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THE RESPONSIBILTY OF A CORPORATION: AN ATTEMPT AT IMPLEMENTATION

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Editors' Preface

The case of *Medical Committee for Human Rights v. SEC*[a] raised some interesting questions. Why did the directors of the corporation act as they did? How should society judge these actions? Resolution of these issues involves consideration of psychological and legal doctrines, as well as an assessment of the social and individual meaning of the professional roles of psychoanalyst and lawyer.

While these questions are relevant to any discussion of corporate social responsibility, this article does not claim to provide definitive answers; it is merely an attempt to demonstrate that the various strands of thought, doctrine and argument examined herein provide insights into the specific questions raised by the *Medical Committee* litigation. If the board of directors of the corporation cannot be psychoanalyzed to determine why they acted as they did, an attempt can at least be made to determine the relevance of Freudian thought to formulation of a system for evaluating those actions. Similarly, the thought of Herbert Marcuse — who is widely regarded as having provided the philosophical basis for much of the contemporary protest against industralized society — will be examined insofar as it is relevant to a resolution of the questions discussed herein. Finally, the author will attempt to delineate what is meant by denominating corporate social responsibility as a legal question.

— *The Editors*

I. PROLOGUE

IMPLEMENTATION OF A DUTY is a process which occurs over time, and the factual patterns which form the basis for that implementation also change over time. Investigation of specific instances of such implementation, however, is the way in which the nature of the duty is defined.

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a. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot,* 404 U.S. 403 (1972).

The case of *Medical Committee for Human Rights v. SEC*[1] is a period piece — yet it is not *merely* a period piece, defined by the proposition embodied in its holding.

> Thinking of a description as a word-picture of the facts has something misleading about it: one tends to think only of such pictures as hang on our walls: which seem simply to portray how a thing looks, what it is like. (These pictures are as it were idle.)[2]

II. THE STATEMENT

A.

Since the argument for the necessity of concrete factual detail is presented herein, it seems appropriate to begin by laying down factual assumptions which structure the problem to be considered.

We are concerned with a corporation which manufactured a product sold exclusively to the United States Department of Defense.[3] There was considerable public protest against the manufacture of this product,[4] because it was instrumental in producing massive, permanent and painful personal injuries, and because the nature of the conflict in which it was utilized made it difficult to distinguish civilians from combatants. Such protest was prompted also by the fact that the purposes for which that war was being fought were unclear — and their validity and legitimacy were widely disputed. The board of directors of the corporation recognized that its continued manufacture might well adversely affect the corporation's long-range future.[5] In addition,

1. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot,* 404 U.S. 403 (1972). [Editors' Note] The case involved a petition for review of an order of the Securities and Exchange Commission (SEC) refusing to require the corporation to include in a proxy statement a resolution that it discontinue the manufacture of napalm. The United States Court of Appeals for the District of Columbia Circuit held that the SEC action was reviewable, and remanded the case to the SEC so that it might "reconsider petitioner's claim within the proper limits of its jurisdiction." 432 F.2d at 682.

2. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 291, at 99 (1953).

3. Brief for Petitioner at 2, Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot,* 404 U.S. 403 (1972) [hereinafter cited as Brief]. The brief stated:

> Dow Chemical Company manufactures a chemical product known as "napalm" which is sold exclusively to the United States Department of Defense.

Id.

4. Petitioner's brief stated:

> It is common knowledge that many American citizens are deeply concerned about the destructive use of napalm, and there has been a considerable degree of public protest against Dow's napalm production.

Id.

5. The following corporate statement appears in the record: "There may be outstanding businessmen or scientists of the future who have been lost to Dow because of deep personal feelings on this matter . . . . From a long-range viewpoint we could be hurt in many ways." *Id.* at 3 n.2.

the contract under which the corporation manufactured the product had a negligible impact on the corporation's sales and profits.[6]

The board of directors decided to continue manufacture of the product on the basis of a sense of patriotic duty to the Government of the United States.[7] The chairman of the board publicly characterized that action as a "moral decision,"[8] and the president referred to it as a matter of individual "conscience."[9]

To the extent that the question of corporate social responsibility is a legal one, that question can in general be explored by queries such as whether the board of directors must be guided by the long- or short-term interest of the corporation in order to avoid liability in a shareholder's derivative suit. In the case we are considering, however, the outcome of that inquiry apparently makes no significant difference.[10]

As a result, a more promising inquiry concerning corporate responsibility in this instance would delineate the extent to which "consciences . . . should be . . . part of the [corporate] decision-making process."[11] This inquiry surfaces the issue of whether the relevant legal question is the nature of the conscience possessed by the individual (the implicit basis of the argument being made by the president of the corporation),[12] or whether there are aspects of "conscience"

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6. The management of Dow was aware of this fact.

Dow's President stated in 1967: "The contract has little economic significance to Dow. It amounted to less than one-half of one percent of total sales last year — in the range of $5,000,000 — and an even smaller percentage of total profits. This year it will be in the range of one-fourth of one percent and again a smaller percentage in profits."

Id. at 25 n.1.

7. *Id.* at 2–3.

Dow's management has made the "moral" decision to continue to produce the product out of a sense of patriotism. According to Dow's President, "We as a company have made a moral judgment on the long-range goals of our government and we support these."

Id. (emphasis added).

8. *Id.* at 3 n.1. In a report to its shareholders, the corporation stated:

At the May 1969 annual meeting Dow's Chairman of the Board said, in answer to persons who criticized during the question and answer period the company's production of napalm: "Last year you said Dow should make a *moral decision.* We've made one."

DOW CHEMICAL COMPANY, SHAREHOLDERS Q. 2 (July, 1969) (emphasis in original).

9. Brief at 3 n.1. The following statement was made by the president of the corporation:

We, as individuals, are personally concerned with the world and its problems. We have sons and daughters in the armed forces, in the Peace Corps, and in the universities. A corporation is a collection of individuals, and the *use of our consciences is, as it should be, a part of the decision-making process.*

Address by President Doan, Dow Chemical Company 1967 Annual Shareholder Meeting, May, 1967, *quoted in* L. Lasser, Dow Chemical Company, 20, 1968 (case study on file at Harvard Business School) (emphasis added).

10. *See* notes 3 & 4 and accompanying text *supra.*

11. *See* note 3 *supra.*

12. *Id.*

which the law imposes on the role of the corporate director; aspects which, if unexercised, will sustain a shareholder's derivative action.

B.

1.

In Freudian terms, the agency of "conscience" is designated "superego."[13] Freud described the genesis of the superego as:

> [A] successful instance of identification with the parental agency . . . . With his abandonment of the Oedipus complex a child must . . . renounce the intense object cathexes which he has deposited with his parents which have probably long been present in his ego.[14]

This superego represents the locus of the connections between the individual and tradition, between humans and society, between existence and morality. Freud's characterization, indeed the very postulation of this mental agency, implicitly asserts its critical significance to the framing of theories of social behavior.

He seems to have been fully aware of the extent to which his concept of the superego sharply diverges from Marxist views of reality. Immediately after describing the superego as "the representative . . . of every moral restriction . . . the vehicle of tradition and of all the time-resisting judgments of value which have propogated themselves . . . from generation to generation,"[15] Freud argues:

> It seems likely that what are known as materialistic views of history sin in underestimating this factor. They brush it aside with the remark that human "ideologies" are nothing other than

13. Sigmund Freud stated:

> There is scarcely anything else in us that we so regularly separate from our ego and so easily set over against it as precisely as our conscience. I feel an inclination to do something that I think will give me pleasure, but I abandon it on the ground that my conscience does not allow it. Or I have let myself be persuaded by too great an expectation of pleasure into doing something to which the voice of conscience has objected and after the deed my conscience punishes me with distressing reproaches and causes me to feel remorse for the deed. I might simply say that the special agency which I am beginning to distinguish in the ego is conscience. But it is more prudent to keep the agency as something independent and to suppose that conscience is one of its functions and that self-observation, which is an essential preliminary to the judging activity of conscience, is another of them. And since when we recognize that something has a separate existence we give it a name of its own, from this time forward I will describe this agency in the ego as the *"superego."*

S. FREUD, *New Introductory Lectures on Psychoanalysis,* in 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 60 (J. Strachey ed. 1964) (emphasis in original) [hereinafter cited as FREUD].

