the-world," then your being would no longer be constituted by a *rationalist* foundational horizon.

At this point in our dialogue, contradictory critiques of Engel's analysis flowing from within a *liberal rationalist* horizon have been heard. We then listened to a critique of Engel's analysis, as well as a critique of the foundations which underlie *liberal rationalist* "objectivity," from a "voice" emanating from within a *critical rationalist* horizon. We will now hear a *liberal rationalist* response to the critique of the *critical rationalist.*

### *C. Liberal Rationalist Response to the Critical Rationalist Critique*

The *liberal rationalist* response to the *critical rationalist* critique will vary depending both upon the particular criticism and the degree to which the critique threatens the assumed legitimacy of *rationalism* as a foundational horizon. The easiest course is to totally ignore the *critical rationalist* critique. Another option is to acknowledge the critique but either: (a) brush it aside as quaint; (b) brush it aside as irrelevant; (c) interpret the critique so as to lessen its bite; (d) employ *rationalist* aesthetic criteria as a basis to discount its "power";[120] (e) acknowledge the validity of the critique, but point out that although there are problems with *liberal rationalism,* it is the best we can do, so the minor glitches should be ignored; or finally, if none of the above work, (f) accuse the critics of being paternalists, immature ideologues, cynics, or nihilists.[121]

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120. *See* Schlag, *supra* note 6, at 1212-13 (describing *rationalist* aesthetic criteria as including: (1) representational accuracy, (2) consensual acceptability, (3) coherence, (4) elegance, (5) sweep, (6) determinacy, and (7) realizability).

121. While this characterization of a probable response by the *liberal rationalist* might seem extreme or uncharitable, it is not in my judgment clearly improbable. Stated in more eloquent language, Paul Carrington's article relating to "belief in the idea of law" proceeds along the line stated in the text. Although Carrington recognizes that certain "glitches" are operative in the legal system, e.g., "vulnerable" officials who are subject to the biases of "self-aggrandizement," socio-economic "class," or "altruism," which may affect legal "objectivity," the overall legitimacy of the system must be believed in. *See* Paul D. Carrington, *Of Law and the River,* 34 J. LEGAL EDUC. 222, 226-27 (1984). Carrington believes if one does not accept a *liberal rationalist* notion of "law" and "objectivity" the only alternative is nihilism, revolution, or corruption. *Id.* Perhaps Carrington is merely reacting against the "negativism" of the Critical Legal Studies movement. The problem still remains, however, that the *liberal rationalist* cannot come up with an adequate response to the *critical rationalist's* critique of the legal system as it actually works in practice.

In the final analysis, neither the *liberal rationalist* nor the *critical rationalist* can come up with a positive "program" which is able to deal effectively with the insights

The responses stated above are basically all avoidance tactics that do not adequately address the substance of the *critical rationalist* critique. The better response would be for the *liberal rationalist* to acknowledge the critical "bite" of the critique and search within a *rationalist* horizon for a better ideology, world view, or paradigm. Finally, if a *liberal rationalist* has *really* understood and accepted the critique as a whole, he or she could then engage in a search for a better foundational horizon from which to understand reality.[122] This assumes, of course, that the *liberal rationalist* would judge such a "search" to be worth the effort.

Having listened to a rather limited response from the *liberal rationalist* to the *critical rationalist* critique, it becomes apparent that our dialogue seems to have broken down somewhat. Although the *critical rationalist* seems to be able to understand the *liberal rationalist*, the *liberal rationalist* does not seem to either understand or to be able to respond effectively to the *critical rationalist*. Employing Kuhnian terminology, the two horizons seem to be "incommensurate," i.e., one cannot lay them down on the same "plane" or "playing field" and compare them within the same "logical" framework.[123] Because

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found in the *critical rationalist* critique. Each tries to perform the difficult (impossible?) task of coming up with a *non-rationalist* account (practice?) of "objectivity" from within a *rationalist* horizon.

122. Of course, if the *liberal rationalist* or you, the reader, have *really* understood the notion of horizon, and have critically understood it to be anterior to the fully conscious world of human knowing and deciding, then you would no longer be operating within a *liberal rationalist* horizon.

Finally, if the *liberal rationalist* or you, the reader, have done more than critically understood the notion of "foundational horizon" and the importance of "practice," and actually have critically judged the notions of "foundational horizon" and "practice" to be existent in your own cognitive processes, and then over time, you have acted to integrate this judgment into your own "foundational horizon" or "practice," then you would no longer be operating within a *critical rationalist* foundational horizon, but rather, would begin to operate within that of a *critical realist*.

123. Kuhn describes the "incommensurability" of scientific "paradigms" as follows:

> If there were but one set of scientific problems, one world within which to work on them, and one set of standards for their solution, paradigm competition might be settled more or less routinely by some process like counting the number of problems solved by each. But, in fact, these conditions are never met completely. The proponents of competing paradigms are always at least slightly at cross-purposes. Neither side will grant all the non-empirical assumptions that the other needs in order to make its case. Like Proust and Berthollet arguing about the composition of chemical compounds, they are bound partly to talk through each other. Though each may hope to convert the other to his way of seeing his

of this lack of a common "playing field," the *liberal rationalist* can only attack the *critical rationalist* on the basis that the *critical rationalist* cannot come up with anything better.

If understanding between the *liberal rationalist* and the *critical rationalist* seems problematic because of "incommensurability," mutual understanding is rendered even more difficult when the "voice" of the *critical realist* enters the dialogue. In an attempt to ameliorate or bridge this problem of incommensurability, the next part of our dialogue will involve a transitional movement out of a *liberal rationalist* horizon into that of the *critical realist*. On an expository level, this transition will involve a fundamental shift in foundational context.[124]

### *D. Transitional Movement Toward a Critique from Within a Critical Realist Horizon*

The critique of Engel's discussion, and what is now more fully understood as a *liberal rationalist* horizon, takes a radically different turn when one assumes a movement out of a *liberal rationalist* horizon. Assuming an initial movement out of the *liberal rationalist* horizon by the (former) *liberal rationalist*, and hypothetically by Engel himself, he or she would want to question his or her own *liberal rationalist*

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> science and its problems, neither may hope to prove his case. The competition between paradigms is not the sort of battle that can be resolved by proofs. . . .
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> More is involved, however, than the incommensurability of standards. Since new paradigms are born from old ones, they ordinarily incorporate much of the vocabulary and apparatus, both conceptual and manipulative, that the traditional paradigm had previously employed. But they seldom employ these borrowed elements in quite the traditional way. Within the new paradigm, old terms, concepts, and experiments fall into new relationships one with the other. The inevitable result is what we must call, though the term is not quite right, a misunderstanding between the two competing schools.

KUHN, *supra* note 99, at 147-49.

124. The statement in the text may seem puzzling to you, the reader. For if you understand "knowing" as merely involving taking a "rational" *look* at the words in the text, then the only level of understanding possible is that which occurs on the expository level of textual exposition. The point of the *critical realist*, however, is that such "surface" knowing will only provide you with an *ideal* understanding of the *critical realist* position. A more in depth understanding can only occur through a lived process involving the appropriation and development of your own consciousness. *See generally* Fejfar, *A Road Less Traveled*, *supra* note 46 (detailing a textual exposition of the notion of "appropriation of consciousness").

horizon in order to ask if such a horizon contains any "blinding prejudices." Additionally, Engel, as well as you the reader, might raise the following critical questions: (1) Does it make sense to employ the general methodology used by Engel? (2) Why would one start with the general assumption of the legitimacy of the legislative process? (3) Why would one assume that ethics merely involves rules, or alternatively, that individual ethical decision making is arbitrary and "subjective" while economic theory is assumed to be "objective"? (4) Why is corporate voluntarism ultimately defined exclusively as a "product" rather than as involving personal and corporate "being-in-the-world" which is anterior to the conscious use of analytical reasoning? (5) Why are the values associated with stock ownership unreflectively accepted as having priority over the obligation of corporate actors to act in accordance with contextual judgments of natural duty? (6) Is an appeal to a property-oriented ideological stance a sufficient response? (7) Does not the mere appeal to ideology incorrectly assume that reality or meaning is only a matter of consciously held ideas, not a matter of "being-in-the-world" which encompasses but goes well beyond our consciously held ideas?

Additionally, if one has understood that the microeconomic theory assumed by Engel is itself partially constitutive of our societal "being-in-the-world,"[125] then is not the objectivity of such a theory

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125. *See generally* BERGER, *supra* note 116. *See also* Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW 281 (David Kairy ed. 1982):

> If we start to look at the world this way—no longer as some determined set of "economic conditions" or "social forces" that are pushing us around but rather as in the process of continuous creation by human beings, who are constantly reproducing the world they know because they (falsely) believe they have no choice—we will obviously bring a very different approach to the debate over whether legal change can ever effect real ("social and economic") change, or whether law is wholly dependent on the real, "hard" world of production. For if social reality consists of reified structures, "law" and "the economy" are *both* belief-systems that people have externalized and allowed to rule their lives. . . .
>
> Obviously there are many constraints on human social activity—scarcities of desired things, finite resources of bodies and minds, production possibilities of existing and perhaps all future technologies, perhaps even ineradicable propensities for evil—that any society will have to face. What is false is to think that these constraints somehow necessarily dictate that we must have some specific set of social arrangements that we are already familiar with, in history or in our own time; that the human race can live only within its real constraints within a few specific ways (e.g., that it *must* choose between liberal capitalism and state socialist dictatorship).

*Id.* at 290-91.

called into question? Furthermore, if such theory does have a constitutive effect on our society, then does it not make sense to question whether or not this theory operates in a morally prescriptive manner as to who *we are* as human beings in society? Taking this a step further, if we assume that microeconomic theory does contain an ethical content (that we can objectify and use other people for our own unreflective self-interest),[126] then can we conclude that the market itself, as so constituted, is morally neutral? And if it is not morally "neutral," is the liberal political theory which relies on such a conception of the market subject to criticism?

Finally, returning to the initial question, how can Engel assume the legitimacy of the legislative process at all when he has failed to present arguments that corporate America does *not* inevitably affect our society's overall "being-in-the-world," or culture, and thus does *not* have a profound impact on the legislative process at multiple levels? If this influence *does* have a constitutive effect on our society generally, and more particularly on legislative enactments, and *if* this influence is constituted by a corporate "being-in-the-world" which *is* characterized at its core by unreflective, self-interested, profit maximization, then at a minimum, is not our legislative process in danger of merely becoming a legitimating tool for self-interested corporate power? If this influence is present, does this entail a need to re-think our idea of the corporation and require that we act to constitute a different mode of corporate "being-in-the-world"?

As noted previously, Engel does raise the legitimation problem within the narrow context of corporate lobbying as an issue in need of further discussion. Moreover, he does recognize that corporations *do* affect our society in innumerable ways. Unfortunately, writing from within a property-oriented *liberal rationalist* horizon, Engel assumes the larger legitimation problem away.

Having undertaken a transitional movement out of the *liberal rationalist* horizon toward that of the *critical realist*, our dialogue now moves toward a critique emanating from within a *critical realist* foundational horizon. As suggested in the introduction to this article, the "voice" of this critique, on the "conversational" level, is my own. This voice does not simply "appear" out of a "rational" vacuum. The "objectivity" of the analysis presented is grounded in authentic subjectivity in community, rather than a *rationalist* psuedo-objectivity. Thus, I acknowledge that the position presented in this article was

126. *See infra* note 154.

developed, in part, as a result of my sustained interaction with family, friends, former teachers, past and present colleagues, as well as the community of scholars whose works I have read.

Perhaps the *liberal rationalist* reader will now think that he or she can disregard the analysis presented in this article because it does not seem sufficiently "objective." Such a result is hardly surprising. Nevertheless, as will become apparent in the discussion which follows, I suggest that even if you do reject the analysis presented in this article, such a decision can only take place within the context of your own foundational horizon—which necessarily will have been formed in the context of your own "subjective" personal history. Our dialogue will now continue, with the "voice" of critique emanating from within a *critical realist* foundational horizon.

### *E. Critique from within a Critical Realist Foundational Horizon*

Just as the various modes of *rationalist* foundational consciousness exist as foundational horizons, so too does *critical realist* foundational consciousness;[127] each constituting the core of an individual's personal horizon and "being-in-the-world." A *critical realist*, however, critically judges the actual existence of "foundational horizon" and that one foundational horizon is not just as "good" as another. A *critical realist* foundational horizon is critically judged as more adequate than the horizons flowing from the previously mentioned modes of foundational consciousness, i.e., *liberal rationalist* and *critical rationalist*.[128] Thus, from within the context of a *critical realist* foundational horizon, *critical realism* is asserted as a *position*, while all other theories which flow from or justify other foundational horizons are referred to as

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127. Critical realism, as an analytically thematized philosophical position, was first developed by Bernard Lonergan in INSIGHT A STUDY OF HUMAN UNDERSTANDING (1956). Lonergan later clarified and supplemented the critical realist position in METHOD IN THEOLOGY (1973). The position that I have developed in this article goes beyond Lonergan's work.

