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THE ROLE OF
THE CORPORATION COUNSEL*

WILLIAM T. GOSSETT†

I have suggested in these lectures that laws regulating the business life of our country—and indeed of western civilization since medieval times—almost always have come about in response to pressures. They usually have arisen from specific events that in turn have focused attention on specific needs. "The life of the law is experience," said Mr. Justice Holmes. Nowhere is this truer than in the area of laws touching upon our business and economic life.

There was no overwhelming doctrinal uprising in America that overthrew the general theories of laissez-faire. The doctrine was overthrown by changes in the whole fabric of our national life, ranging from technological innovations to vast political, economic and social changes that could not possibly have been foreseen. Professor Goodhart of Oxford reminds us of the prophetic words of one great spokesman of the 18th Century: "We must all obey the great law of change," said Edmund Burke. "It is the most powerful law of nature and the means perhaps of its conservation."¹

We could occupy ourselves here with some interesting theorizing on this proposition. For example, there is the always interesting question of the pace of the legislative process in the wise accommodation of laws to change; that is, whether laws sometimes are too precipitously enacted or too long delayed. Then there is the equally interesting, if not somewhat more precise, matter of the response to changes reflected in judicial interpretation of existing law under new conditions; that is, whether there is too much devotion to the doctrine of

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†General Counsel, Ford Motor Company.

¹Goodhart, English Contribution to the Philosophy of the Law (1948) 24.
stare decisis. These things ought to be fully explored, perhaps, for a complete inquiry into the subject of the law and modern business life; but I want to limit myself here to commenting on the legislative and judicial functions only insofar as they can be contrasted to that of the corporation counsel.

Courts, of course, are concerned primarily with what has already happened. Litigation involves accomplished facts and, generally, existing law. Yet, as Cardozo pointed out on a number of occasions, even within this limitation, there is room for judicial consideration of changes and of trends: "The principle... does not change," he said, "but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."2 Those of you who are familiar with Brandeis' Social and Economic Views will remember his example: "The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life."3

I make this passing reference to judicial recognition of social and economic changes now, because it may very well occur to you a little later that much of what I have to say about the duties of corporation counsel has more to do with a priori adjudication than with a posteriori advocacy. You may conclude that the corporation counsel spends more time judging the wisdom of a perfectly lawful action before it is undertaken than in defending it afterwards. This I would not deny. Indeed, I propose to demonstrate, if I can, that in dealing with those problems of a corporation involving conflicting interests, the exercise of a function that is judicial in nature is an essential of the corporation counsel's role.

In some cases, the nature of the conflict in interest may be such that corporation management may find it impossible or inappropriate to resolve the conflict. Such a situation seems to have arisen with respect to employees who may be national security risks. Any responsible management recognizes, of course, a clear duty to protect and preserve our national security. Compliance with requirements developed by the Department of Defense and similar agencies is as conscientious and thorough, at Ford, for example, as human effort can make it. This involves compliance, not only with the regulations

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3Brandeis, Social and Economic Views (1930) 113.
relating to the mechanical methods of protecting our defense secrets, but also those relating to the personnel having access to them. It is not here that the principal problem arises. The question is one of generally screening employees, or job applicants, for so-called “security risks.”

We know enough of subversion to realize that there is a serious danger entailed in the employment of persons of particular affiliations in tasks intimately associated with our national defense. At the same time, there is an obvious obligation to the individuals concerned to ensure fair treatment. A discharge or refusal to hire for security reasons can follow a man to an extent that is almost the equivalent of blacklisting, and thus destroy his ability to earn a livelihood.

There are certain types of government contracts that prohibit the employment of individuals specified by the appropriate government agency as security risks. Here, of course, the burden is not ours. The determination is by the government, and our responsibility, like that of good citizens generally, is in attempting to ensure, first, that government processes are fair, and second, that they are respected. But the problem becomes more direct and acute, for us, when no such government requirement or determination exists. On the one hand, it would seem that some action should be taken to protect our national welfare. Indeed, there is evidence that failure to take such action would subject us to just criticism. At the same time, it would seem that such action should only be based upon appropriate fact-finding and, even then, upon application of appropriate standards to the facts. There must be standards as to what constitutes a “security risk” and then a method of fair hearing to determine whether the facts of a particular case satisfy those standards.

