation, the wholesale jewelry division."[365] His next move was MacAndrews & Forbes, "a supplier of licorice extract and bulk chocolate which had been started a century before."[366] He financed the purchase with low grade, high yield bonds, "precursor of the legendary junk bond" that will come to characterize his operations, consolidated under the "banner of MacAndrews & Forbes Group."[367]

In 1983, Perelman's acquired Technicolor, "a prominent component of the movie industry,"[368] a transaction that would keep him in litigation for a decade longer;[369] and in 1983, he took MacAndrews & Forbes private.[370] A few months later, MacAndrews & Forbes acquired Pantry Pride, "a supermarket chain discharged from Chapter 11 bankruptcy reorganization in 1981."[371] Shortly thereafter, Eric Gleacher called Perelman.[372] An investment banker with Morgan Stanley,

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[361] HACK, *supra* note 360, at 2.

[362] *Id.* at 3–5.

[363] *Id.* at 5.

[364] *Id.* at 9.

[365] *Id.* at 10–12.

[366] *Id.* at 13–14.

[367] *Id.* at 16.

[368] *Id.* at 20.

[369] *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, (Del. 1993); Cede & Co. v. Technicolor, Inc., No. CIV.A.7129, 2001 WL 515106, at *1 (Del. Ch. May 7, 2001) (noting that "[t]he long history of the dispute between these parties is well known not only to the parties, but also to all those who are familiar with Delaware corporate law").

[370] HACK, *supra* note 360, at 26.

[371] BRUCK, *supra* note 291, at 193.

[372] HACK, *supra* note 360, at 45.

Gleacher suggested that Perelman acquire Revlon, "the cosmetics colossus."[373] As Gleacher explained to Perelman, Revlon "was a slumbering Titan": "[p]rofits had fallen . . . the stock had slid . . . . Turning the company around would be a challenge" for which Perelman was well suited.[374]

Perelman was intrigued, and the Revlon saga began. On June 14, 1985, Perelman visited Bergerac's "lavish penthouse apartment" with an offer: he wanted his company, Pantry Pride, to purchase Revlon.[375] Bergerac, the "courtly, somewhat imperious, urbane, witty Frenchman," was unimpressed with the "crude, brusque, [and] humorless" Perelman.[376] As Perelman's lawyer, Donald Drapkin, commented, "They didn't hit it off . . . . Bergerac with his Château Lafite, and Ronnie with his diet Coke."[377] Despite Perelman's successful background, the "Old Boys Club of Wall Street" viewed him as an "upstart[]": "a man whose pushy demeanor and cigar smoke gave them more reason for irritation than for confidence."[378] That his banker was Michael Milken of Drexel Burnham with his junk bonds operation did not help matters.[379]

Michael Milken, originally from Encino, California was the driving force behind the market in junk bonds.[380] The son of an accountant with small practice, Milken attended the University of California at Berkeley where, "[w]anting to be rich," he stood out in a student body committed to progressive reforms.[381] But rich he became, "almost single-handedly creating and controlling a $200 billion market for junk bonds," which played important role in financing the hostile takeovers of the 1980s.[382]

While studying finance at Wharton, Milken joined the "white-shoe Philadelphia firm, Drexel Harriman Ripley," where he "impressed his superiors with his moneymaking abilities and was offered a full-time job in 1970."[383] "[S]hunted off to the side of the trading room," Milken began selling high yield bonds to clients.[384]

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[373] *Id.*

[374] *Id.*; *see also* John Andrew, *Revlon Is Called Overpriced by Some Analysts Despite Wide Speculation About a Takeover*, WALL ST. J., May 22, 1984, at 1.

[375] BRUCK, *supra* note 291, at 193.

[376] *Id.* at 194.

[377] *Id.*

[378] HACK, *supra* note 360, at 10.

[379] BRUCK, *supra* note 291, at 197.

[380] MADRICK, *supra* note 283, at 202–03.

[381] *Id.* at 203.