128. Within the broader category of *liberal rationalist* foundational consciousness, I am including liberal consciousness which could manifest itself in *conventional moralistic*, *pragmatic rationalist*, *empiricist rationalist*, and *idealist rationalist* foundational consciousness. *See* Fejfar, *A Road Less Traveled*, *supra* note 46, at 346-61 (discussing these modes of foundational consciousness). This judgment of relative adequacy is one which is relatively stable, but at the same time provisional. While the *critical realist* position is, of course, open to alteration and refinement, it seems that at the present state of human evolution, with the constituents of foundational consciousness that seem to be available to us as a species, there are certain constraints on how it is that we know reality and make decisions. The *critical realist* attempts to develop consciousness to the limit of those constraints. *Id.* at 356.

*counter positions. Critical realism* asserts, for example, that any *rationalist* justification for a *rationalist* "world view" (foundational horizon) is necessarily inadequate since such a justification improperly assumes that knowing results primarily from the use of the cognitive operations of analytic understanding, when, in fact, knowing does not.

The *critical realist* position, unlike the *rationalist* counter position, is asserted as a fact which is verifiable through a dialectical[129] process involving communication, critical reflection, openness to transcendence, personal growth, decision, and action.[130] The "subjective-value"/"objective-science" distinction asserted by the *liberal rationalist*, therefore, would not be considered a position within the context of a *critical realist* foundational horizon. Rather, it is a counter-position because science can only operate within a tradition or a horizon which is prior to science and which is constituted by a "being-in-the-world" permeated with values and "prejudices."[131] The task, therefore, is to transcend the subjective-objective dichotomy and develop a personal horizon which has at its core a foundational horizon constituted by a "being-in-the-world" which is composed of "prejudices" that are "enabling" rather than "blinding."[132]

While I will set forth some of the main elements of a *critical realist* position, merely *understanding* the position as an interesting, if plausible, *idea* is not sufficient. Rather, what is required in order to assess the adequacy of the position presented here is that you engage in a sustained dialectical process involving communication, openness to transcendence, critical reflection, personal growth, decision, and

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129. In using the term "dialectical" here, I mean to suggest an interactional interplay and do not use the term in the sense of describing oppositional poles.

130. *See infra* note 133 and accompanying text (discussing the sustained dialectical process).

131. Value permeates scientific inquiry in at least two ways: (1) Implicit value judgments of the scientist as to the worthwhileness of: (a) being a scientist; (b) being employed at a given institution; (c) engaging in particular areas of inquiry rather than others; (d) pursuing the verification of a particular theory based on a desire for answers to these particular problems in order to satisfy curiosity, or to help humanity, or to produce military hardware, or to bolster one's reputation within certain groups in the scientific community; and (2) By generating knowledge of reality in some areas and not others, the results of scientific inquiry act to help constitute a world of meaning in which society will find some sets of social arrangements, or areas of development, or activities to be judged as realistically more possible to engage in than others. An example would be research relating to fuel efficiency versus research directed toward solar or wind generated energy sources.

132. *See* text accompanying note 117. Here the terms "blinding" and "enabling" are used in a broader sense than that suggested in Gadamer's work.

action.[133] The assertion which I am making is that, if over time you seriously engage in this radically personal dialectical process, you

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133. "Openness to transcendence" can be understood on one level as the unrestricted human drive, or existential orientation toward absolute relational meaning. The universal presence of this drive or orientation can be empirically verified through rigorous phenomenological reflection as well as in psychological theory. *See, e.g.*, ANDRAS ANGYAL, NEUROSIS AND TREATMENT: A HOLISTIC THEORY (1965):

> To be [human] is to mean something to someone else. This existence we cannot directly create for ourselves; it can only be given to us by another.
>
> . . . .
>
> The unquenchable longing to come into existence in this sense is not a prerogative of reflective or sensitive natures. Only the conscious formulation of this need requires a degree of sophistication. The need itself is an all-embracing need of everyone, whether he be clever or stupid, sophisticated or ignorant, sensitive or callous. The need does not depend on the degree of maturity. Only the manifestations of the need are determined by that. It is the crux of our existence from the cradle to the grave. When we are babies this need expresses itself in things that concern us as babies, and when we are adults in things that concern us as adults, but it is the same superordinate trend of our life at all stages. We exercise our capacities in reference to this broad trend, and our physiological functions, whatever their degree of autonomy and standardization, work within this frame of reference.

*Id.* at 18-19.

I suggest that, on a different level:

> "[o]penness to transcendence"—can be concretely actualized in three different but interrelated types of transcendence: developmental, operational, and numinal.
>
> A person is open to transcendence developmentally, for example, when he or she is open to, and cooperates in, his or her development of the cognitive capabilities of synthetic relational intuitive understanding, practical common sense understanding, abstract analytic understanding, passionate caring love, creative intuitive imagination . . . . Operationally, a person is open to transcendence when, in a concrete situation, he or she is appropriately attentive, intuitively intelligent, practically intelligent, analytically intelligent, reasonable, responsible, relational, creative, and loving. Finally, a person is open to transcendence numinally, when he or she is open to the novel, mysterious, wondrous, or spiritual dimensions of existence.
>
> Full acts of communication, critical reflection, decision, and action, are all acts which find their full operational expression in transcendence. Similarly, personal growth finds its full expression in developmental transcendence. The full expression of developmental transcendence cannot take place without operational transcendence; and, the full expression of operational transcendence cannot occur without developmental transcendence. Finally, numinal transcendence, while certainly occurring within a developmental and operational context, helps to enable us to reach beyond and transcend our current developmental integration, our current understanding, and our current judgments.

Fejfar, *A Road Less Traveled*, *supra* note 46, at 345 n.43.

will judge the position of *critical realism* suggested here to be more adequate than the *liberal rationalist* counter position. In order to gain some understanding of the *critical realist* position in as concise a manner as possible, the discussion below will present selected relevant psychological materials.[134]

The cognitive theories of Jean Piaget, Lawrence Kohlberg, Carol Gilligan, Erik Erikson, Lawrence Kubie, Bernard Lonergan, and Robert Ornstein suggest that human beings, in fact, develop different cognitive operations or capabilities.[135] Such development is not necessarily uniform as to time or degree, but it appears there are certain cognitive capabilities which can develop and be utilized in every day

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134. Consistent with the previous discussion relating to the provisional nature of economic and sociological theory, the same cautions must be asserted in relation to theory relating to developmental psychology. While there may be certain sociological or physiological constraints upon *how* humans develop cognitively, and *when*, it is unclear exactly to what extent those restraints are culturally dictated, and thus provisional, or non-cultural and more stable. Thus, while past research can suggest what cognitive capabilities have been present in human beings given certain socio-economic conditions, etc., and at what ages they have developed, this research cannot necessarily be cited for the proposition that some other developmental paths could *not* result, given changed societal conditions. *See* Kenneth Keniston, *Psychological Development and Historical Change*, *in* EXPLORATIONS IN PSYCHOHISTORY 149 (Robert J. Lifton & Eric Olson eds. 1974) (discussing the provisional nature of developmental research):

> We as yet know very little about the precise sequences of development in each of the areas of human growth that can be distinguished. . . . But what we do now know consistently supports the hypothesis that human development, from infancy onward, is contingent upon the characteristics of the environmental matrix.
>
> This hypothesis, if correct, has important implications for the study of historical change. For, in general, members of any given society in any given historical epoch tend to share a highly similar developmental matrix. It follows that, despite the variations in human development generated by constitutional and idiosyncratic differences, there should be important constancies in the *modal developmental profile* of adults. Put differently, people in any given society or subsociety tend to resemble each other not only because they have internalized the same roles (socialization) and the same symbols and values (acculturation), but also because they have "leveled off" at approximately the same point in their development in each of the sectors of human growth.

*Id.* at 160.

Thus, it is quite possible that the "virtues" of care and responsibility suggested in Carol Gilligan's work, for example, if fully integrated into the legal and business "worlds," could have a dramatic effect upon both individual cognitional development as well as upon dominant modes of social interaction. Gilligan, *supra* note 91.

135. *See generally* Fejfar, *A Road Less Traveled*, *supra* note 46 (discussing in detail the deployment of various cognitive capabilities within a person's developmental matrix).

living in the absence of biological, psychological, sociological, or environmental obstacles. For instance, an adolescent, by high school age, will normally have developed cognitive capabilities of creative intuitive imagination, practical common sense understanding (involving both concrete analytic understanding and synthetic relational intuitive understanding), concrete interactive judgment, and child-oriented love, through a combination of biological growth and socialization.[136]

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136. Concrete analytic understanding is the cognitive capacity for dealing with varied but immediate tasks. Given sufficient prior experience it deals well with a similar situation at hand. (For example, figuring out how to take apart and reassemble a piece of machinery, or building a shed.) It does not do very well, however, at thinking about multiple and varied possible combinations of ideas. Concerned primarily with the immediate present, and unable to postulate and analyze alternative possible future scenarios, concrete analytic understanding tends to let the future take care of itself. Thus, planning for the future, when it does take place, tends to be not very well thought out since only one linear scenario tends to be envisioned. *See* Fejfar, *supra* note 51, at 251-52 (discussing the developmental theory of Jean Piaget).

Analogous to the cognitive capability of concrete analytic understanding is synthetic relational intuitive understanding. While synthetic relational intuitive understanding deals with the world of immediacy, it differs from concrete analytic understanding. While concrete analytic understanding involves a conscious cognitive capability which tends to break down immediate problems into manageable units and then tries to solve them, synthetic relational intuitive understanding involves operations which seek out interconnections, and is more likely to involve feeling and symbol. *See id.* at 267-68. Carol Gilligan suggests that as our society currently exists, girls or women are much more likely to more fully develop synthetic, relational intuitive understanding than are boys or men. *See* Gilligan, *supra* note 91. Finally, the cognitive capability of creative intuitive imagination involves the capacity for imaginal play and free association. *See* Fejfar, *A Road Less Traveled*, *supra* note 46, at 332-34.

In knowing his or her world the child employs both intuitive and analytic understanding, and integrates these cognitive capacities with the cognitive capacity for interactive judgment. Given enough experience in a particular area of human living a child will develop a corresponding capacity for practical common sense understanding and judgment. For example, if a child knows that he or she wants to catch fish in a pond or a lake, he or she should not throw rocks in the water. *See* Fejfar, *supra* note 51, at 270.

Finally, by adolescence a child will normally have developed a cognitive capacity for feeling. The child will love and have received love from his or her parents. The child's love, however, while it may begin to be directed outward toward the care of others, tends to be me-centered and dependent. The child has not sufficiently developed cognitively or socially to have acquired the sustaining, self-revealing, and self-giving love of which an adult is capable. *See id.* at 241.

While many children fully develop and ultimately integrate the cognitive capabilities of concrete analytic understanding, synthetic relational intuitive understanding, creative intuitive imagination, interactive judgment, and child-oriented

In adolescence and early adulthood, a person can develop and integrate additional cognitive capabilities with those already discussed. These new cognitive capabilities can be described as formal analytic understanding, passionate caring love, formal intuitive understanding, interrelational interactive flexibility, and interactive critical judgment.[137] If a person fully develops all of the above cognitive capabilities

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love, even these basic cognitive capabilities can be underdeveloped or repressed to one degree or another. For example, the capacities for playful, creative, intuitive understanding can be repressed through excessively rigid "child rearing." Similarly, all feeling whatsoever, including dependent love, can be "frozen" as a defensive response to unpredictable, violent, or abusive behavior engaged in by the parents of the child. *See generally* ALICE MILLER, FOR YOUR OWN GOOD (1984). Later in life, a process of "psychic conversion" is necessary to one degree or another in order to bring about the development characteristic of a mature authentic self. *See* Fejfar, *supra* note 51, at 284-87.

137. Formal analytic understanding deals with non-immediate, abstract ideas. Its special competence is to break down ideas, concepts, or theories into distinct component parts in order to generate clear and distinct concepts, rules, or generalizations with respect to such components. *See* Fejfar, *supra* note 51, at 268.

Formal analytic operations proceed from the "conscious." An adult development and integration of the creative intuitive imagination and synthetic relational intuitive understanding—what can be generically described as formal intuitive understanding— proceeds from the "pre-conscious." Formal intuitive operations include the "intuitive flashes" of the scientist, the religious experience of the mystic, and the inspiration of the artist. One of its strong points, however, is its ability to understand human culture. Since it is creative, synthetic, and feeling laden, rather than linear and detached, it is able to get beyond, as well as apprehend, the dominant cultural symbols, values, and interrelationships which constitute our societal "being-in-the-world," in a way which formal analytic understanding cannot. *See id.* at 267-68.