14. *Id.* at 63–64.

15. *Id.* at 66–67.

> the product and superstructure of their contemporary economic conditions. That is true, but very probably not the whole truth. Mankind never lives entirely in the present. The past, the tradition of the race and of the people, lives on in the ideologies of the superego, and yields only slowly to the influences of the present and to new changes; and so long as it operates through the superego it plays a powerful part in human life, independently of economic conditions.[16]

At this point, we have confronted the division of views, Freudian and Marxist, on the social role of the term "conscience." In the record of the case we are considering, we have only the testimony of the directors from which a position on this issue can be inferred.[17] Of course they believed, with Freud, that "conscience" both existed and was not susceptible to reductionism; most of us act as though we do. It is ironic, but explicable, that the plaintiffs in *Medical Committee for Human Rights v. SEC,* no doubt widely viewed as having mounted a moral effort, were careful *not* to rely on an explicitly moral perspective. To understand the source of this extraordinary juxtaposition is to undertake an examination of social forces in American society that were uncontemplated by either Marx or Freud.

I turn, therefore, to the most influential commentator who has sought to reconcile Freudian and Marxist viewpoints and whose ideas enjoyed wide recognition during the period which produced the *Medical Committee* litigation. Herbert Marcuse propounded many of the ideas that underlay opposition to contemporary society, characteristic of student protests and lifestyles during the 1960's.[18] Marcuse's concept of the historical impact of technology, which diverges dramatically from Marxist views, accounts in great measure for the popularity of his opinions during that period. Marx maintained that technology was a neutral factor, in that it was determined by the social and economic organization of the society which developed it; Marcuse, however, viewed technology as one of the factors determining that organization.

In defining the impact of technology on society, Marcuse focused upon elements of Freudian theory other than the superego, and redefined those insights in ways less divergent from Marxist views of reality. Thus, Marcuse accepted Freud's correlation of civilization with repression, of the triumph of the reality principle over the unrepressed behavior comprising the pleasure principle. He argued, that the affluence produced by the capitalist economic system based upon

16. *Id.* at 67.
17. *See* text accompanying note 12 *supra.*
18. *See generally* H. MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD (1955).

such repression had created a situation in which the technology required for such affluence imposed upon individuals more repression than was necessary. This historical variant of the reality principle, which Marcuse designated as the "performance principle," functions within his theory in ways analogous to Marx's use of the concept of surplus value in that it embodies a moral condemnation of the society which imposes such demands upon the individual.[19]

A theoretical description of this conduct is useful to us, in a legal context, only if its insights are functional (and therefore ultimately procedural); therefore this description will be derived from an analysis of the functional implementation of Freudian theory — psychoanalysis. Specifically, since the concept of the superego represents, in Freudian terms, the basis for any description of why the board of directors in our problem acted as they did, it seems appropriate to attempt to ascertain whether Marcuse's reformulation of Freudian insights ought to be accepted.[20]

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19. *See* P. ROBINSON, THE FREUDIAN LEFT 204–05 (1969), where the author stated:

> Like surplus repression, which could be correlated with Marx's essentially quantitative notion of surplus value, the performance principle, Marcuse implied, corresponded to Marx's *qualitative* characterization of existence under capitalism, namely the notions of alienation and reification . . . . To be sure, Marcuse's performance principle was a more inclusive concept than either alienation or reification. It incorporated elements of Weber's Protestant ethic (the irrational psychological need to perform, to work for work's own sake) as well as the salient features of modern mass society analysis (the technique of mass manipulation and the organization of leisure by the communications and entertainment industries). But at the heart of the concept was Marx's notion of the transformation of men into things, alienated from the products of their labor, from the labor process itself, and from their fellowmen.

Id. (footnotes omitted). *See also* T. ROSZAK, THE MAKING OF A COUNTER CULTURE, REFLECTIONS ON THE TECHNOCRATIC SOCIETY AND ITS YOUTHFUL OPPOSITION 110–11 (1969). Roszak observed:

> [I]n *Eros and Civilization*, . . . Marcuse offers us the idea of "repressive desublimation" as his explanation of the technocracy's ingenious assimilation of the "erotic danger zone." Repressive desublimation is the "release of sexuality in modes and forms which reduce and weaken erotic energy." . . . Just as Marx, in his analysis of capitalism during the period of primitive accumulation, found the secret of gross physical exploitation in the notion of "surplus value," so Marcuse, in his study of technocracy under the regime of affluence, finds the secret of psychic exploitation in repressive desublimation. It is an excellent example of psychological categories replacing sociological economic categories in social theory — and in this case Marcuse's analysis leads to a much solider [sic] idea than Marx's rather foggy use of the labor theory of value. It also leads to a distinctly non-Marxist conclusion, namely, that technology exerts an influence upon society *in its own right* and independent of the social form under which it is organized.

Id. (emphasis in original).

20. The individuals whose work is the subject of Marcuse's analysis are identified in H. MARCUSE, *supra* note 18, at 248 (footnote omitted):

> The discussion will neglect the differences among the various revisionist groups and concentrate on the theoretical attitude common to all of them. It is

2.

Marcuse defines the historical relationships between psychoanalysis and the societies in which it has existed as follows:

> Psychoanalysis has changed its function in the culture of our time, in accordance with fundamental social changes that occurred during the first half of the century. The collapse of the liberal era and of its promises, the spreading totalitarian trend and the efforts to counteract this trend, are reflected in the position of psychoanalysis . . . . [W]hen Central and Eastern Europe were in revolutionary upheaval, it became clear to what extent psychoanalysis was still committed to the society whose secrets it revealed. The psychoanalytic conception of man, with its belief in the basic unchangeability of human nature, appeared as "reactionary"; Freudian theory seemed to imply that the humanitarian ideals of socialism were humanly unattainable. Then the revisions of psychoanalysis began to gain momentum.[21]

Marcuse then makes it clear that the argument which underlies *Eros and Civilization* is that his views are faithful to the revolutionary insights of Freudian *theory* as opposed to the socially defined ends of Freudian *therapy* (stressed by the Neo-Freudians) which represent the demands of the civilization in which psychoanalysis takes place:

> Freud was fully aware of this discrepancy [between theory and therapy] . . . while psychoanalytic theory recognizes that the sickness of the individual is ultimately caused and sustained by the sickness of his civilization, psychoanalytic therapy aims at curing the individual so that he can continue to function as part of a sick civilization without surrendering to it altogether. The acceptance of the reality principle, with which psychoanalytic therapy ends, means the individual's acceptance of the civilized regimentation of his instinctual needs, especially sexuality. In Freud's theory, civilization appears as established in contradiction to the primary instincts and to the pleasure principle. But the latter survives in the id and the civilized ego must permanently fight its own timeless past and forbidden future. Theoretically, the difference between mental health and neurosis lies only in the degree and effectiveness of resignation: mental health is successful, efficient resignation — normally so efficient that it shows forth as moderately happy satisfaction. . . . Consequently, the critical insights of psychoanalysis gain their full force only in the field of theory, and perhaps particularly where theory is farthest removed from therapy — in Freud's "metapsychology."

