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BOOK REVIEW

WHERE THE LAW ENDS—The Social Control of Corporate Behavior, By Christopher D. Stone; Harper & Row, Publishers, New York, 1975. Pp. xiii, 273 (hard cover).

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.¹

Imagine the scene from Herman Melville's "Bartleby, the Scrivener," where the beleaguered Scrivener looks forlornly out of his employer's Wall Street office window at (into?) a blank wall.² What thoughts can possibly be passing through the troubled mind of this archtype of the forlorn, modern exile?³ Per-

*Professor of Law, University of Southern California

1. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat 19) 517, 638 (1819). (Mr. Chief Justice John Marshall) This case is often viewed as the first exegesis (progenitor) of the legal personality of a corporation in American jurisprudence.

2. Melville, *Bartleby, The Scrivener*, PUTNAM'S MONTHLY MAGAZINE, Nov. & Dec. 1853, at 556 [hereinafter cited as PUTNAM]; H. MELVILLE, ANNUAL 1965 A SYMPOSIUM BARTLEBY THE SCRIVENER (1965).

To reconstruct the setting, the reader can examine the description of the Scrivener's employer of his own office location:

My chambers were up stairs at No. ____ Wall Street. At one end they looked upon the white wall of the interior of a spacious skylight shaft, penetrating the building from top to bottom . . . the view from the other end of my chambers offered, at least, a contrast, if nothing more. In that direction my windows commanded an unobstructed view of a lofty brick wall, black by age and everlasting shade . . ." PUTNAM at 547.

Later the employer-narrator relates the following about the Scrivener: "The next day I noticed that Bartleby did nothing but stand at his window in his deadwall revery." PUTNAM at 556.

3. The following quotes from Friedman, *Bartleby and the Modern Exile*, in H. MELVILLE, ANNUAL 1965 A SYMPOSIUM BARTLEBY THE SCRIVENER 64 (1965) [hereinafter cited as H. MELVILLE] and M. FRIEDMAN, PROBLEMATIC REBEL: AN IMAGE OF MODERN MAN 52 (1963) help explain what is meant by these terms:

Bartleby is a Modern Exile. He does not merely represent that exile of man from paradise which has characterized the human condition from earliest times. He also represents that special intensification of exile that arises from the "death of God" and the alienation of modern man. The "death of God," as that phrase has been used from Nietzsche down, is not a statement about God but about man's alienation itself. H. MELVILLE at 64.

Friedman continues defining his terms with this quote:

Melville's "almighty forlornness" stands opposed to any form of idealism or mysticism that tends to abolish the gulf between man and the world. Man is the creature whose existence is limited in space and time and who knows it; the creature whose life is conditioned by his knowledge of death. He has to face the infinite and know that it is infinite and he is finite. But this is just what specifically modern man cannot bear. For modern man can no longer believe, as primitive man could, that he is one with a natural-spiritual order . . . As man of modern consciousness, he is cut off from all that. Fully aware of his individuality and his individual mortality, he exchanges the consolations that are inaccessible to him for the defiance of the Modern Rebel or the forlornness of the Modern Exile. (citations omitted) *Id.* at 71.

haps Professor Stone has supplied us with answers in his book *Where The Law Ends*.⁴ In all probability, Stone's Bartleby would be seeking the "conjunction of truth and social 'reality'"⁵ in the context of controlling certain corporate behavior legally.⁶ In sum, he would be seeking to give socially meaningful testimony to Mr. Chief Justice Marshall's penetrating observation in the *Dartmouth College* case which was quoted above.

But why select the literary character Bartleby as the focal point and dramatic protagonist for a law professor's ideas on controlling socially certain corporate behavior? A close examination of Bartleby demonstrates that he is the quintessence of the sensitized modern "technological man" whose desire to end his

Friedman continues explaining his interpretation in the following quote:

The forlornness of the Modern Exile is not only that of loneliness. It is a self surrounded by an oppressive, infinite reality of non-self that threatens at every moment to blot out the self. This oppressiveness can be experienced . . . in the world of Bartleby, a world in which the self stands without relation to other selves, without any assertion of its own existence or demand placed upon the existence of others, other than the sheer negative self-assertion of "I prefer not to." *Id.* at 72.

4. The eminent English political philosopher John Locke stated the point dramatically and forcefully with his statement that "Wherever Law ends, Tyranny begins." J. LOCKE, SECOND TREATISE OF GOVERNMENT, § 202 (1690); FAMILIAR QUOTATIONS 372 (Bartlett Fourteenth ed. 1968). *See also*, E. BURKE, LETTER TO THE SHERIFFS OF BRISTOL; 2000 FAMOUS LEGAL QUOTATIONS 400 (1967): "Liberty to be enjoyed, must be limited by Law, for law ends where tyranny begins, and the tyranny is the same, be it the tyranny of a monarch, or of a multitude—nay, the tyranny of the multitude may be the greater, since it is multiplied tyranny."

The title *Where The Law Ends* denotes the frightening end of social regulation. It also connotes a sense of lawlessness, barbarity, lack of civilized behavior, and totalitarianism of one form or another. In short, the end of law demarcates the boundaries of the civilized political community so important to the harmonious life and development of the individual in Anglo-American political ideas. When some individual, fictional or not, either refuses to obey the law thereby circumscribing his or its natural liberty in the Burkean sense, or becomes so powerful that he or it is not subject to the full force and effect of the law, tyranny can result. In this situation, Stone is referring to the tyranny of the large corporations. *See note 51, infra.*

5. This phrase is explained in the following quote from the writings of the English psychiatrist, R.D. Laing:

Few books today, are forgivable. Black on the canvas, silence on the screen, an empty white sheet of paper are perhaps feasible. There is little conjunction of truth and social 'reality' . . . Around us are pseudo-events to which we adjust with a false consciousness adopted to see these events as true and real, and even as beautiful. In the society of men the truth resides now less in what things are than in what they are not. Our social realities are so ugly if seen in the light of exiled truth, and beauty is almost no longer possible if it is not a lie . . . Nevertheless, the requirement of the present, the failure of the past, is the same: to provide a thoroughly self-conscious and self-critical human account of man. R. LAING, POLITICS OF EXPERIENCE, XI-XII (1967).