In a more practical vein, the development, integration, and use of intuitive cognitive processes in conjuntion with analytic understanding, is required in order for a business executive or manager to effectively manage an organization. Management consultant Henry Mintzberg makes a number of observations which support this conclusion. In studying the *actual* thought processes and work habits of some top corporate executives, Mintzberg found that these executives engage in synthetic "intuitive" thought processes which involve "getting a feel" for the "big picture," rather than spending significant time analyzing written, "hard" data. Executives revel in ambiguity and prefer action over conscious reflection. Further, they prefer auditory personal communication over written communication and are "intuitively" able to deal with a complex, dynamic operational environment, which cannot be adequately dealt with through the use of linear analysis. *See generally* HENRY MINTZBERG, MINTZBERG ON MANAGEMENT 49-55 (1989). Additionally, in contrasting preconscious intuitive thought processes with formal analytic thought processes, Mintzberg states that "several studies have shown that—analysis, when correct, tends to be precisely correct, when it errs it can produce strange answers." *Id.* at 70. "Intuition, in contrast, while not usually precise, is generally close enough on certain kinds of issues." *Id.* Finally, while formal analytic processes tend only to produce conventional, unimaginative "solutions" to problems, synthetic intuitive thought processes

and then integrates them through a sustained dialectical process of communication, critical reflection, openness to transcendence, personal growth, decision, and action, then such a person will have developed into a *critical realist* mode of foundational consciousness or what can be described as an adult, critical-relational mode of moral being.[138] The development of the type of "consciousness" which constitutes "critical-relational moral being," however, does not necessarily occur. Though one might assume that all persons who are

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produce innovative solutions. *Id.* at 53. Good management involves the development and integration of powerful intuitive thought processes with clear-headed logic. *Id.* at 54.

Formal intuitive understanding is also a cognitive attribute or process which is essential to mature moral judgment. While formal analytic understanding may be required to clearly articulate judgments which rely on formal intuitive understanding, such analytic understanding is no substitute for the judgments. This is evidenced by the fact that a nuclear physicist may have no regard whatsoever for the just human expectations and feelings of others, while an uneducated person may exercise sound moral judgment with respect to areas of living in which he or she has had lived experience. *Cf.* DYKSTRA, *supra* note 92 (suggesting that lived experience as a functional equivalent to formally differentiated reasoning).

Additionally, a person having a fully developed adult identity is able to engage in sustained passionate caring love in a way that a child or adolescent cannot. Such love is not detached sentimentality nor a me-centered objectifying passion. Rather, it is a totally engaged, deeply caring, strongly feeling love which manifests itself in committed action. It is such love which is ultimately able to heal neurotic distortions which would otherwise warp the proper functioning of other cognitive capabilities. *See* Fejfar *supra* note 51, at 287, 291-92.

Finally, as there exists a cognitive operation of interactive judgment which functions where only concrete or common sense understanding is present, so also there exists the more fully developed cognitive capability of interactive critical judgment, which occurs in the context of interrelational interactive flexibility. Interrelational interactive flexibility is the cognitive capability which enables a person to flexibly utilize and integrate different cognitive functions, and to draw upon and integrate lived experience from different areas of life. The interactive critical judgment which accompanies and coordinates such flexibility is "critical" not in the sense of being judgmental, but rather is critical in the sense of being an interactive, dialectically open, judgment capability. *See* Fejfar, *A Road Less Traveled*, *supra* note 46, at 337-38. Where such an interactive interrelational capability has not developed, a person tends to have "blind spots" in his or her understanding and judgment. For example, where common sense understanding dominates rather than complements other cognitive capabilities, a person's understanding and judgment will tend to be limited to "getting the job done" (whether the task is relatively simple or complex). Questions and judgments relating to the ultimate consequences of the task or the worthwhileness of undertaking the task are excluded.

138. *See generally* Fejfar, *A Road Less Traveled*, *supra* note 46, at 356-57. Previously, I have used the term "critical moral conscience" to refer to what I am now describing as a "critical-relational mode of moral being." *See* Fejfar, *supra* note 51. I have abandoned the former terminology because it tends to suggest that such development is a static attainment, rather than an ongoing, dynamic way of being.

physiologically capable would automatically reach this state of cognitive development, this is not the case. Rather, it appears that social or environmental factors, personal choice, etc., all have an impact which can either enhance or inhibit such development.[139]

The development and presence of an adult critical-relational mode of moral being in a given person, however, does not mean that a person is fully utilizing all of his or her cognitive capabilities in the same manner at all times. For example, scientific activity as described by Thomas Kuhn involves a combination of cognitive operations, with one operation dominating at various times. Within a given paradigm, when a scientist is merely conducting an experiment, his or her common sense understanding predominates as he or she is concerned with the immediate task of properly conducting the experiment. During the course of the experiment the scientist makes fact judgments as to what the data is, using the cognitive operation of interactive judgment. Next, the data is broken down, clarified, and analyzed using the operations of formal analytic understanding. Finally, the "results" produced by this process are checked against other results, and existing theory, to see if any anomalies exist. Interactive judgment is again used to judge the adequacy of the current theoretical paradigm. When enough anomalies occur which cannot be explained within the context of the current theory, the scientist critically judges the theory inadequate, and then opens up his or her formal intuitive understanding to the search for a new paradigm. When a more adequate candidate is found, the scientist makes a provisional judgment that the new theory is "better" or more adequate, and then new experiments are run, beginning the process anew.

Having established some of the elements of the *critical realist* position relating to cognitive development and integration, our discussion of the position now focuses on what the *critical realist* judges to be some of the "blinding" aspects of *liberal rationalist* modes of consciousness. As suggested above, the scientific process is not one devoid of values and personal choice. A scientist can remain fixated in an old paradigm, refusing to acknowledge its inadequacy. The scientist who does this has uncritically put his or her judgment, as to the validity of the existing paradigm, on "auto-consciousness."[140]

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139. *See generally* Keniston, *supra* note 134.

140. "Auto-consciousness" can involve "anticipatory" or "assemblatory" processes:

It may not, and probably does not, appear to the "empiricist" scientist that he or she is making a decision to stay within the old paradigm based on values, blinding biases, or cognitive underdevelopment. However, the presence of any or all of these conditions prevents the scientist from removing his or her prior judgment of the validity of the paradigm from "auto-consciousness," and critically re-examining it.

Since his or her foundational consciousness or horizon is centered in *rationalist* empiricist and pragmatist constituents, the empiricist scientist is blind to much of reality.[141] Additionally, since such a

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> Anticipatory auto-consciousness involves the anticipatory "re-cognition" of sensory experiences. In other words, we do not "perceive" all of the sensory data which could theoretically be available to our senses. As Alvin Goldman states: "[E]ven though our perceptual system may extract features, what we perceive are patterns composed from these features. The features-extraction, feature-combination processes underlying pattern recognition are not available to conscious awareness. What we are aware of are the patterns." Such preconscious "editing" into manageable patterns, however, does not preclude us from recognizing other patterns in the data. Thus "we frequently perceive a thoroughly novel shape, and perceive it in its full individuality."
>
> Auto-consciousness also involves . . . "assemblatory" processes. At a very basic level, it is these assemblatory processes which on the one hand enable us to smoothly perform complex motor tasks, but equally important, enable us to "know" anything at all. It is in auto-consciousness that complex procedures involving other cognitive capabilities are "unconsciously" or "preconsciously" "coordinated." This is why a person "knows" the world in some manner through the interrelated functioning of the cognitive capabilities of experience, understanding, and judgment, even though he or she may mistakenly *think* that he or she knows the world through "rational" abstract analytic understanding.

Fejfar, *A Road Less Traveled*, *supra* note 46, at 340 (citations omitted).

While "auto-consciousness" is a necessary cognitive capability, like any other capability, its use can be distorted. If a person does not develop and use auto-consciousness sufficiently, then he or she spends a disproportionate amount of his or her time and energy consciously dealing with data, problems, etc., which could be more "efficiently" handled in a preconscious automatic mode. Conversely, however, when too much of one's attentiveness, understanding, judgment and decision are relegated to "rigid" procedures in auto-consciousness, then the result is an inauthentic "forgetfulness" of being fully human. Inauthenticity results because convention and habit improperly reign supreme, even though certain conventions or habits involve elements which are immoral, unimaginative, unintelligent, unreasonable, or lacking in love.

141. The distinction between a *rationalist's* understanding of horizon and the understanding of the *critical realist* now becomes even more apparent. The *rationalist* refuses to take seriously the notions of "forestructure" of knowing or "auto-consciousness" in relation to his or her *own* knowing and deciding. To do so, the *rationalist* would have to "decenter" from his or her egocentric view that knowing

person does not want to recognize and deal with his or her blinding biases or underdevelopment, the scientist will continue to take measures to eliminate anything which threatens his or her rigid, but fragile identity. Thus, a certain elitism will have developed which enshrines analytic understanding and denigrates the insights flowing from creative intuitive imagination or synthetic relational intuitive understanding. This elitism will find support in similarly situated persons, and then elitist groups will form.[142] Thus, when a "maverick" scientist argues that an existing paradigm, or the larger "paradigm" of empiricist science itself, is defective and proposes a new one, the elitist group may ignore the maverick and his or her theory, attack the theory, and then attack the maverick personally.[143]

Just as scientists can refuse to acknowledge that their professional activities involve decisions and therefore value judgments, so too, can the business person or the lawyer. Just as the scientist can uncritically default certain judgments or decisions to auto-consciousness, so too, can the business person or the lawyer default to the "role" auto-consciousness of the hard headed "real world" pragmatist.

For example, the decision to lay off workers, or represent a client, can automatically be rationalized by appealing to the assumed role as a pragmatic business person or lawyer. However, any such decision implicitly involves a prior value judgment to conform to the ideology of role—a decision which has now been "defaulted" to auto-consciousness. The values of the person in making the ultimate

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and deciding occurs on a fully conscious level where the *rationalist* is fully in control of his or her universe, and certainly, of himself or herself.

142. This involves the notion of "group bias." *See* Anthony J. Fejfar, *Insight into Lawyering: Bernard Lonergan's Critical Realism Applied to Jurisprudence*, 27 B.C. L. REV. 681, 704-05 (1986) (discussing Bernard Lonergan's work).

143. Richard Bernstein has noted a reaction of this type in relation to Thomas Kuhn's work:

> With elegant conciseness William James described "the classic stages of a theory's career. First, you know, a new theory is attacked as absurd; then it is admitted to be true, but obvious and insignificant; finally it is seen to be so important that its adversaries claim that they themselves discovered it." Nothing like this has already occurred with the theory advanced by Thomas Kuhn in the twenty years since the publication of *The Structure of Scientific Revolutions*. The reaction to the book by its critics was immediate and sharp: Kuhn's leading ideas were absurd, contradictory, and wrong. It was even suggested that they were immoral and irrational. His views were caricatured and ridiculed.

BERNSTEIN, *supra* note 117, at 51.

decision to lay off workers, or to represent any client for any purpose, then, are the values of the implicit ideology, in these contexts, liberal ideology. To the extent, therefore, that such ideology is inadequate, or, that rigid ideological prescriptions or rules are inherently incapable of adequately dealing with concrete situations, then to that extent, any such "automatic" decisions will be inauthentic or illegitimate.[144]

Having listened to some of the basic elements of the *critical realist* position, our discussion of the position will now focus on issues involving corporate "being-in-the-world," corporate decision making and regulation, and historical development.

The foundational mode of consciousness or horizon within which a person is operating is not merely dictated as a matter of personal choice. Rather, a mutually constitutive dialectic among person, community (including the persons within a corporate "community"), and larger society is involved. As noted earlier, we exist and make decisions in the context of "being-in-the-world" prior to the conscious operations of analytic understanding and decision. This "being-in-the-world" is not static, but rather is both stable and in flux because we all are dialectically embedded in a world of meaning. We are both shaped by, as well as shape, the world of meaning in everything

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144. Previously, I illustrated the above observation through the following example:

> [L]et us assume that a particular lawyer in a law firm faces a situation where a secretary comes in two hours late twice in one week. The lawyer "automatically" fires the employee because a law firm rule states that if a support staff person is late more than once for an amount of time exceeding one-half hour, in a one-week period, then he or she is to be terminated. On a fully conscious level the lawyer may not consider his or her action to involve a "moral decision" or even a "decision" at all. On a conscious level the lawyer understands him or herself merely to be engaging in a logical application of rules, *i.e.*, "if late twice, then fired."
>
> What the lawyer fails to realize is that he or she has developed a "method" of dealing with a certain aspect of reality, *i.e.*, rule breaking. The "method" involves value judgments relating to the nature of rules, how they should be implemented, the consequences of not "following" the rules as one is expected to, etc. At some point, most likely as a young child, all the value judgments implicit in the lawyer's "method," as well as the method itself, were incorporated into auto-consciousness as a "preconscious" or "unconscious" assembly of procedures. This example illustrates why it is that some persons will vehemently deny that certain actions involve "morality," "value" judgments, or decisions. Such persons have "defaulted" or incorporated a conscious decision[-]making process into a "preconscious" or "unconscious" procedural assembly in auto-consciousness.