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distilled from the representative works of Erich Fromm, Karen Horney, and Henry Stack Sullivan. Clara Thompson is taken as a representative historian of the revisionists. *Id.*

21. This passage was contained in the Epilogue of *Eros and Civilization*. *Id.* at 238-39.

> The revisionist schools obliterated this discrepancy between theory and therapy by assimilating the former to the latter. This assimilation took place in two ways. First, the speculative and "metaphysical" concepts not subject to any clinical verification (such as the death instinct, the hypothesis of the primal horde, the killing of the primal father and its consequences) were minimized or discarded altogether. Moreover, in this process some of Freud's most decisive concepts (the relation between id and ego, the function of the unconscious, the scope and significance of sexuality) were redefined in such a way that their explosive connotations were all but eliminated. The depth dimension of the conflict between the individual and his society, between the instinctual structure and the realm of consciousness, was flattened out. Psychoanalysis was reoriented on the traditional consciousness psychology of pre-Freudian texture. The right to such reorientations in the interest of successful therapy and practice is not questioned here; but the revisionists have converted the weakening of Freudian theory into a new theory, and the significance of this theory alone will be discussed presently.[22]

Marcuse then reviews what he perceives to be the significant differences between Neo-Freudian views and those of Freud:

> The chief objections of the revisionists to Freud may be summed up as follows: Freud grossly underrated the extent to which the individual and his neurosis are determined by conflicts with his environment. Freud's "biological orientation" led him to concentrate on the phylogenetic and ontogenetic *past* of the individual: he considered the character as essentially fixed with the fifth or sixth year (if not earlier), and he interpreted the fate of the individual in terms of primary instincts and their vicissitudes, especially sexuality. In contrast, the revisionists shift the emphasis "from the past to the present," from the biological to the cultural level, from the "constitution" of the individual to his environment. . . . Freud saw society as "static" and thought that society had developed as a "mechanism for controlling men's instincts," whereas the revisionists know "from the study of comparative cultures" that "man is not biologically endowed with dangerous fixed animal drives and that the only function of society is to control these." They insist that society "is not a static set of laws instituted in the past at the time of the murder of the primal father, but is rather a growing, changing, developing network of interpersonal experiences and behavior." To this, the following insights are added [by the Neo-Freudians]:
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> > "One cannot become a human being except through cultural experience. Society creates new needs . . . Of such a nature are the ideas of justice, equality and cooperation. [But] [s]ome of the new needs lead in a destructive direction

22. *Id.* at 245–48 (footnotes omitted).

> and are not good for man. . . . When the destructive elements predominate, we have a situation which fosters war."
>
> This passage may serve as a starting point to show the decline of theory in the revisionist schools. There is first the laboring of the obvious, of everyday wisdom. Then there is the adduction of sociological aspects. In Freud they are included in and developed by the basic concepts themselves; here they appear as incomprehended, external factors.[23]

As to the second of these charges, "the adduction of sociological aspects," the fact is that the Neo-Freudians, in stressing the influence of the cultural environment (the society) upon the psychological development of the individual, were engaging in something strongly resembling Marxist analysis, which takes the socioeconomic environment as its starting point. Unless the "adduction of sociological aspects" is worthless (or otherwise illegitimate) we might conclude that, in this specific instance, Marcuse was rejecting Marxist analysis altogether.[24]

It is significant that Freud himself pleaded guilty to the first of these charges, which is "the laboring of the obvious, of everyday wisdom":[25]

> I am now prepared to hear you ask me scornfully whether our ego-psychology comes down to nothing more than taking commonly used abstractions literally and in a crude sense, and transforming them from concepts into things — by which not much would be gained. To this I would reply that in ego-psychology it will be difficult to escape what is universally known; it will rather be a question of new ways of looking at things and new ways of arranging them than of new discoveries.[26]

Similarly, given Freud's emphasis upon the Oedipus complex in that description, it seems significant that Marcuse barely refers to it, except to deny its importance.[27] Marcuse maintained that the Neo-

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23. *Id.* at 248–50, *quoting* C. THOMPSON, PSYCHOANALYSIS: EVOLUTION AND DEVELOPMENT 143 (1951) (footnotes omitted).

24. The more precise charge was that the difficulty resided in the fact that the sociological aspects were "incomprehended, external factors" rather than "included in and developed by the basic concepts themselves." *See* text accompanying note 23 *supra.*

25. Marcuse leveled a similar charge at Charles Reich in a review of THE GREENING OF AMERICA:

> Consciousness III is of course that of the young generation in rebellion against the Establishment. What are the new revolutionary values of the rebels? The author formulates them in three "commandments" . . . The astonished reader might ask: "What is revolutionary about these commandments which from the Bible to Kant and beyond have graced the sermons of the moralists?"

Marcuse, *Charles Reich — A Negative View*, N.Y. Times, Nov. 6, 1970, at 41, col. 3.

26. FREUD, *supra* note 13, at 60.

27. *See* P. ROBINSON, *supra* note 19, at 211 & n.142.

Freudian revisionists had "minimized or discarded altogether" those "most speculative and 'metaphysical' [Freudian] concepts not subject to any clinical verification"; it was on this basis that he accused them of "hav[ing] converted the weakening of Freudian theory into a new theory."[28] Given this charge, what seems important is that Marcuse's treatment of "the killing of the primal father"[29] uses Marxist themes to make the implicit question posed the *moral* one of the legitimacy of power rather than the *existential* one of the meaning of revolt.

> In Marcuse's hands the primal crime became a kind of capitalist allegory. Although he did not state so explicitly, he obviously transformed Freud's primal father into the capitalist entrepreneur, and the band of brothers into the European proletariat. The most significant result of this transmutation of Freud's theory was that it moved the focal point of the drama away from the revolt of the brothers, which marked the beginning of civilization for Freud, and back to the establishment of the paternal dictatorship. For Marcuse civilization began not with the revolt against paternal tyranny, but with the founding of the father's rule over his sons. This was the historical moment at which the reality principle (or more accurately, the performance principle) replaced the pleasure principle.[30]

3.

The goal which Marcuse both prescribes and defines is a society in which "Eros, the life instincts, would be released to an unprecedented degree."[31] Utilizing Freudian terminology, Marcuse delineates the difference between his views and those of Freud on the question of whether such a society can be realized:

> The development of the ego is development "away from primary narcissism"; at this early stage, reality is not outside, but is contained in the pre-ego of primary narcissism. It is not hostile and alien to the ego, but "intimately connected with, originally not even distinguished from it." This reality is first (and last?) experienced in the child's libidinal relation to the mother — a relation which is at the beginning within the "pre-ego" and only subsequently divorced from it. . . . The Narcissistic phase of individual pre-genitality "recalls" the maternal phase of the history of the human race. Both constitute a reality to which the ego responds with an attitude, not of defense and submission, but of integral identification with the "environment." But in the light of the paternal reality principle, the "maternal concept" of reality

28. *See* text accompanying note 22 *supra.*

29. This is one of the specific instances offered by Marcuse of the concepts which the Neo-Freudian revisionists ignored. *See* text accompanying note 22 *supra.*

30. P. ROBINSON, *supra* note 19, at 208 (footnotes omitted).

31. H. MARCUSE, *supra* note 18, at 154.

> here emerging is immediately turned into something negative, dreadful. The impulse to reestablish the lost Narcissistic-maternal unity is interpreted as a "threat," namely, the threat of "maternal engulfment" by the overpowering womb. The hostile father is exonerated and reappears as savior who, in punishing the incest wish, protects the ego from its annihilation in the mother. . . . The patriarchal reality principle holds sway over the psychoanalytic interpretation. It is only beyond this reality principle that the "maternal" images of the super ego convey promises rather than memory traces — images of a free future rather than of a dark past.[32]

Accepting the proposition that Freudian terminology may be functional, permitting us to assess the validity of competing attitudes towards reality, what should be noted is that Marcuse's reference to "[t]he hostile father . . . reappear[ing] as savior . . . in punishing the incest wish" may refer to precisely the Oedipus complex.[33] The difference between Marcuse's views and those of Freud apparently rest upon the importance to be attached to the fact that the child is separated from its mother at birth in assessing the psychological make-up and progress of the individual. The divergence between the two views may also be related to Marcuse's emphasis upon the fact that the "sociological aspects" adduced by the Neo-Freudian revisionists were "incomprehended, external factors," rather than "included in and developed by the basic concepts themselves."[34]

Marcuse also notes the extent to which the Freudian concept of the death instinct functions as an obstacle to the attainment of the society which Marcuse delineated:

> [O]ne innermost obstacle seems to defy all prospect of a non-repressive development — namely, the bond that binds Eros to the death instinct. The brute fact of death denies once and for all the reality of a non-repressive existence. . . . The mere anticipation of the inevitable end, present in every instant, introduces a repressive element into all libidinal relations and renders pleasure itself painful. . . . The flux of time is society's most natural ally in maintaining law and order, conformity, and the institutions that relegate freedom to a perpetual utopia; the flux of time helps men

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32. *Id.* at 229–31 (footnotes omitted). In this connection, Marcuse observed:
> In other words, narcissism may contain the germ of a different reality principle: the libidinal cathexis of the ego (one's own body) may become the source and reservoir for a new libidinal cathexis of the objective world — transforming this world into a new mode of being.