This is an undertaking that seems inappropriate for private enterprise, although at present the burden is to a substantial extent cast upon it.

I have digressed on this point so that you might see a specific situation where, in the absence of adequate legislation, counsel must perform a function that is judicial in nature, based upon the facts available and with the public interest as his major criterion.

You will see, also, I hope, that there is a relationship between the concern of the legislator and that of the corporation counsel. While the judge generally is involved in how established facts square with established law, the legislator is involved in the constant adjustment of the laws to the facts and needs of life. If he is responsible he must be equally cautious that the law does not lag too far behind or venture
too far forward. His business is the laws that are to be written, and his purpose is to keep them useful for the advancement of all those elements in a society that make for general progress, security and happiness.

The business of a good corporation counsel, in some measure, is to see to it that some laws are not written—not written because they never become necessary. And so, the legislator—with varying degrees of enthusiasm—resorts to law-making to adjust the activities of corporations to the public interest. Corporation counsel, on the other hand, if he is worth his salt, guides his corporation's activities so that they concur with the public interest to such an extent that legislative intervention is unnecessary. He is, therefore, ahead of judgments and ahead of legislation. And in this sense he is the custodian of corporate freedom.

This may sound as though I put a strain on the role of the corporation counsel. Before spelling it out more thoroughly therefore, I would like, very briefly, to summarize the conditions of corporate freedom.

I do not need to tell you generally in what ways the corporation today is restrained from acting the way a corporation did in the 1920's, or in what ways the corporation of the 1920's was restrained from acting like the corporation of the 1890's. It is sufficient for our purpose to recognize that there is a great difference in corporation behavior from generation to generation.

These changes have all resulted from changes in the dimensions of the area of freedom in which the corporation exists. This area, at the beginning of the rise of the modern stock corporation, really was not defined at all, except in the application of the general principles of the law to the affairs of corporations and in the arrival over the years at some legal formalisms on structure and competence. Soon, however, it became clear that what the corporation did, in an increasingly complex economy, could have profound effects on other entities and other people far removed from it. And it became a wholly natural object of legislative attention, because public opinion concluded that legislation was essential.

Thus far, there is nothing unique about this in the history of Anglo-Saxon jurisprudence. In a democracy the law begins with conclusions. Although these conclusions are not always clearly articulated, they invariably are recognizably expressed. Sometimes they are expressed only in a popular uneasiness such as that which preceded the enactment of the Sherman Act in 1890. In fact, despite all the applications
of the Sherman Act, the Act itself still does nothing more than lay down the very broad popular conclusion that conduct deemed unreasonably to restrain or monopolize trade is against the public interest and therefore is illegal. The particular meaning of the Act has never been constant, and there is no reliable body of precedent in judicial interpretation that can be relied upon with confidence in the face of changing economic facts.

To what extent then does the Sherman Act really restrict the freedom of the business corporation? It has been on the statute books now for sixty-six years. And yet we know very well that in those years there has been an extraordinary range of differing degrees of freedom allowed to the corporation. In effect the Sherman Act has worked only as a kind of enabling resolution, allowing the judges—in the particular economic and social climates of their particular days—to apply the brakes to a course or trend of conduct that—in its context—looked unhealthful. The meaning of the law here is derived, not from the definition of what is good, but rather from a felt need somewhere to achieve relief. There is no philosophic innovation in this. Locke sensed it as early as 1687, when he said: "...what determines the will...is not, as is generally supposed, the greater good in view, but some... uneasiness a man is at present under."4

This leaves us with the need to rely upon our own insight and wisdom in evaluating that uneasiness, in finding out what creates it, in appraising its true extent, in searching its validity and in determining whether it is really there or is being whipped up for some reason. Because we can be certain, in the long history we now have of judge-made law in this field, that such enactments as the anti-trust laws are going to serve as springboards for the courts, and not as fences. Anti-trust laws in America are never in a state of being: they are constantly in a process of becoming. You can never close the book and say that now we know what we cannot do. Different circumstances will bring forth a sequel almost before you know it. "The view of any statutory construction or rule of law as a closed book never was anything but purely theoretical pedantry," said Ehrlich. "Juristic science has never been able to offer prolonged resistance to great and justifiable social or economic needs...."5

For example, prior to the decision of the Court of Appeals in the

4Locke, Essay Concerning Human Understanding (Fraser ed. 1894) bk. 2, c. 21 at 332.
government anti-trust suit against the Aluminum Company of America, in 1945, the courts had held in a number of cases that the exclusion of competition, actual or potential, was a necessary element of the offense of monopolizing under Section 2 of the Sherman Act. But, as you know, the Court held otherwise in the Aluminum case. It held that the mere possession of the power to monopolize, coupled with an intent to exercise it if necessary, is sufficient alone to violate the Act.