Fejfar, *A Road Less Traveled*, *supra* note 46, at 342-43.

that we say and do.[145] Put another way, both individually and collectively, we partially constitute, as well as are partially constituted by, our communal and societal horizons. Thus, a corporation, a shareholder, a director, a manager, and an employee, all are constituted by, and help to constitute a complex and intricate relational meaning web. If any one of these persons changes his or her foundational way of "being-in-the-world," then this has a profound, though perhaps not readily discernable impact on the world of meaning. If directors, managers, and employees, *as groups*, act to change their "being-in-the-world," then the impact becomes more discernable, and has a greater constitutive effect upon our dynamic societal "being-in-the-world."

With respect to decision making and regulation, as noted previously, common sense understanding, whether simple or complex, deals with and is best suited to carry out, practical tasks.[146] The lawyer and politician use this type of understanding just as much as the carpenter or the plumber. It involves knowing how to get the job done. If much of a person's life has been spent "getting the job done" in a particular area of human activity or society, he or she soon learns that although one can make certain rule-of-thumb generalizations, those generalizations do not function as rigid, abstract rules. Rather, they operate as contextual pointers because the human world, unlike the non-sentient biological or physical world, is radically contingent or underdetermined. The human world is subject to radical change, and is always in flux, precisely because it is continually being dialectically reconstituted by the persons who compose it.

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145. *See generally* Fejfar, *A Road Less Traveled*, *supra* note 46, at 361-66 (discussing a critical realist philosophical position as it relates to foundational consciousness and horizon). *See also* BERGER & LUCKMANN, *supra* note 116 (approaching the world of meaning from a sociological perspective).

146. Common sense understanding, although it always deals with practical problems, can function both in simple and more complex forms. In its simplest form, common sense understanding involves very little abstract thought. Instead, it deals with immediate problems in a linear, unimaginative manner. Although some intuitive understanding may be involved, it tends to be very task oriented, largely subordinated to conventional auto-consciousness procedures, and centered in a task oriented role. In its more complex form, common sense understanding involves the increased development and use of formal analytic understanding, and can involve the development and use of formal intuitive understanding as well. Where the use of formal analytic and formal intuitive understanding in a given person is not allowed free reign, but rather, is subordinated to conventional auto-conscious procedures, and centered in a task oriented role, the person's foundational horizon is one of *pragmatic rationalism*.

Because of this radical dynamism and contingency, scientific or logical generalizations can never adequately describe this world.[147] Applying this insight to issues of corporate decision making and corporate regulation, if scientific or logical generalizations cannot adequately describe this complex "common sense" world, is it reasonable to expect that abstract generalizations can be adequately employed to prescriptively require conduct, either legally or ethically? However, such adequacy is precisely what liberal ideology uncritically assumes.

In the context of a *liberal rationalist* horizon, persons are idealized as "rational and autonomous." Legal rules are assumed to have a determinate meaning apart from the persons interpreting and applying them. Legal rules are also assumed to be adequate in and of themselves to regulate a complex, intricate, dynamic world. Additionally, prescriptive generalizations flowing from economic theory (such as "maximizing profit"), "rationalize" persons as "autonomous" units, and abstract away from important aspects of reality, such as the social and cognitive dimensions of decision making. As discussed previously, such "liberal" assumptions as to person and decision making are inadequate. Therefore, the *critical realist* would suggest that any automatic, unreflective rigid adherence in decision making to such assumptions, is inadequate and illegitimate. One can either inauthentically make choices as a pragmatic or empiricist *rationalist* who is a dialectically embedded, acritical, pseudo-autonomous person, or one can develop a critical-relational mode of moral being and authentically make decisions as a dialectically embedded, critical-relational, autonomous person participating in a critical moral community or culture.[148]

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147. *See* Fejfar, *supra* note 142, at 693-94 (discussing Bernard Lonergan's work).

148. The point here is that whether a person recognizes it or not, he or she *is in fact* dialectically embedded. The decision, therefore, does *not* involve choosing to be dialectically embedded or not to be dialectically embedded. The decision involves the choice between authenticity and critical dialectical consciousness on the one hand, and inauthenticity and acritical alienated consciousness on the other. *Cf.* BERGER & LUCKMANN, *supra* note 116:

> [A]lienation is the process whereby the dialectical relationship between the individual and his world is lost to consciousness. The individual "forgets" that this world was and continues to be co-produced by him. Alienated consciousness is undialectical consciousness. The essential difference between the socio-cultural world and the world of nature is obscured—namely, the difference that men have made the first, but not the second. Inasmuch as alienated consciousness is based on this fallacy it is false consciousness. . . . Typically the representations of human, meaningful activity that constitute the reality of the social world are transformed in

What has previously been said also has historical implications. If one recognizes that we are dialectically embedded in a "world of meaning," then this fact must be placed in an historical context. Our current "being-in-the-world" is not just the result of our own decisions and actions, rather it also flows from within the context of the cumulative result of the understanding, judgments, values, decisions, and actions of those of the past.[149] Looking forward then, the judgments, decisions and actions in which we engage, not only dialectically affect those around us, but also set the stage for opportunities for the future. To the extent that we strive to act authentically, we help to bring about the conditions necessary for the promotion of authenticity in others, both in the immediate and not so immediate future. To the extent that we act inauthentically, we set the stage for future inauthenticity.

Thus, we can say that history develops in accordance with emergent probability.[150] It does not *necessarily* develop in accordance with liberal or marxist deterministic theories, because historical development is radically contingent and underdetermined.[151] Given this fact, what is needed is the development of a critical culture composed of persons in concrete but diverse communities, trying as best they can in their particular, everyday circumstances, to develop, integrate, and maintain a fully adult critical-relational mode of moral being through a sustained dialectical process involving communication, critical reflection, openness to transcendence, personal growth, de-

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> consciousness into non-human, meaningless, inert "things." That is, they are reified. The social world then ceases to be an open arena in which the individual expands his being in meaningful activity, [but] becomes instead a closed aggregate of reifications divorced from present or future activity. The actual relationship between man and his world is inverted in consciousness. The actor becomes *only* that which is acted upon. The producer is apprehended *only* as product. . . . .
>
> Now, it is important to recall here that the relationship between human activity and the world produced by it is and remains dialectical, *even when this is in fact denied* (that is, when it is not present to consciousness). Thus men produce their gods even while they apprehend themselves as "totally dependent" upon these their products.

*Id.* at 85-86, 96.

149. *See generally* Fejfar, *A Road Less Traveled*, *supra* note 46.

150. *See* Fejfar, *supra* note 51, at 299-301.

151. *Cf.* Gordon, *supra* note 105, at 100 ("The conditions of social life and the course of historical development are radically underdetermined, or at least not determined by any uniform evolutionary path.").

cision, and action.[152] The occurrence of this process on the individual, group, and societal levels could result in a critical dialectic, which can produce a dynamic critical culture capable of helping to authentically constitute and re-constitute our societal "being-in-the-world."

At this point in our dialogue, we have been listening to a general discussion of the *critical realist* position. Assuming for the sake of exposition that an understanding of the *critical realist* position has occurred, our dialogue will now move on to a more explicit critique of Engel's discussion and the *liberal rationalist* horizon. The *critical realist* critique presented here raises many of the same issues which were presented in the *critical rationalist* critique. However, rather than raising such critical points as questions, or unfounded "non-rational" assumptions, the *critical realist* makes positive assertions regarding the inadequacy of the counter position assumed within the *liberal rationalist* horizon, and by Engel.

To begin with, the *critical realist* critically judges that the *liberal rationalist* assumption of rational autonomy simply is not true. Every person exists in a world of meaning in which he or she is dialectically embedded prior to the conscious engagement of analytic understanding. There is no person outside of a tradition, whether or not one chooses to recognize this fact. This leads to the related issue of objectivity in decision making. Engel seems to assume that some sort of detached mode of empirical decision making exists, and that it is "objective," "neutral," and "legitimate," while a decision-making process which involves critical reflection upon values is "subjective" and "illegitimate." In fact, the opposite is true. What Engel espouses is decision making in the context of dialectically embedded, acritical, pseudo-autonomy. Such decision making can hardly be considered objective or neutral. Rather, decisions flowing from dialectically embedded, critical-relational autonomy are authentically subjective or "objective."

Interestingly, Engel acknowledges the *critical realist* position that rule-oriented ethics *cannot* adequately deal with a dynamic complex world. However, he asserts that the abstract norm of profit maximization, and abstractly framed legal rules and regulations, *can* deal with such a complex dynamic world. The only justification for such an assumption is a blind appeal to an acritical belief in a property-

152. *See supra* note 133 and accompanying text.

oriented *liberal rationalist* ideology, which is fraught with inadequate or false assumptions.

First, *liberal rationalist* ideology does not recognize that sociological and economic generalizations in large measure are, at best, provisional. As illustrated by recent events in eastern Europe, social scientific generalizations are in large measure provisional, precisely because the "data" upon which these generalizations are based, i.e., the world of human meaning and patterns of human interaction and personal development, are subject to dramatic change.[153] Therefore, any theory that assumes such patterns of human interaction as static and unchanging postulates, is inadequate.

Second, in addition to functioning descriptively, economic theories also function prescriptively to partially constitute our world of meaning, including the ways in which we socially interact. Thus, they themselves, as embodying values of utility and the objectification of persons, cannot be considered morally neutral or objective.[154] Neither can a market system which merely expresses such values be considered "neutral."

Moreover, there can be no artificially strict separation of corporate "being-in-the-world," legislative "being-in-the-world," and societal "being-in-the-world." All are dialectically enmeshed with one another in the dynamic, complex, world of human meaning. As long as corporations "exist," they inevitably have an impact on the legislative process in both obvious and not so obvious ways. Corporations influence legislation and its enforcement through lobbying and through the failure to abide by enacted laws and regulations.

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153. *See* BERGER & LUCKMANN, *supra* note 116. *See also* Keniston, *supra* note 134.

154. *See* Hosmer, *supra* note 18. Hosmer describes assumptions relating to the value of human beings which are implicit in the microeconomic model:

> The microeconomic model is impersonal, for it requires that everyone must be treated as a means to an end, and not as an end in him or herself. . . . No one acts as an individual human being, pursuing their own goals worthy of consideration and respect. This denial of worth can be seen particularly clearly in the position of the manager of the firm, who must act solely as an agent for the financial interest of the stockholders. What does this do to self-esteem and self-respect? How can people live worthwhile lives, when always treated as means and not as ends, even though the society as an economic system may have achieved Pareto Optimality? The microeconomic model would appear to be based upon an exceedingly low view of the *worth* of human beings.

*Id.* at 324.

Additionally, but less obviously, corporations shape our society through the individual and group impact of the lives or "being-in-the-world" of persons who are corporate managers, workers, and customers. These persons are members of, and affect their local communities as individuals and as members of the "corporate family." The influence of these persons, whether for good or ill, inevitably has a profound impact on our culture generally and, therefore, an impact on political activity on both the individual and group levels. All of this can be specifically directed to a discussion of corporate voluntarism.

From within a *critical realist* foundational horizon, the treatment of corporate voluntarism as a "product" in the context of a "means-ends" analytic framework, is to entirely miss the whole underlying point of, and justification for, the notion of corporate voluntarism. Corporate voluntarism is *both* process and product.[155] Corporate voluntarism, understood in this way, suggests that the persons who operate in the concrete context of corporate life should develop and maintain a corporate culture or process which is critical and responsible. As such, this corporate culture chooses to authentically and critically constitute its "being-in-the-world" prior to decision making, rather than blindly accept the existing "being-in-the-world." Automatic adherence to an ideological viewpoint which promotes unreflective "rational" self-interest, and an implicit or explicit adversarial relationship with the rest of society would seem to result in the increased illegitimacy of the legislative process, as well as in the deterioration of our society as a whole.

The development of the process and culture of corporate voluntarism, then, does not involve imposing "arbitrary" values on our society. Rather, "arbitrary" values are imposed through the maintenance of a *liberal rationalist* corporate culture which is acritical and irresponsible. The choice is between a corporate culture which is constitutive of authentic critical decision making, and one which is constitutive of inauthentic acritical decision making. Understood within a *critical realist* foundational horizon, the production of a profit can be judged an important value within the functioning of our current market economy.[156] However, the acritical automatic "de-

155. *Cf.* Edwin M. Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility—Product and Process*, 30 HASTINGS L.J. 1287 (1979) (discussing social responsibility as product and process).

156. This is not to say that the "market" should not be regulated at all, but

fault" to profit maximization as the primary goal of corporate activity is rejected as an ultimate value orientation.

We have just listened to a critique, emanating from within a *critical realist* foundational horizon, of Engel's analysis and the *liberal rationalist* horizon. At this point in our dialogue, the *liberal rationalist* and the *critical rationalist* have an opportunity to critique the *critical realist* position.