Id. at 169.

33. *See* note 27 and accompanying text *supra*.

34. *See* text accompanying note 23 *supra*.

to forget what was and what can be: it makes them oblivious to the better past and the better future.[35]

Marcuse overcomes this obstacle by defining a "Nirvana principle" that, in converging with the pleasure principle and becoming reconciled with the reality principle, makes possible the acceptance of death:

> The striving for the preservation of time in time, for the arrest of time, for conquest of death, seems unreasonable by any standard, and outright impossible under the hypothesis of the death instinct that we have accepted. Or does this very hypothesis make it more reasonable? The death instinct operates under the Nirvana principle: it tends toward that state of "constant gratification" where no tension is felt — a state without want. This trend of the instinct implies that its *destructive* manifestations would be minimized as it approached such a state. If the instinct's basic objective is not the termination of life but of pain — the absence of tension — then paradoxically, in terms of the instinct, the conflict between life and death is the more reduced, the closer life approximates the state of gratification. Pleasure principle and Nirvana principle then converge. . . . As suffering and want recede, the Nirvana principle may become reconciled with the reality principle. The unconscious attraction that draws the instincts back to an "earlier state" would be effectively counteracted by the desirability of the attained state of life. The "conservative nature" of the instincts would come to rest in a fulfilled present. Death would cease to be an instinctual goal. It remains a fact, perhaps even an ultimate necessity — but a necessity against which the unrepressed energy of mankind will protest, against which it will wage its greatest struggle.
>
> In this struggle, reason and instinct could unite. Under conditions of a truly human existence, the difference between succumbing to disease at the age of ten, thirty, fifty, or seventy, and dying a "natural" death after a fulfilled life, may well be a difference worth fighting for with all instinctual energy. Not those who die, but those who die before they must and want to die, those who die in agony and pain, are the great indictment against civilization.[36]

Given Marcuse's attack on the Neo-Freudian revisionists for "the laboring of the obvious, of everyday wisdom,"[37] it seems appropriate

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35. H. MARCUSE, *supra* note 18, at 231. Additionally, Marcuse stated:
> It is the alliance between time and the order of repression that motivates the efforts to halt the flux of time, and it is this alliance that makes time the deadly enemy of Eros.

Id. at 233.

36. *Id.* at 234–36 (emphasis in original).

37. *See* text accompanying note 23 *supra*.

to note that very much the same charge can be leveled at his treatment of the death instinct.[38] Perhaps even more important for our purposes, given the connection Marcuse draws between the death instinct and the "flux of time,"[39] is the fact that Freud defined the difference between his views and "materialistic views of history" precisely in terms of time:[40]

> Mankind never lives entirely in the present. The past, the tradition of the race and of the people, lives on in the ideologies of the superego, and yields only slowly to the influence of the present and to new changes.[41]

If the reader is by now satisfied that Marcuse's views will not serve society as effectively as Freudian insights — because Marcuse takes insufficient account of "time" — there still remains the issues raised by the picture of reality contained in the views of Freud himself. If this picture is accepted as an accurate portrayal, it would require that the problems posed by corporate responsibility be treated, at least in part, as psychoanalytic problems.

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38. Roszak stated:

> To protest, to refuse, to struggle against death. . . . What Marcuse's version of non-repressiveness promises us, then, is the capacity to continue this futile opposition with the prospect of marginal gains like greater longevity and consolations for the dying. By no means empty ideals — but very traditional ideas that scarcely need repetition from Marcuse.

T. ROSZAK, *supra* note 19, at 113.

39. *See* text accompanying note 35 *supra.*

40. *See* text accompanying note 16 *supra.*

41. *See* text accompanying note 36 *supra,* delineating Marcuse's formulation of the "Nirvana principle." One contemporary observer has noted a phenomenon similar to that described by Marcuse:

> Radicals often object that liberal programs generate an illusory feeling of movement when in fact little is changing. Their assumption is always that such an illusion slows down movement, but it is just as likely that the reverse is true. Radicals are so absorbed with the difficulties they have in overcoming inertia that they tend to assume that motionlessness is a comfortable state that everyone will seek with the slightest excuse. But even an illusory sense of progress is invigorating, and whets the desire for further advances. Absolute stagnation is enervating, and creates a feeling of helplessness and impotence. The "war on poverty" may have done very little to alleviate poverty and nothing at all to remove its causes, but it raised a lot of expectations, created many visions of the possibilities for change, alerted a large number of people to existing inadequacies in the system and to the relative efficacy of various strategies for eliminating them. One factor that radicals overlook, in other words, is the educative value of liberal reform, however insignificant that reform may be in terms of institutional change.

P. SLATER, THE PURSUIT OF LONELINESS: AMERICAN CULTURE AT THE BREAKING POINT 123-24 (1970).

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Joseph Goldstein, trained in both law and psychoanalysis, has described the basis upon which one could assume that the two disciplines are relevant to each other:

> Psychoanalysis endeavors to provide a systematic theory of human behavior. Law, both as a body of substantive decisions and as a process for decision-making, has been created by man to regulate the behavior of man. Psychoanalysis seems to understand the workings of the mind. Law is mind-of-man-made. There is in law, as psychoanalysis teaches that there is in individual man, a rich residue which each generation preserves from the past, modifies for the present, and leaves for the future. An initial, though tentative assumption that one discipline is relevant to the other seems therefore warranted.[42]

If that relevance rests on the success of the endeavor "to provide a systematic theory of human behavior," however, it seems quite clear "that the student of law who turns to psychoanalysis for a finished theory offering a complete explanation of any and all human activity will be either duped or disappointed."[43] Freud himself has described the factors which made success at "developing a systematic theory of human behavior" unlikely:

> Psycho-analysis is not, like philosophies, a system starting out from a few sharply defined basic concepts, seeking to grasp the whole universe with the help of these and, once it is completed, having no room for fresh discoveries or better understanding. On the contrary, it keeps close to the facts in its field of study, seeks to solve the immediate problems of observation, gropes its way forward by the help of experience, is always incomplete and always ready to correct or modify its theories.[44]

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42. Goldstein, *Psychoanalysis and Jurisprudence,* 77 YALE L.J. 1053 (1968).

43. *Id.* at 1077.

44. S. FREUD, *Psycho-Analysis,* in 18 FREUD, *supra* note 13, at 253. Freud further commented:

> I must confess that I am not at all partial to the fabrication of *Weltanschauungen.* Such activities may be left to philosophers, who avowedly find it impossible to make their journey through life without a Baedeker of that kind to give them information on every subject. Let us humbly accept the contempt with which they look down on us from the vantage-ground of their superior needs. But since we cannot forgo our narcissistic pride either we will draw comfort from the reflection that such "Handbooks to Life" soon grow out of date and that it is precisely our shortsighted, narrow and finicky work which obliges them to appear in new editions, and that even the most up-to-date of them are nothing but attempts to find a substitute for the ancient, useful and all-sufficient church catechism.