In this brief allusion to the Sherman Act, I want to suggest that you can look successfully for no moral absolutes in the laws controlling business activities. What is good and constructive and useful in one decade under one set of circumstances may somehow, under different conditions ten years later, turn out to be sufficiently repulsive or destructive to occasion new constructions of the law that once held the action to be perfectly proper. The standard of reference, then, is not alone what the law says, but the total environment that will give color and character and significance to the act. This leads us directly to the real nature of the responsibility of the modern corporation counsel.

At the beginning of this discussion, I pointed out that there is as much of the judicial function attached to the corporation counsel as there is of advocacy. I also referred to corporation counsel as the custodian of corporate freedom. I would like now to bring these two thoughts together, and then proceed, by way of example, to show you in what kinds of cases counsel is called upon also to serve as a specie of house philosopher. This happens sometimes when there is not only no question of law involved, but when there is not even the prospect of legislative inquiry.

To begin with, the present-day corporation counsel stands not on the periphery of the democratic process, as he did in the last half of the nineteenth century, but in its dead center.

The democratic process is a continuing and sensitive series of rising pressures and inevitable responses. As a major element in our capitalist democracy, the corporation occupies a unique place. It has a personality that can be credited or blamed; but unlike the individual, it has very little margin for error because it is without any inherent value. It is valuable only insofar as it serves people. It cannot, therefore, behave quite as cavalierly as individuals can, because if it makes a mistake, and certainly if it repeats a mistake, something will happen sooner or later to ensure that it never makes the same one again.

*United States v. Aluminum Company of America, 148 F. (2d) 416 (C. C. A. 2nd, 1945).*
Pressures will rise to police it tighter, to impose new regulations, to restrict it in new ways, sometimes to punish it. And the response will come through the courts, through the legislatures, through labor unions, through consumers—through all the means available for the people in a democracy to express themselves.

Between the rising pressures and the inevitable responses stands the corporation counsel. His job is to contribute creatively, constructively to keep them in pace, to forestall pressures that are overwhelming and to foresee responses that are crippling. He is not a partisan. He is on the side of the corporation's growth and survival, but he cannot afford to stand on the platform, "my company right or wrong." If he does, his corporation will not grow and may not survive.

For growth and survival, in political and economic institutions as well as in the natural world, a certain area of freedom is prerequisite. In a democratic society, that area is defined by no rigid rules, because the areas all overlap. It may be, therefore, that the liberty that you give one man restrains another—as, for example, in some kinds of boycotts and work stoppages or in rebate concessions. Here the arbitrator is really public tolerance. If there is sufficient popular concern about an episode or a course of conduct on the part of a corporation, it will sooner or later find expression in governmental action through administrative agencies, the courts or the legislatures, and it will take the form of curtailing the freedom of the corporation. Now there is not much point in the corporation at that late stage shrieking protests that it is being abused. By that time there is little that can be achieved by advocacy, however skilled and eloquent counsel may be. Obviously, the way to prevent increased curtailments of the corporation's freedom is to avert the rise of pressures to which the curtailments are a response.

I have put all this so far in generalities. This is because, in the first place, I wanted to indicate that, when you deal with corporation law in a complex industrial society such as ours, you are dealing with the whole society and not just a part of it; and in the second place, because there is a general principle of freedom involved and not just the isolated interests of a single business or industry.