### *F. Liberal Rationalist and Critical Rationalist Critiques of the Critical Realist Position*

A *liberal rationalist* critique of the *critical realist* position would probably first proceed along traditional aesthetic lines dealing with logical coherence, clarity, sweep, determinacy, and realizability.[157] The first move might be to dismiss the notion of both personal and societal "being-in-the-world" as interesting metaphysical speculation that cannot be taken seriously since such a theory is not subject to empirical verification.[158] Next, the underlying justification for the theory, when considered on a purely analytic level as a syllogistic argument, is logically circular and, therefore, has no firm analytical foundation. Additionally, most people generally are not constituted by a critical-relational mode of moral being, and therefore the theory is excessively utopian. Finally, the theory lacks sufficient determinate content.

Initially, a *critical rationalist* critique might suggest that the "ideas" of "transcendence" or a "critical-relational mode of moral being" are merely "theoretical unmentionables" designed to deal with theoretical contradictions which cannot be reconciled on a purely *ra-*

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is instead to suggest that regulation alone is never sufficient. Moreover, what I have suggested does not constitute an unqualified endorsement of a market system, but simply recognizes that, as a matter of provisional judgment, it appears that centrally planned economies such as those which are being "reformed" in eastern Europe, are not able to deal with the diversity and complexity involved in the production and distribution of goods and services. This observation, however, does not mean that the "market" must function within a "liberal" societal horizon. Nor does it mean that a better "mechanism" for the production and distribution of goods and services cannot evolve.

157. *Cf.* Schlag, *supra* note 6, at 1212-13.

158. In fact, in another context, Engel seems to suggest that such a response is probable, when he states that "there is something metaphysical going on through much of [Ralph Nader's book,] *Taming the Giant Corporation* . . . ." Engel, *supra* note 1, at 28 n.81.

*tionalist* analytic level.[159] Such "theoretical unmentionables" are not helpful analytically for two reasons. First, it is difficult for others to understand what a writer means when he or she refers to the "entity" or "quality" described by a "theoretical unmentionable." Second, even if others can come to an understanding of what the writer means, it is still difficult to determine when the "entity" or "quality" is *really* present and when it is not. Thus, a *critical realist* theory which explicitly employs a theoretical unmentionable is analytically suspect. The use of the terms "transcendence" or "critical-relational mode of moral being" only amount to an interesting linguistic ploy designed to eliminate contradictions which the *critical realist* cannot account for on an analytic level.

Alternatively, a *critical rationalist* critique might recognize the basic validity of the *critical realist* position in theory, but might also assert that practically, there is no guarantee that a critical-relational mode of moral being can be achieved and maintained on a personal level, nor that a critical moral culture can be achieved at the community or societal levels. The *critical rationalist* would point out that in order for such a critical-relational mode of moral being to properly function as a personal way of "being-in-the-world" in the context of the larger "being-in-the-world" of a critical culture, the existing social environment would have to enable persons from all parts of society to engage in the sustained dialectical process involving com-

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159. Schlag defines "theoretical unmentionables" as follows:

> Theoretical unmentionables are another way of containing the recognition of contradiction within manageable proportions. Any theory or mode of thought has certain gaps, holes, and absences that, by virtue of the internal constitution of the theory or mode of thought, cannot be articulated in positive terms. Sometimes these gaps, holes, and absences bear names and thus appear to have integrity and substance, even though, by definition or by theory, nothing positive can be said about them. These, then, are *theoretical unmentionables*, those wonderful theoretical spaces that we are quite sure exist, but that by virtue of the constitution of the theory we cannot say very much about. All theories and modes of thought have them. A major distinction among theories and modes of thought, however, is how rapidly they resort to the invocation of theoretical unmentionables to resolve potential difficulties like contradiction, paradox, and incommensurability.
>
> From this perspective, God is no doubt the all-time champion theoretical unmentionable. Featured in the same role today are some more secular derivatives including pragmatism, practical reason, good judgment, discretion, and balancing.

Pierre Schlag, *Contradiction and Denial*, 87 MICH. L. REV. 1216, 1222-23 (1989) (citations omitted).

munication, critical reflection, openness to transcendence, personal growth, decision, and action. However, the problem is that the current societal status quo in large measure either does not encourage, or openly attempts to prevent, such a mode of "being-in-the-world" to develop in oppressed classes of people.[160] The *critical rationalist* would point out that there is no reason to believe that those in power will ever allow oppressed classes to develop such consciousness.

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160. The *critical rationalist* might point to the observation made by Brazilian educator Paulo Freire about the relationship between education and politics:

> [S]eparating education from politics is not only artificial but dangerous. To think of education independent from the power that constitutes it, divorced from the concrete world where it is forged, leads us either to reducing it to a world of abstract values and ideals (which the pedagogue constructs inside his consciousness without even understanding the conditioning that makes him think this way), or to converting it to a repertoire of behavioral techniques, or to perceiving it as a springboard for changing reality.
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> In fact, it is not education that molds society to certain standards, but society that forms itself by its own standards and molds education to conform with those values that sustain it. Since this is not a mechanical process, a society that structures education to benefit those in power invariably has within it the fundamental elements for its own self-preservation.
>
> The idea of education as a springboard for changing reality arises, in part, from an incomplete understanding of the above mentioned epistemological cycle. The idea is rooted in the second stage, where education functions as an instrument for self-preservation. It is as though defenders of such an idea were saying, "If education preserves itself, this is because it can change what it preserves." They forget that the forces that mold education so that it is self-perpetuating would not allow education to work against them. This is the reason any radical and profound transformation of an educational system can only take place (and even then, not automatically or mechanically) when society is also radically transformed.

PAULO FREIRE, THE POLITICS OF EDUCATION 170 (1985). A similar, but much less persuasive, argument would be that the cognitive integration suggested by the normative notion of a "critical-relational mode of moral being" cannot realistically be expected to develop because Kohlberg's research suggests that approximately one half of the population in the United States operates at the conventional level of morality or below. *See* Kohlberg & Gilligan, *supra* note 89. This argument is non-persuasive for two reasons. First, as Keniston suggests, developmental research *cannot* be cited for the proposition that a community or society could *not* "realistically target" and then maintain different cognitive integrations and different patterns of social interaction than those which have dominated in the past. *See* Keniston, *supra* note 134. Second, Carol Gilligan's more recent work suggests that cognitive capabilities involving "care," "relationality," and "responsibility" have been miscategorized as constituting a lower "conventional" stage by Kohlberg. *See* Gilligan, *supra* note 91. Thus, the real problem, as suggested in the text, is the suppression of such cognitive capabilities in persons, and the exclusion of critically responsible persons from the legal and business "worlds," by a society partially constituted by inauthentic and patriarchal elements.

Finally, in a more pessimistic vein, the *critical rationalist* might suggest that such a critical-relational moral mode of being is merely a random occurrence. There actually is no consistently present grounding of transcendence, whether such grounding flows from nature, or otherwise.[161] Thus, there truly is no reason to commit one's life to enlarging the occurrence of a "being-in-the-world" which presupposes the actualization of such transcendence in a significant number of persons. Given this assumption of purely random actualization, the *critical rationalist* might point out that a person's only "rational" response involves two alternatives: (1) dedicating one's life to the personal and societal development of such "being-in-the-world" as a basically hopeless, but nevertheless worthwhile existential statement, or (2) nihilism.[162]

At this point in our dialogue, we have listened to a discussion of the *critical realist* position and a critique of Engel's analysis and the *liberal rationalist* horizon emanating from within a *critical realist* foundational horizon. We next heard critiques of the *critical realist* position flowing from within the *liberal rationalist* and *critical rationalist* foundational horizons. The dialogue now continues with a response to the *liberal rationalist* and *critical rationalist* critiques, emanating from within a *critical realist* foundational horizon.

### *G. Critical Realist Response to the Liberal Rationalist and Critical Rationalist Critiques*

Responding to the *liberal rationalist*, a *critical realist* would suggest that there actually is empirical support, found in developmental and cognitive psychology, for the cognitive assertions underlying the *critical*

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161. Here, of course, the reader has the option of considering the grounding of transcendence in either a non-theistic naturalist manner or a theistic manner. A non-theistic grounding is based upon an empirical or phenomenological analysis which suggests that there exists some natural capability that inheres in nature which in some way results in a universal pull or drive of human beings toward absolute relational meaning. A theistic grounding is similar, except that it goes beyond the purely empirical or phenomenological analysis and affirms a reasonable belief in a transcendent source of the universal pull or drive. *See* Fejfar, *supra* note 51, at 261 n.155 (discussing the Transcendent and its relationship to evolutionary advance).

162. As I use the term "nihilism" here, I intend its meaning in the sense of holding the position that life or existence is meaningless. In his article, Paul Carrington seems to use the term in a more narrow context, referring to "legal nihilism." Carrington, *supra* note 120, at 227. Apparently, a "legal nihilist" is a person who professes "that legal principle does not matter." *Id.* "A lawyer who succumbs to legal nihilism . . . must contemplate the dreadful reality of government by cunning and a society in which the only right is might." *Id.*

*realist* position.[163] Second, existentially, any attempt to disprove the cognitional structure will result in the person attempting to disprove the structure, as minimally actualized in human beings, to existentially employ the structure, thus involving the person in an internal contradiction between statement and performance.[164] Finally, the assertion that the critical foundation for the *critical realist* position, when considered as a syllogistic argument, is analytically circular, is critically judged not persuasive. The foundation for the position is existential, not purely conceptual. The "proof" is in the person's own participation in a sustained dialectical process involving communication, critical reflection, openness to transcendence, personal growth, decision, and action.[165] *If* this is, in fact, how we can more

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163. *See* Fejfar, *supra* note 51, at 239-60 (providing a general summation of such empirical support); Fejfar, *A Road Less Traveled*, *supra* note 46, at 330-46. *See also* MINTZBERG, *supra* note 137; Gilligan, *supra* note 91.

164. *See* BERNARD TYRELL, BERNARD LONERGAN'S PHILOSOPHY OF GOD 92-93 (1974):

> [S]elf-affirmation is an immanent law of intelligence . . . any attempt to deny that one is a knower in the sense specified is to involve oneself in a contradiction between statement and performance. . . . [For] to deny that one is a unity-identity-whole characterised [sic] by acts of sensing, perceiving, enquiring, understanding, reflecting and judging one must appeal to one's own experience, elucidate one's [own] understanding, indicate sufficiency of evidence for judgment and claim personal responsibility for the judgment one makes. Self-affirmation accordingly, in Lonergan's analysis, cannot ultimately be avoided by anyone who endeavours [sic] to operate in full accord with the exigencies of intelligence and rationality and on the basis of his own cognitive experience.

*Cf.* ALVIN I. GOLDMAN, EPISTEMOLOGY AND COGNITION (1986). Although utilizing different terminology, and essentially limiting his discussion to fact judgments involving "justifiable beliefs," Goldman comes to a conclusion similar to that of Tyrell:

> Although I am leery of the thesis that our belief-forming processes could not *be* too defective, I acknowledge that nobody could *believe* that his or her own processes were defective in a wholesale way; at least nobody with a modicum of logical acuity and reflectiveness. How could anyone think that *all* his or her belief-forming processes are radically defective? A little reflection would indicate that this very belief is thereby undermined, since it too must have been formed by putatively defective processes. Still, while wholesale self-deprecation is excluded, a person can certainly believe that *some* of his or her belief-forming processes are faulty.

*Id.* at 120.

165. On a purely conceptual level, when presented as an abstract argument, the foundation for the *critical realist* position is circular. However, existentially the foundation is not circular. When presented in the *abstract*, the terms or elements comprising the dialectical process are considered in a static analytic framework. Existentially, however, the *actual process* of the sustained dialectic of communication,

adequately know and live in the world, then how else would one judge the process to be more adequate, other than to actually live it, not just conceptualize it?

Similarly, just as the cognitive capability of analytic understanding is inadequate in and of itself to judge the validity of the *critical realist* position, so, too, the *rationalist* aesthetic criteria are insufficient to provide an adequate bench mark against which to judge the

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critical reflection, openness to transcendence, personal growth, decision, and action is dynamic and progressive, not static. A person is able to exercise *critical realist* "objectivity" and is able to break out of a relatively closed epistemological circle precisely because each person's cognitive processes actually function more like a spiral than a circle.

Existentially, when we critically reflect, we never return to exactly the same place or point of reflection, even though we can recall in memory the earlier place or point of reflection. While a person's epistemological spiral is never entirely closed because of temporal change and the ever shifting world of meaning, it can become relatively closed. Moreover, the epistemological spiral can spiral to some extent toward increasingly blinding processes by reason of inauthentic, and undialectical consciousness. As a practical matter, the ultimate limit on such a blinding spiral is insanity or death. Much blind destruction can be wreaked, however, short of a person reaching this ultimate limit. However, the epistemological spiral, if it is oriented toward enabling transcendence, rather than blinding closure, enables the person to spiral out of a relatively confined, closed spiral.