S. FREUD, *Inhibitions, Symptoms and Anxiety,* in 20 FREUD, *supra* note 13, at 96.

It is remarkable that despite these views, Marcuse insists that he deals with psychoanalysis strictly as a theory or philosophy. He focused precisely on the "most speculative and 'metaphysical' [Freudian] concepts not subject to any clinical verification,"[45] and stressed that "[t]he purpose of [*Eros and Civilization*] is to contribute to the philosophy of psychoanalysis — not to psychoanalysis itself. It moves exclusively in the field of theory, and it keeps outside the technical discipline which psychoanalysis has become."[46]

Marcuse argues, moreover, that the reasons for believing that the society, which he believes to be optimal, can be attained are based upon

> Freud's own theory [which] provides reasons for rejecting his identification of civilization with repression. On the ground of his own theoretical achievements, the discussion of the problem must be reopened. Does the interrelation between freedom and repression, productivity and destruction, domination and progress, really constitute the principle of civilization? Or does this interrelation result only from a specific historical organization of human existence? . . .
>
> The notion of a non-repressive civilization will be discussed not as an abstract and utopian speculation. We believe that the discussion is justified on two concrete and realistic grounds: first, Freud's theoretical conception itself seems to refute his consistent denial of the historical possibility of a non-repressive civilization, and second, the very achievements of repressive civilization seems to create the preconditions for the gradual abolition of repression.[47]

The second ground upon which Marcuse seeks to refute the charge of "abstract and utopian speculation, . . . the very achievements of repressive civilization," is apparently based on the view that

> [t]he more complete the alienation of labor, the greater the potential of freedom: total automation would be the optimum. It is the sphere outside labor which defines freedom and fulfillment, and it is the definition of human existence in terms of this sphere which constitutes the negation of the performance principle.[48]

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45. H. MARCUSE, *supra* note 18, at 7. *See* text accompanying note 22 *supra*.

46. H. MARCUSE, *supra* note 18, at 7. One commentator, in an assessment of Marcusian thought, said:

> With Freud's own writings it is continually necessary for the reader to turn back from the theorizing to the case histories, from the inflated conceptual schemes to the revealing clinical detail or other shrewd empirical observations; and it is in such observations that in the end the evidence for the truth or falsity of psychoanalytic claims must be found.

A. MACINTYRE, HERBERT MARCUSE: AN EXPOSITION AND A POLEMIC 44 (1970).

47. H. MARCUSE, *supra* note 18, at 4–5.

48. *Id.* at 156.

This view is politically significant insofar as it depends on some remarkable assumptions about the world. It is not clear whether the world possesses sufficient material resources, and the technology to exploit those resources, such that a political reorganization would universally eliminate poverty and scarcity, while reducing labor. It is clear, however, that "total automation" postulates a world in which work is not needed. One need only deny *that* possibility to conclude that Marcuse's lack of analysis of either empirical problems[49] or political obstacles in connection with the question whether such a world *could* in fact be achieved means that he is himself engaging in "abstract and utopian speculation."

Even if Marcuse appears unsuccessful in utilizing Freud's "own theoretical achievements" to demonstrate the possibility of a non-repressive civilization, however, the question nevertheless remains whether Freud's own views — which stress the relationship between civilization and repression — are entitled to a significantly greater degree of acceptance. The first point to be made is that Marcuse seems correct in stressing the importance to the evaluation of any human concept of the "specific historical organization of human existence" from which it emerges. Thus, as Erik Erikson has noted:

> [I]t is important to concede that there is a hidden ideological connotation to all theories concerning man's nature: even the most carefully verified observations will prove to have been subject to the ideological polarizations of their historical period. This certainly has been the case with the theory of psychosexuality.[50]

And Erich Fromm — one of the Neo-Freudian revisionists attacked in *Eros and Civilization* — himself identified the "ideological connotation" of psychoanalysis with the "specific historical organization of human existence" that gave rise to Marxist analysis:

> Freud's concept of man was the same which underlies most anthropological speculation in the nineteenth century. Man, as he is molded by capitalism, is supposed to be the natural man, hence capitalism the form of society which corresponds to the needs of human nature. This nature is competitive, aggressive, egotistical. It seeks its fulfillment in victory over one's competitors. In the sphere of biology this was demonstrated by Darwin

49. *See* H. ARENDT, THE HUMAN CONDITION 132 (1958):

> The progress ([in] the gradual decrease of working hours) has been rather overrated, because it was measured against the quite exceptionally inhuman conditions of exploitation prevailing during the early stages of capitalism. If we think in somewhat longer periods, the total yearly amount of individual free time enjoyed at present appears less an achievement of modernity than a belated approximation to normality.

50. Erikson, *Reflections on the Dissent of Contemporary Youth*, 51 INT'L J. OF PSYCHOANALYSIS 11, 12 (1970).

> in his concept of the survival of the fittest; in the sphere of economics in the concept of *homo economicus,* held by the classical economists. In the sphere of psychology Freud expressed the same idea about man, based on the competitiveness resulting from the nature of the sexual instinct.[51]

To a considerable extent, therefore, Marcuse's views on the psychology of human nature may simply be an example of one of those "new ways of looking at things and new ways of arranging them" that Freud himself accepted as characteristic of "ego-psychology":[52] a "new way," accounted for in Marxist terms, by the fact that it originates from a "specific historical organization of human existence" different from that in which Freud lived.

It is equally true, however, that the language in which Freud expressed much of his own "new way of looking at things" served to hide the connection between his views and those of Marx described immediately above. As Erik Erikson has noted:

> To express the fact that libidinization withdrawn from the genitals thus manifests itself elsewhere, Freud used the thermodynamic language of his day, the language of preservation and transformation of energy. The result was that much that was meant to be a working hypothesis appeared to be making concrete claims which neither observation nor experiment could even attempt to substantiate.[53]

Thus "way[s] of looking at things" represented by the physical sciences — such things as atomic theory and relativity theory, for example—may themselves be subject to the same sort of Marxist analysis in terms of relationships to a "specific historical organization of human existence" which has been adumbrated immediately above in connection with the views of Freud.[54] In terms of the problem we are

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51. Fromm, *The Human Implications of Instinctivistic "Radicalism": A Reply to Herbert Marcuse,* 2 DISSENT 342, 343 (1955).

52. *See* text accompanying note 26 *supra.*

53. E. ERIKSON, CHILDHOOD AND SOCIETY 59 (1950). *See* R. RHEES, WITTGENSTEIN LECTURES AND CONVERSATIONS ON AESTHETICS, PSYCHOLOGY & RELIGIOUS BELIEF (1966), where the author stated:

> Or suppose you want to speak of causality in the operation of feelings. "Determinism applies to the mind as truly as to physical things." This is obscure because when we think of causal laws in physical things we think of *experiments.* We have nothing like this in connexion with feelings and motivation. And yet psychologists want to say: "There *must* be some law" — although no law has been found. (Freud: "Do you want to say, gentlemen, that changes in mental phenomena are guided by *chance*?") Whereas to me the fact that there *aren't* actually any such laws seems important.

Id. at 42 (emphasis in original).

54. *See generally* A. WHITEHEAD, SCIENCE AND THE MODERN WORLD (1925), for a delineation of many of the implications of a view of the physical sciences such as

considering, however, what seems more important is that both law and the social sciences — at least for the present and foreseeable future — will "be making concrete claims which neither observation nor experiment could even attempt to substantiate":

> [T]he meaning of an actual experience in giving direction to a person's life rests on countless internal and external variables. Not only may what appears to be a similar event have different significance for the same person at different stages in his development, but it may also have different implications for different people at similar stages of development. Implicit in this observation is an insight of substantial significance to anyone seeking to predict or to evaluate the consequences of decisions in law. It points to a limitation, frequently obscured in assumptions, on empirical studies about the impact or likely impact of a statute, judgment, or administrative ruling. Unless such decisions are perceived as external events in the lives of many people — events which have different meanings for different people — statistical evidence of success may include, without recognizing a distinction, a number of people upon whom the decision had no impact and, even more significant, may include in the failure column a number upon whom the decision had not just no impact, but an impact contrary to that sought. For example, in evaluating a decision to impose a criminal sanction against a specific offender for purposes both of satisfying the punitive demands of the community and of deterring others from engaging in the offensive conduct, the student of law must recognize that the decision may satisfy some demands for vengeance, exacerbate some, and have no effect at all on others; and may for some restrain, for some provoke, or for some have no impact on the urge to engage in the prohibited conduct. Recognition of the multiple consequences of every law-created event makes comprehensible the never-ending search for multiple resolutions of what is perceived to be a single problem in law and the resulting need to find an ensemble of official and unofficial responses which on balance come closest to achieving the social control sought.[55]

The answers social scientists have evolved is to focus not upon the individual person, but upon the person's role or institutional capacity, or to define explanation in terms of prediction and often to utilize statistical techniques to describe the responses of a given sample of

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that suggested in the text. For a detailing of the extent to which development of a "new way of looking at things" in the physical sciences can be regarded as following a process strikingly similar to the one adumbrated in the text concerning Freud's development of his views on "ego-psychology", *see* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). *See also* J. YOUNG, DOUBT AND CERTAINTY IN SCIENCE: A BIOLOGIST'S REFLECTIONS ON THE BRAIN (1960), where the author suggests that certain aspects of human "ways of looking at things" may be correlated with the nature and structure of human brain components.