Yet, just as our judicial system is litigatory, proceeding through cases, our whole society and especially corporations move forward through events—through things that are done—and not just ideas that are expressed. Tempting as the assignment might be, no corporation counsel of whom I know has yet been hired solely for the purpose of philosophizing generally to elevate the corporation's board of directors. His judgments, like those of the courts, spring more from experience than from orderly syllogisms.
This experiential factor, as opposed to one strictly legal, can be well illustrated by practices followed in dealing with patents in my own industry. The principal source of development with respect to the products and methods of manufacture at Ford comes, of course, from our own engineering staff, a staff that is specifically employed to make such developments. As a matter both of implied contract7 and also, in our Company as in most companies with large engineering staffs, as a matter of express contract, any invention or new idea that may be conceived becomes the property of the Company. Large research and development facilities and staffs could not be maintained if each employee became the owner and patent-holder of any discovery that he might make. The common law recognized this fact to such an extent that even in the absence of an express agreement, and even though the employee may not have been employed specifically for development work, the employer has the right to make use of discoveries that are made on employer's time and with his facilities.8 Most employers, though, will consider such development in determining the employee's salary advancement, and some will give special recognition to unusually creative work through bonus systems.

But many developments are made outside the organization. One source, tremendous in quantity although meagre in quality, is through unsolicited disclosures. At Ford we receive hundreds of such disclosures or offers of disclosure each year, although only a very small fraction of one per cent are novel and have any real merit. The principal problem is to avoid the risk of creating latent liabilities while at the same time giving courteous treatment to these suggestions. Many of them are from customers, the maintenance of whose good will requires that they be accorded fair consideration. There is no feasible way of preventing the suggestions from coming in, or of screening them in advance so that we look at only those of merit. At the same time, the frequency of suits alleging use of an idea confidentially disclosed attests to the risk of accepting unconditionally such disclosures. In such suits the Company is put to the burden of contesting the novelty or value of the idea, at best. But it is in a particularly difficult position if an unsolicited disclosure contains an idea on which at the time the Company's own engineering staff happens to be working.

So far as possible, therefore, we at Ford try to specify the rights of the parties in advance. In the case of an offer of disclosure, we reply that we would be glad to consider it provided the discloser executes

8E.g., Grip Nut Co. v. Sharp, 150 F. (2d) 192 (C. C. A. 7th, 1945).
the usual confidential disclosure form. The form provides that the disclosure gives rise to no rights to Ford to use the idea, on the one hand, and, on the other, that it creates no additional right or remedies for the individual beyond those to which he may be entitled under the patent laws. If the initial letter makes the disclosure, of course, this method is impossible. In such a case we usually return the letter and say that we cannot submit it to the appropriate department for study unless the form is executed.

When a worthwhile idea does come along, we enter into negotiations with a view to buying or taking a license to use the idea. And, I might add, we do not necessarily confine our negotiations to ideas that have such novelty and utility as to be patentable. While we must necessarily limit with strictness our potential liability in the face of the multitude of disclosures that continually are being made, we apply a much more flexible approach where an idea in fact appears to have merit.

A third source of development for an individual member of any industry is, of course, through the efforts of competitors. Practices in this regard vary from industry to industry. In some, advances by each member are guarded jealously against competitors. In others, there is rather extensive interchange of developments through cross-licensing. There has been a trend toward the latter practice, particularly during the past twenty years. To some extent, this has been the direct or indirect result of decisions under the anti-trust laws.

In many industries, however, new patents are no longer of such fundamental nature as to be of great significance to any competitor and often are of transitory utility. Particularly in those industries of large mass-producers, profits depend so significantly upon design, manufacturing and sales considerations that patentable innovations often are of relative insignificance. Even in the 1930's, when restrictive patent practices were common in various industries, liberal cross-licensing arrangements were found to exist in the automotive industry. These gave to the public the benefit of technical advances by whom- ever made. While there is at present no such formal agreement in the industry, most automobile manufacturers have been satisfied in recent years with two or three years of exclusive rights on a patent property, and have been willing then to license the patent at nominal royalty rates or royalty-free.

This is not to say, of course, that our patent laws embody undesir-

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9 See Testimony of Edsel Ford, Hearings before the Temporary National Eco-
able policy, or that it is not to the benefit of society to encourage inventions by granting to the inventor a right, limited in time, to the exclusive use of his invention. In many fields, particularly that of the small manufacturer of components, the patent laws provide worthwhile incentives. But here again the corporation counsel does not advise his company with reference only to the existing law. He must take into consideration those factors that, in the experience of his company and his industry, indicate doing more than the bare minimum legally required. For it is this kind of foresight that preserves the corporation's freedom.