Responding to the argument that we are each caught in an epistemological circle or "quagmire," Goldman makes a similar point:

> [One argument is] that there is no point in seeking a [cognitive] right rule system under a reliabilist criterion, because there is no possibility of improvement. If we unfortunately start out with an unreliable set of [cognitive] processes, any attempt to identify proper processes and methods (right rules) will fail. So we would be stuck in an epistemic quagmire. If, however, we are fortunate [enough] to start with a reliable set of processes, any attempt to identify proper processes will be pointless, since we will already be using such processes.
>
> It is evident, though, that this argument is a flop. First of all, even if we natively use (mostly) reliable processes, it is another matter to identify what those processes are. Second, no convincing argument has been given against the possibility of improvement, of epistemic bootstrapping. The main sort of bootstrapping scenario runs as follows. We start with a set of available processes with varying degrees of reliability. We use the more reliable processes to identify good methods. We then use the more reliable processes, together with some of the good methods, to identify the various processes and their respective degrees of reliability. The superior specimens are so identified, and their use is said to be justification-conferring. The inferior specimens are so identified, and their use is said to be non-justification-conferring. If the faulty processes are subject to direct or indirect control, we try to avoid those processes. Or we try to devise methods to minimize their impact. In this manner epistemic melioration is possible.

GOLDMAN, *supra* note 164, at 120-21.

adequacy of the *critical realist* position.[166] The *rationalist's* aesthetic criteria are designed to deal primarily with the clear and logical presentation of a universal system of aesthetically pleasing ideas. This, of course, makes sense since this type of ideal presentation is exactly what analytic understanding is able to appreciate and affirm. By way of contrast, the *critical realist* position, while recognizing the proper role of logic and analytic understanding, is also concerned with lived reality and process, involving cognitive, cultural, and historical dimensions. Therefore, the *critical realist* position is somewhat open-ended, and "non-systematic" because human cognitional processes, human culture, and human history are somewhat open-ended and "non-systematic."[167] This is especially perplexing to the *rationalist* because he or she desperately wants to idealize the universe as linear, neat, orderly, and systematic, pretending that egocentric *rationalism* is entirely in control of its world.

The most recent part of our dialogue has involved the *critical realist* response to the critique emanating from within the *liberal rationalist* foundational horizon. We will now have the opportunity to listen to the *critical realist* respond to the critique emanating from within the *critical rationalist* foundational horizon.

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166. Along similar lines, management consultant Henry Mintzberg points out that "rational" analytic understanding is incompetent to disprove the competent functioning of intuitive understanding:

> If to be rational really means to use the process that most effectively achieves your goals, then intuition, no matter how mysterious, has never been demonstrated to be any less rational than conventional, formal "rationality"—no one has ever proved it to be an inferior process. Of course, how could they? The concept of proof itself resides in conventional rationality. How can we allow "rational" argument to prove or disprove the inferiority of a thought process that itself is beyond such rationality? That would be like using black-and-white photography to study the colors of the rainbow.

MINTZBERG, *supra* note 137, at 343.

167. The *critical realist* position is systematic in the sense that it does involve an overarching theory which is logically consistent. It is not systematic in the purely ideal sense, however, since it does not abstract away from the actual cognitional processes which human beings employ to know reality and make decisions. Thus, *critical realism* provides a systematic account of a radically personal, critical, authentic "method" of "being-in-the-world," which is able to deal with the *real* world, including both its physical and social dimensions; a world which is dynamic and complex, and not capable of being forced into abstract, static, ahistorical categories. A person who has developed a critical-relational mode of moral being is better able to deal with the world—not the person whose knowing and deciding is dominated by the one-sided development of formal analytic understanding.

The *critical realist* must initially respond to the *critical rationalist* assertion that the "ideas" of "transcendence" and "critical-relational mode of moral being" are "theoretical unmentionables" employed to deal with contradictions that cannot be resolved on a *rationalist* analytic level. The *critical realist* would agree with the *critical rationalist*—at least to a degree. The basic position of the *critical realist* is that a *rationalist* analytic framework and *rationalist* foundational consciousness are inherently unable to deal with reality in a sufficiently adequate manner. Thus, for the *critical realist*, the notions of transcendence and critical-relational mode of moral being, are not only "mentionable" but are explicitly placed at the core of the position. These notions are problematic to the *critical rationalist* only because, as a *rationalist*, he or she still tends to take seriously only those aspects of his or her "world" which can be "viewed" from within a static, visualist model. The *critical realist* is able to move beyond this limitation and seriously consider the fact that our "world" is full of complex, mutually constitutive relationships which cannot be "laid out" or "explained" solely through surface analysis which takes place on a visual plane.[168]

The *critical rationalist* might suggest that the terms "transcendence" and "critical-relational mode of moral being" are not clear or definite enough to be useful. The *critical realist* would respond by suggesting that the terms have been sufficiently defined and are situated within a larger philosophical and empirical framework. The fact that "transcendence" involves a heuristic category which is defined operationally does *not* negate the fact that it *does* describe an important aspect of the cognitive dimension of human existence. Similarly, the fact that many persons may not understand the notions of critical-relational mode of moral being or transcendence because of their own developmental situation or lack of critical reflection does not suggest a deficiency in the *critical realist* position any more than the assertion that aerodynamic theory, for example, is theoretically flawed just because some people have not developed the formal analytic understanding necessary to comprehend it. Thus, it appears that the *critical rationalist* criticism of the *critical realist* position, based upon the idea of "theoretical unmentionables," while it does have a certain "bite" within a *critical rationalist* horizon, does not really present a significant criticism within a *critical realist* horizon.

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168. *See supra* note 8 (briefly discussing "visualism"); Anthony J. Fejfar, *Legal Education and Legal Scholarship: From Rationalist Discourse to Dialogical Encounter*, 20 CAP. U.L. REV. 97 (1991) (discussing the relationship between *rationalist* consciousness dominated by analytic understanding and "visualism").

A more persuasive point may be made by the *critical rationalist.* Even if the *critical realist* position is correct, you must acknowledge that most people do not engage in a sustained dialectical process involving communication, critical reflection, openness to transcendence, personal growth, decision, and action. Similarly, it does not appear that a critical moral culture as envisioned is present. What grounds are there to think that such critical activity can develop in persons throughout a society, since persons who have not reached this mode of "being-in-the-world" will necessarily misunderstand it, and those who are currently wielding power inauthentically, will oppose it?

There is no easy response to this question. The *critical realist* would reply that while many people do not consciously understand how they know and make decisions in the world, they do know a great deal about the world and make decisions in it. If it is true that many people have not engaged in a sustained dialectical process involving communication, critical reflection, openness to transcendence, personal growth, decision, and action, it would seem equally true that most people reflect upon their lives at least at some moments, and do actually undergo personal growth. If it is true that neurotic biases or social structures operate to prevent, to one degree or another, many of us from fully developing cognitively and fully engaging in the sustained dialectical process, it appears equally true that the dominant mode of "being-in-the-world" in which we do function does enable us to make many judgments and decisions which are consistent with authentic judgment and decision.

Thus, the task is to determine what we can do individually, as communities, and as a larger society to foster the development of conditions which enable authenticity and the sustained dialectical process. Each positive step taken will effect a dialectical progression in history involving the individual, community, and larger society. This dialectical progression will help to constitute a "being-in-the-world" which is more "enabling" of authenticity. The following suggestions are offered as potentially contributing to such development.

First, psychologist Alice Miller suggests that much of our destructive and rigid behavior results from early child rearing practices that dehumanize children.[169] Such child rearing results in adults who

169. *See* MILLER, *supra* note 136. *See also* Janice T. Gibson, *Training People to Inflict Pain: State Terror and Social Learning,* 31 J. OF HUMANISTIC PSYCH. 72 (1991)

lack creativity, who accept the authority of those in power with little or no critical questioning, and who, at the same time, project all their repressed anger and frustration on those who are less powerful than themselves.[170] Such projection results in dehumanizing action against others, such as the abuse of their own children, and the promotion of individual or institutionalized acts of violence against poor persons or minorities.[171] Miller suggests that in order to break this cycle of dehumanization we must thoughtfully, but critically, reflect upon our own parents' child rearing practices, and not automatically assume that the way in which we were raised could not be improved upon, even if our parents genuinely and in good faith thought their child rearing techniques were for "our own good."[172]

Similarly, psychologist Lawrence Kubie suggests that the institutional structure and pedagogical method employed in our grade schools and high schools systematically operate to exclude critical reflection and personal growth.[173] This theme is echoed by Paulo Freire, a Brazilian educator, who suggests that "banking" education (the method used in many of our classrooms), as a pedagogical process, promotes a passive and acritical mode of "being-in-the-world" on the part of students.[174] Freire advocates a critical pedagogy

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(suggesting that "ordinary/normal" persons who are raised in strict/rigid moral or religious environments can develop attitudes of "authoritarian submission," "conventionalism," and "authoritarian aggression"). Such rigidly moralistic persons are more likely to commit atrocities or inflict immoral pain and suffering upon other persons, where a conventional authority has sanctioned such action. *Id.*

170. Gibson, *supra* note 169, at 79.

171. MILLER, *supra* note 136, at 116.

172. *Id.* at 58-63. An example of inadequate child rearing portrayed in our popular culture can be found in the Simpson's cartoon show, where the impact of Homer Simpson on Bart's development is all too apparent. Homer alternates between the passive "wimp-slave" and the authoritarian, violent "master."

173. LAWRENCE S. KUBIE, NEUROTIC DISTORTION OF THE CREATIVE PROCESS (1961): "My unhappy conviction is that much of the learning which has traditionally been looked upon as an essential attribute of the educated man has no necessary relevance either to creativity or to maturity, and that instead many ingredients in the process by which men become learned tend actively to obstruct them both." *Id.* at 111.

174. *See* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (1970):

> Implicit in the banking concept is the assumption of a dichotomy between man and the world: man is merely *in* the world, not *with* the world or with others; man is spectator, not re-creator. In this view, man is not a conscious being (*corpo consciente*); he is rather the possessor of *a* consciousness: an empty "mind" passively open to the reception of deposits

which actively and effectively involves the students in the knowing process.[175]

The psychological and educational concerns expressed above also have their analogs in the "adult" corporate world. Psychologist Anne Shaef suggests that psychological theory relating to dysfunctional families can be applied to organizations such as corporations.[176] Shaef notes that just as co-dependency and other psychological dysfunctions can affect adult children of alcoholics in their families (where the adult children now are the parents), so, too, can co-dependency, perfectionism, and workaholism permeate a corporate organization causing it to dysfunction.[177] The only way to deal with such dysfunction is on *both* the individual and the organizational levels.[178] Corporate culture, as well as the individual's identity, must be transformed. In essence, Shaef advocates a sustained process of communication, critical reflection, openness to transcendence, personal growth, decision, and action, which takes place on both personal and interpersonal bases within the organization.

Similarly, many management consultants and academics have been advocating and helping to implement critically reflective processes, as well as intuitive thought processes, within corporations. For example, Charles McCoy has found, in his discussions with managers, that they have come to realize that they had been making value judgments as well as fact judgments in the context of their everyday decision making.[179] Although such value judgments were always pres-

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of reality from the world outside.

. . . .

It follows logically from the banking notion of consciousness that the educator's role is to regulate the way the world "enters into" the students. His task is to organize a process which already occurs spontaneously, to "fill" the students by making deposits of information which he considers to constitute true knowledge. And since men receive the world as passive entities, education should make them more passive still, and adapt them to the world. . . . Translated into practice, this concept is well suited to the purposes of the oppressors, whose tranquility rests on how well men fit the world the oppressors have created, and how little they question it.

*Id.* at 62-63.

175. *See* Fejfar, *A Road Less Traveled*, *supra* note 46 (discussing a critical-dialogical pedagogy in the context of legal education); Fejfar, *supra* note 168 (same).

176. *See* ANNE WILSON SCHAEF & DIANE FASSEL, THE ADDICTIVE ORGANIZATION (1988).

177. *Id.* at 73-76.

178. *Id.*

179. *See* CHARLES S. MCCOY, MANAGEMENT OF VALUES (1985): "When ethics

ent, the managers did not recognize what, implicitly, they were already doing since their decision-making processes were defaulting to auto-consciousness.[180] Moreover, these managers came to realize that their decisions were made in the context of an already present corporate "being-in-the-world" permeated with values. Thus, they came to recognize the importance of consciously and reflectively defining and developing their corporate "being-in-the-world" prior to actual decision making.[181]

Additionally, Professor Edwin Epstein has argued that corporate social responsibility must be considered *both* as product and process.[182]

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is understood not as a rigid set of rules to be obeyed but rather as the continuing reflection on the moral significance of action, it becomes clear that persons and organizations are constantly involved in such reflection." *Id.* at 72.