55. Goldstein, *supra* note 42, at 1071–72 (footnotes omitted).

the population. The environment in which human behavior takes place (because it includes other human beings) is, however, sufficiently complex that the problems involved in selecting and adequately analyzing a sufficient number of factors in choosing the population sample may frequently be insuperable, especially since awareness of being part of the sample may change the behavior of the population being surveyed.[56]

Since another possible way of addressing the issue of corporate social responsibility is in terms of the *legal* "way of looking at things," however, it must also be noted that — at least as embodied in judicial decisions — the law, too "appears to be making concrete claims which neither observation nor experiment could even attempt to substantiate." As in the case of the other sciences, much of the difficulty results from a failure to distinguish between the results reached, *i.e.,* the particular scientific theory or judgment, and the process utilized to achieve those results. The use of "logic" that is deductive in form — reasoning from premises contained in legislative enactments or judicial precedents — permits judicial decisions to give the appearance of having been dictated by the facts recited in the opinion, although the results reached may in many of the important cases be determined by a combination of the judge's individual personality and the "specific historical organization of human existence." As Judge Jerome Frank observed:

> Generally, it is only after a man makes up his mind, that he attempts, and then artificially, to separate [the determination of the facts and the determination of what rules are to be applied to those facts].
>
> This must be as true of the judge as of other men. It is sometimes said that part of the judge's function is to pick out the relevant facts. Not infrequently this means that in writing his opinion he stresses (to himself as well as to those who will read the opinion) those facts which are relevant to his conclusion — in other words, he unconsciously selects those facts which, in combination with the rules of law which he considers to be pertinent, will make "logical" his decision. A judge, eager to give a decision which will square with his sense of what is fair, but unwilling to break with the traditional rules, will often view the evidence in such a way that the "facts" reported by him, combined with those traditional rules, will justify the result which he announces.[57]

56. *See generally* C. ARGYRIS, INTERVENTION THEORY AND METHOD: A BEHAVIORAL SCIENCE VIEW 97–102 (1970).

57. J. FRANK, LAW AND THE MODERN MIND 134–35 (1936). *See also* M. COHEN, REASON AND LAW 73–74 (1950):

> [I]n any intellectual enterprise . . . there must always be a certain difference between theory and practice or experience. A theory must certainly be simpler than the facts it covers. Complexity or chaos is the result when we lack the guidance which a general chart of the field affords us. A chart or map would be altogether

It is therefore necessary to seek criteria which will form the basis for determining which "way of looking at things" is to be preferred. The resolution of that problem may well depend on which facts are perceived as relevant to any given situation. There are two bases for the belief that this is likely to be the case: first, the multiplicity of things that can be denominated "facts" which are related to any events or process of importance to human being; second, the fact that, even if a science could persuade us that it described *all* facts relevant to a given event or process, it remains true that any persuasive attempt at explanation necessitates a demonstration of *which* of the relevant facts are to be stressed. A conflict between a Marxist and Freudian view of a given historical event or process, for example, can fairly be summarized as a dispute over whether socioeconomic or individual psychological facts provide more powerful analytic or explanatory tools.

The criterion applied here for the purpose of determining which "way of looking at things" to prefer is that of *purpose,* the function fulfilled by stressing or seeking one rather than another fact. Given this criterion, it seems significant that Marcuse explicitly gave as a ground for preferring his "way of looking at things" to that adopted by the Neo-Freudian revisionists his preference for the theoretical rather than therapeutic purpose of psychoanalysis:

> Our concern is not with a correlated or improved interpretation of Freudian concepts but with their philosophical and sociological implications. Freud conscientiously distinguished his philosophy from his science; the Neo-Freudians have denied most of the former. On therapeutic grounds, such a denial may be perfectly justified. However, no therapeutic argument should hamper the development of a theoretical construction which aims, not at curing individual sickness, but at diagnosing the general disorder.[58]

Even if we accept the purpose of psychoanalysis as therapeutic,[59] however, it cannot serve to answer many of the specific questions raised by the factual assumptions previously discussed. Thus, what-

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useless if it did not simplify the actual contours and topography which it describes. . . . No science offers us an absolutely complete account of its subject matter. It is sufficient if it indicates some general pattern to which the phenomena approximate more or less. For practical purposes any degree of approximation will do if it will lead to a greater control over nature than we should have without our ideal pattern. But for theoretic purposes we need the postulate that all divergences between the ideal and the actual will be progressively minimized by the discovery of subsidiary principles deduced from, or at least consistent with, the principles of our science.

58. H. MARCUSE, *supra* note 18, at 7-8.

59. *See generally* P. RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD (1966).

ever psychoanalytic therapy may do for the individuals whose "moral decision[s]" and "conscience[s]" produced the actions of the corporation's board of directors, neither psychoanalytic therapy nor theory claim to be able to provide answers to the question as to how to judge those actions.

2.

Goldstein has formulated a general description of the purpose of law:

> Law is at the same time the guardian of a powerful substantive heritage, as well as a generator and regenerator of fundamental societal values. It is a concrete and continuous process for meeting both man's need for stability by providing authority, rule, and precedent, and his need for flexibility by providing for each authority a counter-authority, for each rule a counter-rule and for each precedent a counter-precedent. In deciding between available alternatives and among oft-conflicting goals, law ideally allows, encourages, and secures an environment conducive to man's growth and development. . . . Thus the study of law focuses or should focus, upon the ways in which this process meets or fails to meet these needs.[60]

This description may be utilized as a description of law as "applied" social science. As noted above, however, one technique social scientists have developed to meet the problems presented by the fact that they deal with conscious beings rather than inanimate objects is "to define explanation in terms of prediction." When one attempts to intervene in disputes among human beings, however, this technique inevitably raises such questions as: how much probability justifies an intervention directed towards this given end, or any intervention at all. At least in terms of those interventions known as judicial decisions, it is the attempts to answer questions such as these that make a lawyer's "way of looking at things" stress so heavily such tools as presumptions, burdens of proof, and other evidentiary requirements.

Furthermore, in systemic terms, there are four characteristics that mark the lawyer's "way of looking at things": reliance upon facts rather than theoretical generalizations; emphasis upon concrete, existing situations and their interrelationships rather than hypothetical possibilities; a stress on an adversary process that presupposes that purposes may conflict, *i.e.*, that "ways of looking at things" may differ; and a characteristic attempt, when dealing with institutions (which play so large a role as employer, beneficiary and target of legal talents), to hold these institutions to their stated goals or ideals.

60. Goldstein, *supra* note 42, at 1056 (footnote omitted).

The first two characteristics, the emphasis upon facts and upon the particular situation being addressed, are most valuable because of the precision they make possible: it is probable that a larger proportion of the total possible factors and the interrelationships between them can be studied and understood as the specificity with which the issues are defined is increased.[61]

This stress on concreteness and complexity, on facts in terms of the specific situation being addressed, also implicates the third characteristic of a lawyer's "way of looking at things": an adversary process that presupposes that purposes may conflict, that "ways of looking at things" may differ.[62] The ideological basis for this characteristic is our society's insistence on the treatment of another human being — another "way of looking at things" — as a subject rather than an object, an entity at whose disposal legal talents are to be put. Strict adherence to this characteristic will in almost all cases entail a loss in efficiency, since the operation of the adversary system results in a significant expenditure of resources. Social "waste" in these terms, therefore, can be measured by the costs incurred in terms of efficiency resulting from the treatment of human beings as subjects rather than objects. Insofar as a society is willing to accept this "waste," however, the purpose of law can be defined as a process for establishing communication, agreement, or common language[63] among disputing

61. *Compare* this proposition *with* the problems raised in the text accompanying note 56 *supra*.