In his continuous function of avoiding trouble ahead, i.e., further restraints on corporate freedom, the corporation counsel is especially alert to three major means through which those restraints can take form and become effective. One is the introduction of new legislation. Another is the addition of new restrictions or new areas to contractual relationships. And a third is the elusive process by which unorganized public opinion, while taking no formal expression, nevertheless effectively stigmatizes a corporation as just not being allied with the public interest.

On far less general problems than that, it is possible for a sufficient degree of restlessness to occur to precipitate a crisis in corporate freedom. It is not necessary for the general public to be uneasy or perhaps even aware of the problem. A relatively small segment with a common interest can send up the age-old cry, "There ought to be a law." But often when you get into the matter, you will find that more will be risked by the proposed law for one group than will be achieved for another. Indeed, it is quite possible that one segment of an industry will be hurt by remedial legislation that shows promise of relieving another segment of the same industry.

A corporation's freedom is subject, as I have suggested, to restraints other than those expressed in public laws. In order to be able to retain what it needs to operate efficiently, a corporation must restrain its own freedom of action in some particulars. Otherwise it risks the imposition of more severe statutory restraints in the future. An alert corporation counsel constantly should be seeking to learn the direction in which society is moving. Today's aspirations are reflected in tomorrow's law; and no counsel wants his corporation limping along, surly in protest, bringing up the rear in those constantly changing frontiers in human relationships that give the law its flexibility.

Let me emphasize that counsel has a determining voice here, and a highly creative part to play, because there is an opportunity for him to give guidance and point to future laws. Consider, for example,
a general situation that has developed in this country since the First World War. Its full significance was not wholly realized until after the Second World War. With the decline in great personal fortunes and the steady increase in taxes, the historical sources of financial support of important private educational and charitable activities were in great measure being gradually shut off. Large or even adequate individual gifts were becoming more and more infrequent. A notable void was becoming apparent in our social structure in areas where government support was either impossible or undesirable. The continuance and strengthening of these traditionally privately supported activities were not only essential to the economic, social and physical health of our society but indirectly at least to the life blood of the corporations themselves.

Yet if the corporation had moved in to help fill the void, an immediate conflict might have arisen between the corporation's stewardship of shareholder's money and its responsibilities as a citizen. The problem involved both the proper extent and the proper range of contributions to essential activities in the local or national communities. The corporation counsel cannot satisfy an imaginative and responsible management simply by pointing out limitations. He must construct an affirmative policy that will win the approval of the public and of the shareholders and, if a test comes, of the courts.

Where does he begin?

The common law established an insufficient guide for resolving the problem: a corporation gift for charitable or educational purposes was proper only if it appeared to result in some direct and proximate benefit to the corporation or tended reasonably and directly to promote its purposes. Stated with such generality, of course, the rule had little meaning, and specific content had to be sought from the case law.

A lawyer for a corporation even thirty years ago certainly would have advised that his client should be conservative in making donations. The principle tended to receive a restrictive application at common law. Between 1880 and 1900, for example, there were decisions in various jurisdictions holding it ultra vires for a corporation to make donations for religious or school facilities for employees and their families, or for projects such as international festivals even if they

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would tend to increase the number of the corporation's customers.\(^{12}\)

While there was some evidence that a more liberal view was emerging\(^{13}\), the case law was at best conflicting, and at worst positively restrictive.

Despite the restrictions, or at least the uncertainty, of the common law as to corporate philanthropy, corporations were subject to increasing pressure, both from within and without, to recognize a charitable responsibility. In the face of uncertainty and risk in the light of outmoded common law decisions, our corporations responded to these pressures. While no responsible corporation management consciously undertook, I think, to exceed its authority under applicable legal rules, there is no question that corporation counsel resolved the uncertainties of the common law rules in favor of as liberal a construction of the permissive limits as possible. They went as far as they reasonably could. And they would have gone farther, I think, had there been reliable legal precedent to support them. The problem became one of clarifying and modernizing the law.

Here I think the corporation counsel played a major role in advocacy. Test cases were instituted and skillfully argued. Policy statements to shareholders were carefully drafted. Legislatures were urged to liberalize the laws to conform to new realities.