[382] *Id.* at 202.

[383] *Id*. at 205.

[384] *Id.*

He was an outcast, but in 1973, the "profitable brokerage firm Burnham and Company, bought the [then] struggling Drexel" and Milken became a star.[385] As Madrick writes: "If anti-Semitism or mere snobbishness was an issue at Drexel, it wasn't for Burnham, who was himself Jewish, as were most of his partners."[386] Burnham was happy to invest capital in Milken's junk bonds operation, and even allowed the latter to keep 35% of the profit to himself.[387] "Milken demanded autonomy . . . and Burnham gave it to him."[388] Shy of thirty, Milken had the junk bond market to himself, with a group of loyal clients, many of them Jewish, outsiders to the corporate elite, who built fortunes with Milken's help. Milken became "buyer and seller of junk bonds, and consultant, underwriter, and analyst."[389] It was in this capacity that he came to help Perelman's campaign to take over Revlon (and other corporations).

If Milken and his team provided Perelman with junk bonds to fund his acquisitions, Joe Flom offered a much-needed legal advice.[390] Flom, the son of Russian Jewish immigrants, was born in 1923 and grew up during the Depression in Borough Park, Brooklyn.[391] His father was a union organizer, who could barely provide for the family, and his mother worked at home, "doing appliqué."[392] As Malcolm Gladwell writes, Flom's "family moved nearly every year when he was growing up because the custom in those days was for landlords to give new tenants a month's free rent, and without that, his family could not get by."[393] Like many second-generation Jewish New Yorkers, Flom attended Townsend Harris and City College, working to support himself while there.[394] He served in the army and then, fulfilling his parents' wishes (like many Jewish immigrants, they wanted their son to be a professional—a doctor or a lawyer), Flom applied to Harvard Law School. Despite not having a college degree, he got in.[395]

After graduation, Flom joined the newly formed Slate, Arps and Meager.[396] "They had a tiny suite of offices on the top floor of the Lehman Brothers Building

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[385] *Id.* at 205–06.

[386] *Id.* at 206.

[387] *Id.*

[388] *Id.*

[389] *Id.* at 206–08; David Warsh, *Undercurrent of Religious, Cultural Antagonism in Drexel's Rise, Fall*, WASH. POST (Feb. 21, 1990), https://www.washingtonpost.com/archive/business/1990/02/21/undercurrent-of-religious-cultural-antagonism-in-drexels-rise-fall/735af83d-5320-4985-925e-8a5cee03af93.

[390] MADRICK, *supra* note 283, at 216.

[391] *Id.* at 75; MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 116 (2008).

[392] GLADWELL, *supra* note 391, at 116; MADRICK, *supra* note 283, at 75.

[393] GLADWELL, *supra* note 391, at 117.

[394] MADRICK, *supra* note 283, at 75.

[395] GLADWELL, *supra* note 391, at 117.

[396] MADRICK, *supra* note 283, at 75.

on Wall Street" and, according to Flom, did "[w]hatever [kind of law] came in the door."[397] When, in 1954, Flom became Skadden's managing partner, "the firm began to grow by leaps and bounds."[398] As Gladwell writes, in those years, "old-line Wall Street law firms . . . . represented the country's largest and most prestigious companies, and 'represented' meant they handled the taxes and the legal work behind the issuing of stocks and bonds and made sure their clients did not run afoul of federal regulators."[399] So, while white-shoe firms considered it "scandalous" and not "gentlemanly" "for one company to buy another company without the target agreeing to be bought,"[400] Flom built his practice and reputation representing those engaged in proxy fights.[401] Described as "indifferent to social niceties," he was also well respected; "in the judgment of colleagues and of some adversaries, his will to win was unsurpassed and he was often masterful."[402] When, in the 1980s, hostile takeovers became, almost overnight, acceptable and what "*every* law firm wanted to do," Flom was ready.[403] And although Stuart Shapiro argued the case before the Delaware Supreme Court, Flom, the legal mastermind, helped develop the winning strategy.[404]