62. *See* P. FREUND, ON UNDERSTANDING THE SUPREME COURT 90–91 (1949):

> One final objection to the so-called Brandeis brief is that it places an inappropriate task on counsel. Is the adversary method the most suitable one for dealing with economic data? Someone has said that there are three sides to every lawsuit — my side, your side, and the truth. Should the responsibility for developing the background facts be placed on counsel, or should it be borne by some distinterested source? Should there be established for the courts something equivalent to the legislative reference service organized in a number of states for the benefit of the legislature? This would perhaps be a more radical innovation than the Brandeis brief itself, and yet it is not altogether fanciful. We owe much of our commercial law to the boldness of Lord Mansfield in seeking advice from experienced merchants regarding mercantile practices. The English admiralty courts have utilized the services of retired mariners drawn from the Royal Navy and the Merchant Marines — the celebrated "elder brethren of Trinity House." Some of our courts are beginning to employ disinterested medical and psychiatric advisers. The great difficulty with this idea in constitutional litigation is that the experts would be tempted to intrude their views on the merits of the legislation instead of helping the court to understand other people's views.

See also Karst, *Legislative Facts in Constitutional Litigation*. 1960 SUP. CT. REV. 75.

63. In discussing the role of the Supreme Court in this process, one commentator has stated:

> In setting the verbal formulas that define phrases like "ordinary and necessary business expenditure," "auxiliary and supplementary," "rail-trucking services," "reserve gate picketing," and "public service" broadcasting, which are the common coin of administrative decision making, the Supreme Court helps to set the terms of debate and trade in the bargaining that constantly goes on between those

"ways of looking at things";[64] a purpose whose significance resides in the fact that

> [t]here may be truths beyond speech, and they may be of great relevance to man in the singular, that is, to man in so far as he is not a political being, whatever else he may be. Men in the plural, that is, men in so far as they live and move and act in this world, can experience meaningfulness, only because they can talk with and make sense to each other and to themselves.[65]

3.

Since this article represents an attempt to apply legal analysis to the institution known as the corporation, much that will be indicated about the role of corporate director is also relevant to the role of lawyer insofar as any given legal system is itself an institution.

Reference to the provisions of the Constitution of the United States as they have historically been interpreted by the United States Supreme Court seems sufficient to establish the relevance of the fourth characteristic of a lawyer's "way of looking at things," the proposition that the content given institutional goals or ideals can vary significantly over time; and a reference to the Warren Court seems sufficient to establish that reasonably rapid changes can be brought about through utilization of legal processes. In terms of this characteristic, however, it seems clear that the institutional structure of the legal profession ought to operate so as to counteract the dangers involved in excessive adherence to professional values.

The basis for the privileges and respect society has accorded those fulfilling a professional role has presumably been the assumption that professionals were sufficiently experienced in the area of their concern and sufficiently in control of their talents, so that they could be relied upon in any given concrete situation to evaluate the meaning and

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who administer and those who are administered. . . . It is in these terms that judicial legitimation should be thought of — judicial doctrines become the legitimate bases for discourse and negotiation in the administrative process.

M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 270 (1968).

64. *See* Gilmore, *The Truth About Harvard and Yale,* 1964 YALE L. REP. 9, where the author stated:

> No lawyer worthy of the name can ever be either truly a conservative or truly a radical: at one and the same time we must somehow devote ourselves to the preservation of tradition, which we do not greatly respect, and to the promotion of change, in which we do not greatly believe.

Id.

I would argue that the legal profession's "way of looking at things," *i.e.,* that pattern of organizing concepts that is legal analysis as contrasted with mathematical or theological or another mode, has its own requirement. This helps to explain why psychoanalytic testimony, originating in a different "way of looking at things," presents such substantial evidentiary difficulties. *See* note 77 and accompanying text *infra.*

65. H. ARENDT, *supra* note 49, at 4.

relevance of their own "way of looking at things." However, in terms of personal responsibility for the environment in which one lives and which one therefore, to some extent, creates, too narrow a focus upon a specific situation runs the substantial risk of abdicating that very responsibility. Thus, the extent to which the status quo (the "specific historical organization of human existence") remains in being is a function of the extent to which the need for change, for new "ways of looking at things," is accepted by those in a position (or playing a role) in society such that their acceptance of this need will bring about such a change. Insofar as too narrow a focus on concrete and specific situations impedes this acceptance, therefore, it runs the substantial risk of delaying necessary societal changes.[66]

Given the very substantial privileges that surround the attorney-client relationship, therefore, one possible application of the characteristic of holding institutions to their stated goals or ideals would be a willingness by bar association grievance committees to recommend disbarment of lawyers who assist clients in achieving acts violative of conscience in the sense that the lawyers themselves regard the acts as immoral.

The basis for demanding this personal moral responsibility is the fact that institutional decisionmaking increasingly affects the daily lives of individuals. Thus, the privileges accorded to the status of director by the society, like those accorded lawyers, ought to be matched by an effort on the part of directors and the organizations they control to prevent a director's "way of looking at things" from impeding the exercise of the director's personal moral responsibility. In these terms, however, the role of the director differs significantly from that of the lawyer, in the sense that, in our society, the task of representation asso-

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66. The following is an excerpt from an address by Mr. Justice Stone delivered on June 15, 1934:

> I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that "a man cannot serve two masters." . . . The loss and suffering inflicted on individuals, the harm done to a social order founded upon business and dependent upon its integrity, are incalculable. There is little to suggest that the Bar has yet recognized that it must bear some burden of responsibility for these evils. But when we know and face the facts we shall have to acknowledge that such departures from the fiduciary principle do not usually occur without the active assistance of some member of our profession, and that their increasing recurrence would have been impossible but for the complaisance of a Bar, too absorbed in the workaday care of private interest to take account of these events of profound import or to sound the warning that the profession looks askance upon these, as things that "are not done."

Address by Justice Stone, Dedication of Law Quadrangle, Univ. of Michigan, June 15, 1934, in Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 8–9 (1934).

ciated with the former role has historically been perceived in terms of a more specific purpose: that of profit maximization.

Analogous to the effect that the use of "the thermo-dynamic language of his day" had in the development of Freudian theory,[67] the use of the language of economics — especially when expressed in mathematical form — gives to decisions justified in terms of profit maximization an aura of certainty, objectivity, and an aura of not having been influenced by any given "way of looking at things." There exist, however, three different objections — which may be three different expressions of the same objection — to a justification of directors' decisions in this manner.