180. Although McCoy does not use the term "auto-consciousness," he suggests its presence in some corporate decision making:

> In projects the Berkeley group has conducted with executives of corporations and other kinds of organizations, there is often an initial reluctance to discuss ethics because they think it involves applying unrealistic rules from outside business to the policies and choices of the corporate world. Once this roadblock is removed, we discover that each individual brings many ethical convictions to his or her job and that ethical reflection is also going on in the organization—sometimes on an explicit level but more often as a tacit dimension of the policy process.

*Id.* at 73.

181. Again, while not using the precise language I employ in the text, McCoy states:

> Although it is important to be wary of trying to impose particular solutions to problems or specific political directives, the criteria by which management develops policy are the product of ethical reflection with implications for the future. Social vision is present and provides the basis for distant purposes and for the appraisal of immediate consequences. It is not so much a question as to whether social vision will be present in corporate policy but rather the extent to which such vision is self-consciously developed, deliberately discussed, and critically integrated into the policy process.

*Id.* at 113.

182. *See* Epstein, *supra* note 155.

> Corporate social responsibility can be usefully thought of as a *Process*: a system of decision making whereby corporate managers try to anticipate and consider the *total* consequences of business policies and operations before they act. What managers consider to be relevant to formulating and implementing corporate policy encompasses not only economic factors, but also the social, political, environmental, and cultural consequences of corporate action. This broader decision-making transforms social responsibility from a Product to an institutionalized Process. This institutionalization is an essential aspect of a Process view of corporate social responsibility. It requires that the firm build into and utilize in key aspects of its normal business operating practices (particularly areas unregulated

Such activity is "rational" in two respects. First, the process intends "better" decisions. Second, it supports long-term business and societal well being and democratic pluralism.

Epstein has expanded upon this "product and process" approach and has developed a more inclusive process notion which he describes as the "Corporate Social Policy Process."[183] This social policy process involves the dialectic between (1) *business ethics* (which is concerned with moral reflection), (2) *corporate social responsibility* (which is concerned with the normative correctness of the products produced), and (3) *corporate social responsiveness* (which is concerned with corporate decision-making processes involving the institutionalization of organizational policies and practices).[184]

Along more "intuitive" lines, management consultant Henry Mintzberg argues that we must take steps to eliminate formal "machine" rationality from our organizations.[185] Such rigid rationality results in destruction of human beings and human relationships, rather than authentic growth and creation:

> Bear in mind what "rationality" means in management. . . . To rationalize almost inevitably means to cut, to reduce, to eliminate, not to integrate or grow or create. In effect, rationalizing is to the contemporary manager what bloodletting was to the medieval physician. No matter what form it takes—firing workers, cutting budgets, restructuring, etc.—rationalizing becomes the machine bureaucracy's solution to all its problems. Integrating, growing, and creating depend in good part on the other mode of thinking—on viewing things holistically, from the perspective of synthesis, processes that seem to be beyond the machine bureaucracy.[186]

At this point in our dialogue, the *liberal rationalist* might interject several interrelated objections. First, the fact that some corporations

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by government) structures and practices that require it to consider decision criterion that were once thought to be "exogenous" or irrelevant.

*Id.* at 1303-04.

183. Edwin M. Epstein, *The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness*, 29 CAL. MGMT. REV. 99 (1987).

184. *Id.* at 104.

185. MINTZBERG, *supra* note 137, at 342-48.

186. *Id.* at 343-44.

are engaged in this kind of a sustained critical dialectical process does not mean that all corporations will follow. Second, even if such a corporate process is a good thing, there is no way to require that the process take place in a corporation and, therefore, a legal requirement coercing such a process will at best, result in mere window dressing in corporations that are not genuinely committed to the idea. Third, it is possible that a corporation engaging in such a process may be foregoing short-term profits which would make it a "ripe plum" for a corporate takeover, the result of which would be either the "carving up" of the corporation, or the replacement of management, and the reversal of already instituted policies and decisions. Finally, if corporate takeovers do not occur, the presence of such corporate voluntarism could result in increased economic inefficiency.

Although the above points, which have some merit, can be dealt with, the proposed resolution may not be satisfactory to the *liberal rationalist*. While the legal system cannot directly coerce such a corporate culture, some important steps can be taken to actively encourage its development. First, it is important that the corporate responsibility process, such as that suggested by McCoy and Epstein, be given general societal approval and legitimation. A good first step would be the adoption of something like the American Law Institute's (A.L.I.) Corporate Governance Project's statement of corporate purpose, which states the goal of the corporation as producing a profit, but that the corporation can properly take ethical and social concerns into account in its operations.[187]

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187. *Cf.* Edwin M. Epstein, *The Corporate Social Policy Process and the Process of Corporate Governance*, 25 AM. BUS. L.J. 361 (1987) (praising the A.L.I.'s effort for moving into the "external" sphere of Corporate Legitimacy—involving obligations of the corporation to diverse segments of society impacted by its operations).

The American Law Institute Tentative Draft No. 2, § 2.01, relating to "The Objective and Conduct of the Business Corporation," provides:

> A business corporation shall have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain, except that, whether or not corporate profit and shareholder gain are thereby enhanced, the corporation, in the conduct of its business
>
> (a) is obliged, to the same extent as a natural person, to act within the boundaries set by law,
>
> (b) may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and
>
> (c) may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

I understand § 2.01 as both encouraging and legitimating a "both/and" relationship

Second, those of us in law schools can help to teach lawyers to be counselors in addition to advocates. Counselors must actively and constructively participate in the sustained critical dialectical process.[188] We can also emphasize more experiential, process oriented learning, rather than just the development of analytical skills. This would involve the use of simulated or clinical learning situations where, affective, intuitive, inter-personal dynamics are emphasized.[189]

Third, we cannot limit our concern to persons acting inside the corporation, but also must address the shareholders themselves. If the shareholders and the public are to have a basis upon which to evaluate and compare corporations on criteria other than that which is purely "economic," it is important that social responsibility information be made available to the shareholders and the public. This could be accomplished by amending the Securities and Exchange Commission (SEC) proxy solicitation disclosure regulations, to explicitly require that corporations include in their annual report, a

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between profit and contextual moral responsibility rather than promoting profit *maximization* in which contextual moral responsibility is subordinated to profit. *But see* Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1990) (interpreting § 2.01, within an essentially "either/or" analytic framework, as endorsing the "traditional" view that management and directors are to make individual decisions whose end is the maximization of profit for shareholders with no responsibility to other "constituents").

188. The *liberal rationalist* might object that it is improper for legal counsel to do anything beyond giving "legal" advice to a corporation as to the limits on what corporations can or cannot legally do. Robert Rosen argues, however, that *failing* to give advice on matters relating to policies and goals of the corporation is to give the "corporate client" poor quality and unprofessional advice:

> The Inside Counsel Movement claims that when high-status lawyers refuse to assume influential corporate roles, clients receive lesser quality service. [The] Inside Counsel Movement challenges the profession to articulate why lawyers ought not to play a political role in client decision making. It challenges the profession either to affirm the burden of the profession's past claims or to articulate why resistance to the Inside Counsel Movement does not deny past claims to the moral and social significance of the practice of the influential and independent counselor role.

Robert E. Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 536 (1989). *See also* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 30 (1988) (generally discussing the position that lawyers' advice, or lack thereof, cannot avoid influencing their client's "moral" behavior).

189. Group dynamics and decision-making courses are already present in management schools and used in organizations by management consultants. *See, e.g.*, materials produced by University Associates, San Diego, California.

social responsibility report.[190] The exact content of this report would not be dictated. However, if the report deals with a certain area, such as the environment, for example, then it would be required to state all reasonably relevant information within that category.[191] Additionally, the support and expansion of the scope and availability of shareholder initiatives or proposals would provide a forum for shareholders to voice their concerns to management.[192]

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190. *See* NEIL W. CHAMBERLAIN, SOCIAL STRATEGY AND CORPORATE STRUCTURE 74 (1982) (discussing the notion of the corporate "social audit"). *See also* Walter F. Abbott & R. Joseph Monsen, *On the Measurement of Corporate Social Responsibility: Self-Reported Disclosures as a Method of Measuring Corporate Social Involvement*, 22 ACAD. OF MGMT. J. 501 (1979) (suggesting that useful social responsibility information can be obtained through an analysis of the information already required to be placed in the corporation's annual reports by the SEC).

Currently, SEC regulations require that:

> a proxy solicitation on behalf of the issuer with respect to an annual meeting for the election of directors must be accompanied or preceded by an annual report to security holders that includes, *inter alia*, (1) balance sheets for two years and income statements for three, all audited and prepared on a consolidated basis in substantial compliance with Regulation S-X, (2) selected financial data, and (3) management's analysis of financial condition and results of operations.

LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATIONS 434-35 (1988).

Consistent with A.L.I. § 2.01, since management, investors, and potential investors can, and in many cases explicitly do entertain a broader conception of "return" on investment than that which can be expressed in purely "financial" terms, it would seem that the current regulatory structure could be altered to include a specific requirement relating to social responsibility concerns. "Moral" and "political" corporate policies which are "significantly related" to corporate operations are already considered to be the proper subject of shareholder proposals pursuant to SEC regulation, § 14a-8. For examples supporting shareholder consideration of moral/political issues under § 14a-8, see Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1979), *vacated as moot*, 404 U.S. 404 (1972) (stating that shareholders are entitled to consider moral or political issues related to the corporation); Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554 (D.D.C. 1985) (holding that a shareholder is entitled to preliminary injunction barring corporation from excluding from the proxy materials corporate related ethical and social concerns raised by shareholders).

191. Some environmental information may already be available through SEC reporting requirements. *See* Risa V. Ferman, Note, *Environmental Disclosures and SEC Reporting*, 17 DEL. J. CORP. L. 483 (1992) (discussing SEC disclosure requirements relating to environmental regulatory violations).

192. *See* 17 C.F.R. § 240.14a-8 (1991). *See* Schwartz & Weiss, *supra* note 77 (providing a positive assessment of the impact of the shareholder proposal rule). *But see* Dent, *supra* note 77 (arguing that the rule should be abolished because it is not "cost effective"); Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481 (1972) (arguing that the rule should be limited or abolished because it is too "effective" in focusing public concern on corporate responsibility issues).

With respect to the "corporate takeover" objection, Engel himself provides the *critical realist* with an initial response. As discussed earlier in our dialogue, Engel suggests that once "irreducible" corporate voluntarism becomes ingrained in a corporate culture, the corporation will tend not to be considered a good target for a takeover because such a "voluntarist" culture will be viewed as a "negative" profit factor to potential corporate raiders.[193]

In a different context, a point analogous to that of Engel's is implicitly made by David Levine in a discussion of "participatory" organizations.[194] Levine's analysis suggests that in participatory corporate cultures, where there is a high investment in employee development and participation,[195] the corporation tends not to be an attractive target for a raider who desires to realize a profit either by selling off assets[196] or by attempting to implement a non-participatory, authoritarian management structure.[197] Thus, if a potential corporate raider is to realize a profit from a takeover, he is essentially forced to continue a participatory culture. In my judgment, a healthy, relational-process oriented corporate culture which includes the positive attributes suggested by Schaef[198] and Epstein,[199] would necessarily have to be a participatory organization to some degree. Therefore, it would seem that such a corporation would not be an attractive target for a corporate takeover where the raider merely intends to sell off assets or to significantly change the organizational culture.

The other objections raised by the *liberal rationalist* relate to economic "efficiency." At the outset, it is apparent that whether or not corporate voluntarism would produce "inefficiency" depends

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193. *See supra* note 15.

194. *See* David I. Levine, *Participation, Productivity, and the Firm's Environment*, 32 CAL. MGMT. REV. 86 (1990).

195. Levine suggests that in order to be successful, a "participatory" organization must develop policies which promote employee trust, loyalty, honest communication, and positive motivation. *Id.* In order to facilitate these characteristics within the organization, it is necessary to institute policies that ensure employee participation in profits, job security and long-term employment relations, measures to build group cohesiveness, and institutional guarantees against arbitrary sanctions or dismissal. *Id.*

196. This is because too much of the corporation's capital is invested in human resources.

197. Once employees have had the experience of meaningful participation, they tend to rebel against authoritarian submission.

198. *See supra* text accompanying notes 176-77.

199. *See supra* notes 182-84 and accompanying text.

upon how one defines "efficiency." The *critical realist* suggests that a healthy, relational-process culture of corporate voluntarism would be much more "efficient" at producing socially responsible "products."

It is difficult to see how the *liberal rationalist* would be able to counter this use of "efficiency" on purely "empirical" economic grounds. This assertion is supported by Professor Arthur Leff's treatment of Richard Posner's *Economic Analysis of Law*.[200] In critiquing Posner's work, Leff points out that "law and economics" assumes that what people actually buy, and the price they pay for it, expresses that which they really want or prefer.[201] Leff suggests, however, that *if* people are *really* getting what they want at "Time 1" in Culture A, then the system is by definition already functioning "efficiently."[202] However, the same would be true at "Time 2" in changed Culture B, where a different set of wants or preferences are being expressed.[203] Therefore, there is no basis for asserting that either Culture is functioning "inefficiently."[204] Alternatively, in order to claim that certain changes in a culture will result in more or less "efficiency," one would have to have a normative basis for stating that the situation at "Time 1" in Culture A is "better" or "worse" than the situation at "Time 2" in Culture B.[205] As an *empiricist rationalist*, however, the economist is precluded from making such "ought" statements.[206] Rather, he or she must find an independent "rational" grounding for the normative evaluative standard.[207]

A corollary to Leff's argument is that even if we limit the "products" that the corporation "produces" to goods and services produced, it is quite possible that a healthy corporation which is critically reflective will more "efficiently" produce "socially responsible" goods and services than otherwise, and might even produce

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200. *See* Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

201. *Id.* at 456.