It will be easy to assume that Perelman, Milken, Flom, and their colleagues were members of another generation of Jewish Americans seeking integration into the ranks of the business elite, but the 1980s battlefields were different than they were in the first half of the 20th century. For one, Revlon, while being a "cultural and commercial lodestar of the establishment," was known as "a Jewish company."[405] Formed in 1932 by Jewish brothers, Charles and Joseph Revson, and chemist Charles Lachman (who contributed the "L" in the Revlon name),[406] Revlon notably had several Jews on its board of directors (including Ezra Zilkha, "the scion

[397] GLADWELL, *supra* note 391, at 118.

[398] *Id.*

[399] *Id.* at 124.

[400] *Id.* at 124–25.

[401] *Id.* at 126–27.

[402] *Id.*

[403] *Id.* at 128.

[404] Flom advised Shapiro to focus on the Revlon directors' conflict of interests, rather than on what the directors should have done differently. As Flom put it, "You can't argue that they have an absolute right or absolute obligation to take a certain action. You have to argue that what they did was conflicted and wrong. Not because they chose one course over the other, but because they did it on the wrong basis." CLOSE, *supra* note 346, at 109. Justice Moore accepted Flom's argument; Moore's decision focused on the directors' conflict of interest and their failure to prove the fairness of their actions. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182, 184 (Del. 1986).

[405] CLOSE, *supra* note 346, at 96.

[406] *Our Company: Our Founders*, REVLON, https://www.revloncorp.com/our-company/our-founders.php (last visited Jan. 13, 2024).

of an ancient Baghdadi-Jewish banking family,"[407] and Simon Rifkind, who resigned from the MacAndrews board, but stayed on Revlon's when the litigation began[408]). Revlon was represented by Arthur Liman, third-generation Jewish American and "one of the best-known securities litigators in the country," and his team from Paul, Weiss, Rifkind, Wharton & Garrison;[409] Litman was joined by Martin Lipton from Wachtell, Lipton, Rosen & Katz.[410] Both firms were large Jewish law firms that, like Skadden, Arps, had developed a successful takeover practice (Marty Lipton was described as Flom's "worthy opponent"; they were both rivals and friends).[411] Revlon's investment banker was Lazard's high-powered Felix Rohatyn, a Jewish immigrant from Vienna (he arrived in the United States at the age of 14).[412]

Perelman's struggle to acquire Revlon was thus not merely against Bergerac (who was handpicked by Charles Revson as CEO of Revlon), but also against his cultural compatriots, who had already secured their positions within the ranks of the corporate elite. Unlike the midcentury second-generation Americans, who, seemingly united against antisemitism, aimed to find their place in corporate America by entrepreneurship or investment, Milken, Flom, and Perelman were fighting

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[407] CLOSE, *supra* note 346, at 99.

[408] BRUCK, *supra* note 291, at 207.

[409] *Id.* Paul, Weiss, Rifkind, Wharton & Garrison LLP opened its doors in 1875—formed by Julius J. Frank and Samuel W. Weiss, both graduates of Columbia Law School—and has been known as a Jewish law firm through its different transformations. *History*, PAUL, WEISS: ABOUT THE FIRM, https://www.paulweiss.com/about-the-firm/history (last visited Jan. 13, 2024); *see also Paul, Weiss Denounces Anti-Semitism in Statement Condemning Recent Attacks Across the U.S.*, PAUL, WEISS: FIRM NEWS (May 27, 2021), https://www.paulweiss.com/about-the-firm/firm-news/paul-weiss-denounces-anti-semitism-in-statement-condemning-recent-attacks-across-the-us?id=40231 (noting that "Paul, Weiss's . . . very founding represented a frontal challenge of prevailing bigotry in the profession . . . . Louis Weiss and John Wharton, who founded Paul, Weiss predecessor firm Weiss & Wharton in 1923, were determined to build a firm that aggressively disregarded the . . . unspoken rule that Jews and Gentiles neither practiced together nor attracted clients of their respective creeds—ultimately helping transform the then-cultural norms of the New York legal community").