First, while it may be true that money is socially utilized simply as a measure of exchange and is therefore totally fungible, recognition of that fact does not make it impossible to recognize and act upon the realization that different uses of wealth resulting in the same profit, and different ways in which any such use of wealth is implemented, may well have different meanings for different human beings. Second, given the mathematical language, the terms of which appear to justify the "objectivity" of profit-maximization decisions, it should be noted that the difficulties which are raised by the possibility that the "new way of looking at things" represented by the physical sciences could be analyzed in terms of relationships to a "specific historical organization of human existence,"[68] may well also be true of the "way of looking at things" represented by mathematics.[69]

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67. *See* text accompanying note 53 *supra.*

68. *See* note 54 and accompanying text *supra.*

69. *See* W. QUINE, *Two Dogmas of Empiricism,* in FROM A LOGICAL POINT OF VIEW (1961), where the author noted:

> Physical objects are conceptually imported into the situation as convenient intermediaries — not by definition in terms of experience, but simply as irreducible posits comparable, epistemologically, to the gods of Homer. . . . I do, qua lay physicist, believe in physical objects and not in Homer's gods; and I consider it a scientific error to believe otherwise. But in point of epistemological footing the physical objects and the gods differ only in degrees and not in kind. Both sorts of entities enter our conception only as cultural posits. The myth of physical objects is epistemologically superior to most in that it has proved more efficacious than other myths as a device for working a manageable structure into the flux of experience. . . . Moreover, the abstract entities which are the substance of mathematics — ultimately classes and classes of classes and so on up — are another posit in the same spirit. Epistemologically these are myths on the same footing with physical objects and gods, neither better nor worse except for differences in the degree to which they expedite our dealings with sense experiences.
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> The over-all algebra of rational and irrational numbers is underdetermined by the algebra of rational numbers, but is smoother and more convenient; and it includes the algebra of rational numbers as a jagged or gerrymandered part. Total science, mathematical and natural and human, is similarly [illegible] more extremely underdetermined by experience. The edge of the system must be kept squared

Finally, in terms of the problems we are considering, however, it seems most significant that our society's legal system has already refused to accept immediately measurable maximization of profits as the exclusive standard in terms of which a board of directors' fidelity to its responsibilities would be assessed. Thus, *A.P. Smith Manufacturing Co. v. Barlow*[70] involved a claim by shareholders that directors had both exceeded corporate powers and misappropriated corporate funds in making a contribution of corporate funds to a privately supported, educational institution.[71] Corporate officers testified in support of the directors:

> Mr. Hubert F. O'Brien, the president of the company, testified that he considered the contribution to be a sound investment, that the public expects corporations to aid philanthropic and benevolent institutions, that they obtain goodwill in the community by so doing, and that their charitable donations create favorable environment for their business operations. In addition, he expressed the thought that in contributing to liberal arts institutions, corporations were furthering their self-interest in assuring the free flow of properly trained personnel for administrative and other corporate employment. Mr. Frank W. Abrams, chairman of the board of the Standard Oil Company of New Jersey, testified that corporations are expected to acknowledge their public responsibilities in support of the essential elements of our free enterprise system. He indicated that it was not "good business" to disappoint "this reasonable and justified public expectation," nor was it good business for corporations "to take substantial benefits from their membership in the economic community while avoiding the normally accepted obligations of citizenship in the social community." Mr. Irving S. Olds, former chairman of the board of the United States Steel Corporation, pointed out corporations have a self-interest in the maintenance of liberal education as the bulwark of good government. He stated that "Capitalism and free enterprise owe their survival in no small degree to the existence of our private, independent universities" and that if American business does not aid in their maintenance it

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with experience; the rest, with all of its elaborate myths or fictions, has as its objective the simplicity of laws.

Id. at 44–45. *See also* Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFFAIRS 66 (1972); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973).

70. 13 N.J. 145, 98 A.2d 581 (1953).

71. Such a use of corporate funds was expressly authorized by a state statute. N.J. STAT. ANN. § 14A:3-4 (1969). The court noted, moreover, that

> since in our view the corporate power to make reasonable charitable contributions exists under modern conditions, even apart from express statutory provision, [the State's] enactments simply constitute helpful and confirmatory declarations of such power, accompanied by limiting safeguards.

13 N.J. at 160, 98 A.2d at 590.

> is not "properly protecting the long-range interest of its stockholders, its employees and its customers."[72]

The Supreme Court of New Jersey, relying on a plethora of precedents (largely from other jurisdictions), upheld the conduct of the directors, on, *inter alia,* the following grounds:

> As has been indicated [in this opinion], there is now widespread belief throughout the nation that free and vigorous nongovernmental institutions of learning are vital to our democracy and the system of free enterprise and that withdrawal of corporate authority to make such contributions within reasonable limits would seriously threaten their continuance. Corporations have come to recognize this and with their enlightenment have sought in varying measures, as has the plaintiff by its contribution, to insure and strengthen the society which gives them existence and the means of aiding themselves and their fellow citizens. Clearly then, the appellants, as individual stockholders whose private interests rest entirely upon the well-being of the plaintiff corporation, ought not be permitted to close their eyes to present-day realities and thwart the long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure.[73]

In the case we are considering, therefore, the issue presented can be framed in terms of the extent to which the directors' individual consciences should be permitted — in shareholder derivative suits — to serve as justifications for decisions as to which a corporate statement admits that "[f]rom a long-range viewpoint we could be hurt in many ways."[74] An attempt will therefore be made to sketch several different (although hopefully not inconsistent) lines of argument, directed towards resolving such a suit.[75]

First, relying on the doctrine that the standard by which actions of the board of directors is judged is that of profit maximization, and stressing heavily the negligible impact on the corporation's profits of the contract at issue, facts could be developed concerning the extent to which *this* corporation's performance of *this* contract was of relevance to the United States Department of Defense: facts concerning the extent to which the product was necessary to the conduct of the conflict at hand and the ease with which other business enterprises could have filled any urgent Defense Department need for the product.

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72. 13 N.J. at 147–48, 98 A.2d at 583. *See* text accompanying note 10 *supra.*
73. 13 N.J. at 161, 98 A.2d at 590.
74. *See* note 5 *supra.*
75. What follows are not briefs or trial strategies, but suggested outlines. *See generally* Douglas, *Directors Who Do Not Direct,* 47 HARV. L. REV. 1305 (1934).

In addition, if psychiatric testimony is available and the court can be persuaded that it is admissible, it may be possible to utilize the psychoanalytic "way of looking at things" to persuade the court that the operation of personal, rather than corporate, purposes played so large a role in the reaching of the "moral decision[s]" relied on as justifications here that the directors were not adequately performing their representative function.[76] An analogous argument, utilizing conflict-of-interest terminology, might also be based on psychiatric testimony detailing the effects on individual directors of service in, or close personal contact with, officials of the Defense Department.[77]

Finally, if there is division on the board of directors concerning the contract in question, it may be relevant to attempt to disqualify certain directors on the basis either that commitments of their time to other enterprises or to personal interests are such that they are devoting insufficient time to the function of directing this corporation, or that — on the basis of testimony or corporate minutes — the time devoted to this decision was insufficient to meet the high standard with which corporate directors must comply in reaching decisions as difficult as the one at issue here.[78]

One hopes, moreover, that there will be within our society, individuals and institutions willing and able to expend the resources required to obtain the number of lawsuits (successful either in terms of results or deterrence or both) sufficient to produce practices among corporate directors that more fully comport with the theoretical ideal in terms of which their function is legally defined.[79]

III. EPILOGUE

Events have taken place, subsequent to the decision by the court below, and some subsequent to our decision to grant certiorari, that require that we dismiss this case on the ground that

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76. *See* A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 98 A.2d 581 (1953), where the court stated:

> There is no suggestion that [the charitable contribution at issue] was made indiscriminately or to a pet charity of the corporate directors in furtherance of personal rather than corporate ends.

Id. at 161, 98 A.2d at 590.

77. Assuming, that the psychiatrist would be testifying in terms of Freudian doctrine and that he would be qualified as an expert in the course of persuading the court to admit his testimony, this trial strategy runs a substantial risk that the psychiatrist's opinion will have an undue impact on the judge or jury's determination. In this connection, *see* text accompanying notes 62 & 64 *supra*.

78. The doctrinal legal basis for this line of argument is summarized in H. BALLANTINE, CORPORATIONS 156–67 (rev. ed. 1946).

79. *Id.* Cf. Rohrlich & Rohrlich, *Psychological Foundations for the Fiduciary Concept in Corporation Law*, 38 COLUM. L. REV. 432 (1938).

it has now become moot. In January 1971, the Medical Committee again submitted its napalm resolution for inclusion in Dow's 1971 proxy statement. This time Dow acquiesced in the Committee's request and included the proposal. At the annual stockholder's meeting in May 1971, Dow's shareholders voted on the Committee's proposal. Less than 3% of all voting shareholders supported it . . . . We find that this series of events has mooted the controversy.[80]

80. SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 405–06 (1972). *But cf.* Deutsch, *Perlman v. Feldman: A Case Study in Contemporary Corporate Legal History,* 8 U. MICH. J.L. REFORM 1, 58–59 (1974).