And many of the legislatures responded. More than half of the states now have statutory provisions authorizing corporate donations for general charitable purposes. While in some cases they seem merely to restate the common law rule, many others go much further and purport to permit such contributions without regard to business purpose.\(^{14}\) Questions have been raised as to whether such statutes can be constitutionally effective as to previously organized corporations. That issue was litigated in the now famous *A. P. Smith* case\(^{15}\) in New Jersey. There it was held that subsequent liberalizing legislation of this type does not violate the shareholders' right of contract. While there may be some question, in the light of the opinion in the *Smith* case, as to just how far the New Jersey statute expands the powers of corporations to make donations for general educational purposes,\(^{16}\)

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\(^{12}\)See, e.g., *In re Branksea Island Co.*, 1 Meg. 12 (1888); *People ex rel. Moloney v. Pullman's Palace Car Co.*, 175 Ill. 125, 51 N. E. 644 (1898); *Davis v. Old Colony R. R.*, 131 Mass. 258 (1881); *Tomkinson v. South-Eastern Ry.*, 35 Ch. D. 675 (1887).

\(^{13}\)See *Steinway v. Steinway & Sons*, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718 (1896).

\(^{14}\)See, e.g., *Mich. Gen. Corp. Act § 10(k); Del. Corp. L. § 122(g); N. Y. Gen. Corp. L. § 34*.


\(^{16}\)The decision of the Smith case, insofar as it bears on guides for corporate giving, may be summarized as follows: a corporation may make a charitable dona-
the approach of both the statute and the court was clearly an attempt
to relax the common law "direct benefit" rule.

While state legislatures were thus adding liberalizing amendments
to their corporation laws, corporations amended their charters ac-
cordingly, and Congress acted to amend the tax laws to remove the
tax penalty on donations. The Revenue Act of 1936 added what is
now known as Section 170 of the Internal Revenue Code, permitting
corporations to deduct up to 5 per cent of net income for charitable
contributions.

The result has been a tremendous burgeoning of corporate phi-
lanthropy. From a total of thirty million dollars in 1936, corporation
giving has grown to nearly half a billion dollars a year. The measure
of the significance of these figures is readily apparent from the fact that,
since 1944, recorded charitable contributions by corporations in this
country have exceeded in each year the total collections of all com-
munity chests in the United States.

In the face of liberalizing legislation apparently broadening the
scope within which corporations properly may engage in philanthropic
activities, and with the ever-increasing pressure in fact to broaden such
activities, the need for policies to guide the exercise of judgment in
such affairs has become even more urgent.

Here the corporation counsel is not being asked to move ahead of
management, but only to keep abreast of it and to guide it. This is a
matter primarily of keeping constantly in sight the broad picture, of
understanding the general trends of our society. Management itself
is exposed to that society in a hundred different ways, and a good
management wants to move with it. The corporation that is aware of
the opportunities, and not merely the obligations, of citizenship wants
to go beyond what it is required to do, legally or by other pressures,
because corporations cannot live on a day-to-day basis. Any major
corporation needs a reservoir of good will. A reservoir of good will is a
sufficient body of people who will resent unjust attacks on the corpor-
ation because they know something of the direction in which it is
moving, and they approve. Consequently, modern management is
watchful of any reasonable opportunity to extend the responsibility
of the corporation as a citizen. Counsel has a determining voice here,
and a highly creative part to play.

These examples of the corporation counsel's activities and enlarged

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<th>Condition</th>
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<td>(i)</td>
<td>not made to further personal ends</td>
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<td>(ii)</td>
<td>not excessive in amount</td>
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<td>(iii)</td>
<td>made to a worthy cause</td>
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<td>will aid the public welfare</td>
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(a) as a private corporation and (b) as part

of the community in which it operates.
interest point to the recognition of the major fact in his professional life. That fact is that where once he functioned as an expert in the law as it affected corporate behavior, he must now be a constant and sharp-sighted student of the trends of society as a whole. He must recognize the social nature of his corporation—that it is something more than a legal fiction by which a group of managers operate a business for a large number of absentee owners. It would be good for the perspective of every corporation lawyer to consider, as Professor Berle has done in his recent book, what might happen if a modern large corporation were suddenly, by act of the state, court decision, or in some other fashion deprived of its supposed legal existence:

"... a moment of astonishment might affect the minds of its directors, officers, employees, customers, creditors, and so forth. But one imagines that the instantaneous reaction would be one of mild amusement—like that pictured in a famous cartoon showing a workman at the top of a vast dam bellowing through a microphone to a workman at the bottom of it that the dam had been declared unconstitutional. The dam would still be there—and so would the corporation. Clearly it is not the law, with its fiction of juristic personality, that supplies the life blood and beating heart of these vast mechanisms. If the law, acting through some instrumentality, declared that they did not exist, the entities would be found to be not fictitious, but factual. The railroad would go right on running. The mail order house would continue to ship to its customers. The steel company would continue to transport ore and process it into steel. The men grouped in these concerns would continue to do what they were accustomed to do. The community would still look to them for supply. Buyers from them would continue to pay their bills. Sellers to them would continue offering their wares. Plant executives would go down to the office as usual... In vain would some lawyer complain that the directors could no longer fix policy, or the president give orders.... The huge machine would keep right on rolling. This is of the essence of an institution, and not of a legalistic creation."  

We in America do not live in a doctrinaire society in which new laws are normally enacted without regard to facts and realities. The law-making process is slow and, on the whole, pretty well integrated with the play of events on public opinion. So it becomes necessary for modern management to consider how the facts and realities in a corporation's affairs will square with the public philosophy, with the values of the total national community and its sense of where it is

\cite{Dodd, For Whom Are Corporate Managers Trustees? (1932) 45 Harv. L. Rev. 1145, 1160.}
\cite{Berle, The 20th Century Capitalist Revolution (1954) 18.
headed. This is not just a matter of what is legal or illegal or doubtful today; it is at the very root of the problem of the area of freedom that the corporation will have tomorrow.

If corporation counsel is to serve his company effectively then, he will find himself deep in an extra-legalistic judicial activity. But his standards of reference are broader than the statute books or the opinions of the courts. In recent times the lawyer too often has been no closer abreast of society than the present state of the law itself, which necessarily always lags behind. This is something with which some practitioners can still content themselves. But any corporation counsel worthy of his trust must anticipate the popular judgments that lead legislators to make new laws and judges to hit upon new interpretations of old ones.

This is not to imply that counsel should be a weather-vane entirely subservient to the popular view, or that he should follow a quixotic line. There will be occasions when he will be constrained to take an unpopular position—when he will advise his client to stand squarely on its rights under the law. And any lawyer worthy of the name will not hesitate to fight ill-founded claims or unreasonable demands; and he will avoid counselling the easy road of appeasement. But his client's interests will not be well served by advice that ignores the deeper aspirations of his time.

The point I want to make is that the court and jury that concerns the corporation counsel today is not sitting on an isolated case in a single courtroom. It sits as a perpetual grand jury with powers just as sweeping. It sits continuously across the land; and with the speed of modern communications it can get and appraise the evidence very rapidly indeed.

To deal with this great force, counsel must be judging constantly the pace and direction of progress of the free society in which his company exists. His constant observation and appraisal of the new ideas of conduct, as they become current, must be sound. His estimate of their real vitality as opposed to their temporary spurts of liveliness must be wise and objective.

In the practical terms of his own company's affairs, this means that counsel judgess his company's actions before they are undertaken, in relation to their possible contribution to a new need or to a public clamor for a new law.

This is, of course, a function of the highest political order. But after all it is the same function embraced two centuries ago by lawyers like John Adams and Josiah Quincy, and a few generations later by Webster and Clay. And just as these men were shapers of law in days
when political relationships formed the major domestic preoccupation of the nation, the corporation counsel should be a shaper of laws today when economic relationships form a major domestic preoccupation of our society. And the quality of his advice—his real effectiveness—will be just as good as the quality of his broad judgment and the depth of his insight into the world around him. Nevertheless, for better or for worse, he will affect the growth of corporation law and set the broad terms under which our future economic life will be conducted.

And so the corporation counsel of today, if he is to live up to the challenge of his new responsibilities, will shun the kind of advice that is motivated by a desire to preserve the rubrics of a vanished era; he will be alive to the social, economic and political implications of the time; he will avoid a narrow, shortsighted approach to his corporation's problems; he will have the courage to advise against a business program or device which, although legally defensible, is in conflict with the basic principles of ethics. Failing this, he not only will be ignoring his obligations to his profession, he will be doing a disservice to his company, which may find itself in the position of winning a legal battle but losing a social war.