[410] BRUCK, *supra* note 291, at 197, 207. Herbert Wachtell was a son of Jewish immigrants from the Ukraine; his father and brothers worked in the garment industry. Born in 1930, Wachtell grew up in the Bronx. Martin Lipton, also a descendant of Jewish immigrants, was born in 1931, and grew up in New Jersey. Leonard Rosen was also a son of Jewish immigrants from the Ukraine. Born in 1930, he grew up poor in the Bronx; his father also worked for the garment industry. George Katz, grandson of Jewish immigrants from Eastern Europe, was born in 1931. He grew up in the Bronx; his grandfather worked in the garment industry and his father sold insurance. CLOSE, *supra* note 346, at 9.

[411] MADRICK, *supra* note 283, at 81, 84; Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1832 n.133 (2008).

[412] *See* Cole, *supra* note 292, at D12; Sewell Chan, *Felix G. Rohatyn, Financier Who Piloted New York's Rescue, Dies at 91*, N.Y. TIMES, https://www.nytimes.com/2019/12/14/nyregion/felix-rohatyn-dead.html (Dec. 23, 2019).

against investment bankers and lawyers, in this case representing Revlon, who, by the 1980s, "were part of the Jewish establishment in New York."[413] As Bruck writes, those within the establishment "feared that the common strain among these nouveau entrepreneurs and their nouveau bankers at Drexel—an overwhelming majority were Jews—would unleash a backlash of virulent anti-Semitism."[414]

In the end, for Revlon executives and the corporate elite more broadly, "the fight for Revlon was a rude introduction to a new world."[415] Their "brainpower, clout and class connections" were no longer "match for the raw financial might of Drexel."[416] As Bruck explains, Michael Milken and his junk bonds, became "the great equalizer[s]."[417] Martin Lipton (and Frank Rohatyn) attempted to distinguish the takeover practice upon which Wachtell, Lipton, Rosen & Katz built its wealth, to "draw[] a line between the kinds of hostile takeovers he had helped to engineer in the seventies and the Drexel-type wave launched by what he called 'takeover entrepreneurs.'"[418] As Lipton saw it (and as he testified before Congress), "[s]oundly financed acquisitions by successful operating companies seeking to diversify or expand" were positive parts of the country's economic progress.[419] In turn, "the bust-up takeovers by takeover entrepreneurs . . . . weakened companies, both financially and operationally."[420] But the Delaware Supreme Court refused to accept the distinction.

No evidence or rhetoric in *Revlon* suggests that Justice Moore was aware of the cultural struggles unfolding in conference rooms and his court chambers. But even if he wasn't, raising the Jewish question helps understand the case as the litigants viewed it. *Revlon* was not merely a corporate law case; it was a case that ensured access to the ranks of the corporate elite to those traditionally excluded due to their ethnic or cultural background. Moore's decision forced members of the corporate elite to reckon with, and in fact accept, the outsiders.

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413 BRUCK, *supra* note 291, at 205.

414 *Id.* As one Drexel client put it, all the takeover entrepreneurs were "Jews with the exception of Pickens and Lindner—and Lindner, a longtime supporter of Israel, is the most Jewish non-Jew I've ever known." *Id.*; *see also* CLOSE, *supra* note 346, at 9 (noting that "the New York world of finance, its Jewish community, and the social events among the growing ranks of M&A specialists" was a "small . . . village").

415 BRUCK, *supra* note 291, at 203.

416 *Id.*

417 *Id.*

418 *Id.* at 204.

419 *Id.* at 204–05.

420 *Id.* at 205.