202. *Id.* at 457-58.

203. *Id.*

204. *Id.* at 462-63.

205. *Id.*

206. This is because the *empiricist rationalist* purports to be engaging in "detached observation," and is supposedly applying objective "value-neutral" criteria for evaluation. Leff's point, analogous to that made by Hosmer, is that the economist *is* implicitly employing "subjective" value laden criteria in his or her analysis. *Id.* at 463.

207. *See id.* at 464-66.

more profit than otherwise. This point is made in a slightly different fashion by James O'Toole in *Vanguard Management*.[203] O'Toole contrasts successful, progressive, innovative "Vanguard" managers with "boss" managers of the "Old Guard":

> Apparently, what attracts some people to management is the opportunity to be decisive and adamant, to take a clear and consistent stand, and to "do it, fix it, try it." In short, they want to be a "boss." To these people, such activities as balancing short[-]term and long[-]term goals, balancing the needs of employees and shareowners, and balancing economic and environmental needs is simply evidence of weak, indecisive leadership.
>
> But the Vanguard executives see things in a different light. They do not see the balancing of equal but competing values in terms of either/or. To learn more about this belief, I made it a point to ask every Vanguard executive I interviewed the same question: "How do you decide when forced to make a tough trade-off between the conflicting needs of two stakeholders?" It came as a continual surprise to me that one after the other of these leaders refused to answer my question. Apparently, they do not believe in zero-sum games. They argued that, with a little imagination and commitment, one could always arrive at a solution that would serve—if not fully please—the interests of all parties involved . . . .
>
> As one who was schooled in the harsh realities of textbook economics where everything is cast in terms of trade-offs, in which there are always winners and losers, and in which the first rule is that you can't have your cake and eat it, too, I initially found this contradiction to my academic training hard to reconcile. But the more I talked to the managers of the Vanguard corporations, and the more I learned about their companies, the less relevant what I had *read* about how to run a company seemed. Like our nation, these companies are full of paradoxes: They pursue entrepreneurial ends by cooperating with the government, they ignore opportunities to make easy money while making a lot of money pursuing higher ends, and

208. JAMES O'TOOLE, VANGUARD MANAGEMENT (1985).

> they reconcile opposites which, it turns out, are not irreconcilable.[209]

At this point in our dialogue, the *critical rationalist* might jump back into the discussion, pointing out that even if everything previously said is true, all that has been established is that such a critical culture *can* come into being, not that it *will* come into being. What reason is there to think that in a world full of neurosis, oppressive social structures, greed, and corruption, that such a culture will develop? The *critical realist* would respond that there is no guarantee. The conditions for future authenticity are based upon the present mutually constitutive dialectic involving the person, community, and society. The acritical inauthenticity present in our society cannot

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209. *Id.* at 386-87. *See* Dawn Gibeau, *Investment pros find social responsibility pays off*, Nat'l Cath. Rptr., June 29, 1990, at 7 (providing more current, but informal support of the profit potential of socially responsible corporations). Referencing an interview with Gordon Davidson, executive director of the Social Investment Forum, Gibeau states:

> The majority of investment professionals who eschew social-responsibility considerations still say "you should only think about the bottom line, profit," when handling money, Davidson said. But social responsibility investing has proved profitable in many cases. . . .
>
> [W]e believe and our experience tells us that if a company is well managed from a social point of view, it means that they have to have more careful, hands-on management to be aware of all the social issues. And dealing with them in a good way means they're obviously going to have to be a well managed company from a financial point of view, too. In the long term at least, you will see [such] a company do well. . . .
>
> Such companies are not merely young, entrepreneurial organizations; some are major corporations. H.B. Fuller, for instance, a multinational adhesives manufacturer, has "very, very enlightened environmental policies; it is very, very good on worker relations," said Davidson. H.B. Fuller "closed down a plant in Texas and gave everybody $10,000 and six months training for new jobs. I mean, they were really incredible. There are some really, really good companies out there, but they are the exception, not the rule."

*Id. See also* Robert H. Stovall, *When Do-Gooders Do Good*, Fin. World, Sept. 1, 1992, at 68, 70 (stating that this year will see a doubling of the number of socially responsible mutual funds and that socially responsible investors are "finding profits in their principles"). *But see* Abbott & Monsen, *supra* note 190, at 514: "Being socially involved does not appear to increase investor's total rate of return. Nor does it appear that being socially involved is dysfunctional for the investor." *See also* Gordon J. Alexander & Rogene A. Bucholz, *Corporate Social Responsibility and Stock Market Performance*, 21 ACAD. OF MGMT. J. 479, 485 (1978) ("The results of [our] study indicate that the degree of social responsibility, as measured by the rankings of businessmen and students, bears no significant relationship to stock market performance. Furthermore, there seems to be no significant relationship between stock risk levels and degree of social responsibility.").

easily be erased this year, next year, or even ten years from now. It can only be eliminated through a dialectical progression of authenticity in which our personal, communal, and societal "being-in-the-world" is gradually transformed. Thus, sustained committed action is needed now, although the effects of such action may not immediately be apparent and can be negated or muted through the inauthenticity of others both now and in the future.

Such a realistic recognition of the scope of the problem and its solution does not necessarily lead to nihilism. Nihilism only results if we as individual persons, communities, and a society dialectically constitute ourselves in and through core attitudes of cynicism and despair, rather than attitudes of realistic hope and openness to transcendence. The future is in our hands.[210]

## IV. CORPORATE VOLUNTARISM, PANACEA OR PLAGUE?

We began our dialogue in the initial section of this article by focusing on Engel's analysis of corporate voluntarism. As our dialogue proceeded, it became apparent that Engel's analysis proceeded from within the context of a property-oriented *liberal rationalist* horizon. Of course, in his discussion, Engel did not even deal with the notion of horizon. Instead, he suggested that the important issues underlying the legitimacy of corporate voluntarism relate to political ideology. Engel, however, cannot really be faulted for failing to discuss the notion of horizon, since egocentric *rationalism* does not recognize that it functions as a foundational horizon. Moreover, within such a *liberal rationalist* horizon there is no need to justify the assumption of the

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210. *Cf.* O'TOOLE, *supra* note 208, at 389:

> Could it ever come to pass that the majority of corporations would follow the lead of the Vanguard? Only if shareowners, unionists, consultants, the media, politicians, educators, employees, and all those who have influence in society continually bring home the point to the leaders of the Old Guard (and to the leaders of the financial community) that such a course would not only be better for society, it would also be better for competitive, corporate capitalism in the long run. Indeed, the way of the Vanguard is probably the only alternative available to corporations that would allow them any real freedom to operate in the future. The leaders of the Old Guard must learn that they will not be permitted to turn the clock back to the days when an undemanding public would accept single-stakeholder laissez-faire behavior among large corporations. . . .
>
> It is our duty—those of us who are not corporate managers—to educate business leaders of the ultimate folly of pursuing a course that runs against their self-interest, and ours as well.

*Id.* at 389.

priority of egocentric property rights over the right and obligation of corporate actors to act in accordance with individual judgments of natural duty, other than to openly assert the assumption. This is so, because the alternative assumption that the right and obligation of corporate actors has priority over egocentric property rights would be equally ideological in character.[211]

Similarly, Engel's point concerning the illegitimacy of corporate voluntarism, as process, also makes sense within the context of a property-oriented *liberal rationalist* horizon. In order to refute his argument, one must "assume" a notion of moral judgment and personhood at odds with the *liberal rationalist* assumptions relating to the "subjective—objective" dichotomy, and "rational autonomy."

What Engel fails to explicitly point out is that his approach is also subject to internal contradiction. The legitimacy of the legislative process, as suggested in the *liberal rationalist* framework assumed in this article, is based upon the notion that people act in accordance with "natural duty" in their "private" lives, and especially in their "public" lives. Whether one idealizes the actions of corporate actors as "private" or "public," it seems that they have natural duties to other persons with whom they directly interact in everyday life, and to persons indirectly, through the promotion of the principles of justice in the legislative process. As Engel surely would recognize, to *assume*, a priori, that the natural duty of corporate actors is limited or defined by self-interested profit maximization both in everyday corporate actions, as well as when participating in the legislative process, merely begs the question at issue. Engel can give no analytically independent justification for such assumed legitimacy. Thus the legitimacy of the legislative process itself has no firm "rational" footing.

It appears, therefore, that no logically coherent case, other than one which begins with an irresolvable "irrational" ideological presupposition, can be made either for or against corporate voluntarism within a *liberal rationalist* horizon. Moreover, the foundational assumptions upon which either the property-oriented, or the duty-conscience oriented *liberal rationalist* makes his or her case, for or

211. This is not to say that in my judgment, Engel's analysis is adequate, or that all analytical approaches are purely "relative." Rather, my point is that even though Engel's analysis is perfectly plausible within a *liberal rationalist* horizon, the horizon of the *liberal rationalist* is foundationally flawed and inadequate. Thus, his analysis is rendered inadequate.

against corporate voluntarism, are subject to *critical rationalist* or *critical realist* critique, e.g., the "subjective—objective" dichotomy, market neutrality, the "public role—private role" dichotomy, and, "rational autonomy" itself. The *critical rationalist*, however, is unable to provide a critical, but realistic, alternative to *liberal rationalism* unless he or she is willing to promote on personal, communal, and societal levels, something analogous to the development of a *critical realist* foundational horizon, as a core method or mode of "being-in-the-world."

The best case for corporate voluntarism as both process and product, proceeds from within a *critical realist* foundational horizon. The case for corporate voluntarism is made on the basis that corporate voluntarism, as both process and product, can make a legitimate contribution to a broader attempt to develop a more authentic "being-in-the-world," which is at once personal, communal, *and* societal. In other words, corporate voluntarism would support the development of a corporate "being-in-the-world" which promotes dialectically embedded, critical-relational, autonomy in community and larger society, rather than dialectically embedded, acritical, pseudo-autonomy. The result will be a progression towards a society which is increasingly more humane, just, democratic, and centered in authentic freedom.[212]

Given the foregoing, the reader may be curious as to how the *critical realist* position fits into our current political ideologies. The answer is that it does not. It does not fit into either the "liberal" or "conservative" variations of the *liberal rationalist* horizon which dominate political life in contemporary America.[213] The closest that it comes to is a sort of civic republicanism,[214] with the caveat that persons, communities, or society are not idealized as being someone or something they really are not. Moreover, a *critical realist* can only give *provisional* support to *any* political ideology. This is because any abstractly stated static political ideology as well as the quasi-stable social structures and relationships it supports, must be subject to

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212. *See* Fejfar, *supra* note 51, at 307-09 (discussing this approach to justice).

213. As an aside, the *critical realist* position does not fit within Marxist ideology either. The historically unfolding dialectic within the *critical realist* position involves the dialectical interplay between authentic human subjectivity and inauthentic human subjectivity. Economic determinism presented in either Marxist or capitalist economic theories is rejected. *Cf.* Gordon, *supra* note 125; Gordon, *supra* note 105 (stating that the course of historical development is underdetermined).

214. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (discussing contemporary approaches to republicanism).

continuing critical critique and redevelopment on the personal, communal, and societal levels. Additionally, even this provisional support for a political ideology must be tempered by the recognition that the mere acceptance of *ideas* in the abstract, by persons or groups, will not necessarily result in a significant change in a person's foundational horizon, the horizon of a community, or that of larger society. In this sense, a *critical realist*, while he or she certainly must employ interlocking systems of ideas in articulating a provisional political philosophy or a political stance with respect to particular issues, can never be an ideologue.

## V. CONCLUSION

In the final analysis, contrary to the view suggested in the context of the *liberal rationalist* counter position assumed by Engel, I would suggest that any discussion as to the legitimacy of corporate voluntarism does not primarily involve questions relating to underlying political assumptions or ideology, but rather, horizon. From within a *liberal rationalist* horizon, the case for or against corporate voluntarism is equally "rational" or "irrational" on both sides of the issue. From within a *critical rationalist* horizon, one is able to point out the inadequacy of the *liberal rationalist* horizon, but ultimately, is not able to get beyond it and provide a positive alternative. In the limit, the question of whether corporate voluntarism is panacea or plague is better and more critically decided from within a foundational horizon of *critical realism*. From within this foundational horizon, a critical grounding of corporate voluntarism as process *and* product can be found.