EPILOGUE

Having studied the role that Jewish Americans played in the history of American business, Charles Dellheim concluded that:

> The corporate world was not simply driven by the rational calculation of profit or the invisible hand of the market. Its hierarchies also were shaped by social choices and ethnic biases no less than by economic needs. For Jews, as for other would-be Americans, business was an arena for self-fashioning, a means to redefine identity. If the business of America was business, the business of business was meaning as well as money.[421]

In the 1980s, money and meaning collided as individuals like Perelman were able to gain leadership positions in corporate America that have thus far been outside their reach. Almost overnight, "Wall Street was . . . viewed as Jewish, as it had once been seen as Wasp."[422] Jewish lawyers, like the ones involved in the Revlon saga, were similarly able to take advantage of the confluence of events that led to the hostile takeovers to raise the stature of the Jewish law firm.[423] As John Close writes, these firms were the "experts to whom judges and fellow lawyers would come . . . for explication of the techniques and doctrines that they were creating."[424]

But with presumed acceptance, new problems arose, especially when insider trading scandals, most notably Milken's, came to the fore shortly after the takeover blitz. The takeover phenomenon "that had once been viewed as cleansing and regenerative" was rapidly decried as "a matter of uncontrolled self-interest and greed," and the involvement of Jewish financiers and businesspeople in the events of the 1980s quickly flamed "reservoirs of anti-Semitism that . . . had been agitated already by, among other things, the rise to preeminence of Jewish lawyers and investment bankers—the rise of a deal culture itself."[425] As Robert Teitelman writes, "[t]he argument over takeovers steadily morphed into an easily digestible cultural, rather than economic or legal, critique. . . . The culmination of this phenomenon, which put its stamp on the *zeitgeist*, was the notion that the barbarians had arrived. A lot of them seemed to be Jews."[426]

Also in the 1980s, organizations such as the Moral Majority and the Christian Coalition began to proclaim that "the United States was—or should be—a Christian nation, guided by Christian values."[427] Far right groups' hate speech and actions

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[421] Dellheim, *supra* note 67, at 242.

[422] ROBERT TEITELMAN, BLOODSPORT: WHEN RUTHLESS DEALMAKERS, SHREWD IDEOLOGUES, AND BRAWLING LAWYERS TOPPLED THE CORPORATE ESTABLISHMENT 312 (2016).

[423] CLOSE, *supra* note 346, at 9.

[424] *Id.* at 10.

[425] TEITELMAN, *supra* note 422, at 312.

[426] *Id.* at 313.

[427] DINER, *supra* note 58, at 125.

became more noticeable (and vocal). "Many Nazi-type groups appeared . . . . There was also a sharp rise in the number of militias, military-style organizations that considered the federal government their enemy."[428] Today, 40 years later, antisemitism and hate crimes continue to rise at an alarming pace.[429]

In this atmosphere, it is perhaps not surprising that, despite growing attention to antisemitism and different forms of discrimination, scholars have resisted raising the Jewish question with respect to corporate law and economic integration, more broadly, fearing perhaps the association of Jewish American history with the quest for financial success.[430] Yet, asking the Jewish question is important. Recalling the stories told in this Article enriches our understanding of corporate law and Jewish American history and sheds light on the intersection between them; each of the cases discussed above illustrates how litigation has been a site where Jewish Americans asked the courts to mediate conflicts and facilitate their entry into business and their integration into the higher echelons of American society. Most important, this Article has demonstrated how antisemitic attitudes impacted Jewish American entrepreneurs, underscoring the promise and limits of economic and financial success; it is a lesson that continues to resonate.

[428] *Id.* at 125–26.

[429] Lisa Hagen, *Antisemitism Is on the Rise, and It's Not Just About Ye*, NPR, https://www.npr.org/2022/11/30/1139971241/anti-semitism-is-on-the-rise-and-not-just-among-high-profile-figures (Dec. 1, 2022, 1:51 PM).

[430] Dellheim, *supra* note 67, at 242 (noting that "fears of anti-Semitic libels . . . have contributed to the relative neglect of the role of Jews in modern capitalism and the impact of capitalism on Jewish life and culture").