6. The following quote could apply equally to Stone:

This is a study of the very large corporation in American society, the leviathan that gives the American economic order the characteristic feature that distinguishes it from most of the rest of the world. These are enterprises of enormous magnitude with such profound impact on the lives and fortunes of so many human beings, communities, and even nations that they must be regarded as a unique phenomenon. Unless we recognize that these very large corporations, or megacorporations, are different in kind and degree from corporations generally, we cannot understand their implications for democratic society or deal effectively with establishing appropriate political controls over these centers of economic, political and social power. (citations omitted)

P. BLUMBERG, THE MEGACORPORATION IN AMERICAN SOCIETY: THE SCOPE OF CORPORATE POWER 1, I (1975).

From time to time, the book review will use interchangeably "large corporation" and "megacorporation."

alienation would stimulate him to search for effective means to reassert control over these important institutions in his social environment. *Bartleby* is representative of the person who could be energized more quickly to work through his alienation, apathy, and confusion to reach social reform. Like *Stone*, *Bartleby* is in the state of ready sensitivity needing only guidance and direction to carry out a rebellion. Equally important, *Bartleby* crystallizes the character profile of the modern alienated man facing a painful paradox. This modern man both depends on modern corporations for important items in his daily existence such as jobs, food, and clothing, and is harmed seriously by the corporations' operations. Plainly, *Bartleby* is the archetype of the excited exile and rebel who could not so easily, but dearly and urgently need, to embark on *Stone's* journey to find the — "conjunction point" necessary to form the base of social action. (Paraphrasing Beckett, "I can't do it, I must do it!") Thusly, a focus on *Bartleby* helps us to comprehend the complex social environment which surrounds the intricate psychological underworld that is beneath *Stone's* ideas. In this sense, he sheds light on the ontogeny of a rebellion, and in turn intensifies our comprehension of the compelling arguments supporting *Stone's* analysis.

In addition, recall *Bartleby* was employed in the matrix of a legal-commercial world which is important to the growth of large corporations. Ironically, *Bartleby's* employer, a lawyer, is representative of a group which has had a very large hand in helping these corporations to elude social control.⁷ Simply stated, *Bartleby* demonstrates the paradox of the legally trained technological man, or at least a technological man thrust in the midst of the legal community. *Stone's* *Bartleby* dramatizes the need for those knowledgeable about the legal community to overcome the syndrome of complicity to persuade and guide the lawyers to be spearheads for social change.

The adaptation of *Bartleby's* character for my present analysis, then, serves the purposes noted. Furthermore, it rivets attention on the fact that the omnipresent modern exile, flesh and blood characters such as you and I, and not some remote, lifeless fictional figure (the "reasonable man") is in the vortex of the dilemma of controlling socially this modern incubus.⁸ Thus, viewing *Stone's* book through the character of *Bartleby* gives a valuable insight (also exegesis) into the ideas expounded.

Having set forth the above, how is *Stone's* *Bartleby* transported from his employer's office into the heart of social action? A conceivable scenario would be

7. In a cynical manner, Ambrose Bierce once defined the lawyer as "one skilled in circumventing the law." But in a more positive manner, another writer stresses the role of the lawyer in a business corporation in the following fashion:

When the business corporation is born, the lawyer is the midwife who brings it into existence; while it functions he is its philosopher, guide and friend; in trouble he is its champion, and when the end comes and the last sad rites must be performed, the lawyer becomes the undertaker who disincorporates it and makes final report to the Director of Internal Revenue.

R. REDFIELD, *FACTORS OF GROWTH IN A LAW PRACTICE* 30 (1962).

8. In essence, this focus on the human predicament in a social environment which is manipulated by corporations has elements of an existential philosophical analysis. See W. BARRETT, *IRRATIONAL MAN A STUDY IN EXISTENTIAL PHILOSOPHY* (1958).

the following. Return to the picture of Bartleby looking out of the window. He perceives the deleterious impact of the very large corporations on his physical and intellectual environment.⁹ But assume Bartleby wants to reject despair and escapism so as to transcend his alienations to achieve knowledge he can translate into a plan for social action. Hence, a complete withdrawal into his solipsistic universe, constant refusals to join the carnage in the form of a snappy "I prefer not to," or idle wishing will not aid him in reaching his goal. "Bartleby, the Reformer," must take some concrete and positive steps. Perhaps the proper approach is to start with the task of reanalyzing the "corporate problem." Conceivably, this approach can lead to the discovery of a new analytical framework. And in turn, perhaps this reexamination will lead to a different jurisprudential conceptualization of large corporations in a manner which will engender the social accountability society should demand of these collectives of individuals.¹⁰

Taking this view, Stone's book appears to be more than a rehash of existing theories on how large corporations operate. Then too, it is not another simple chronicle of the horrors of corporate operations. He is about serious social reform. As adumbrated above, Stone is a social critic who seeks to analyze the conceptual framework of corporations and the social regulation of their behavior. In essence, his task is to reconceptualize politically and jurisprudentially these significant social institutions so as to supply society with a meaningful prescriptive¹¹ and normative¹² analysis for restructuring legal control of their operations.

To inaugurate his analysis, Stone (qua Bartleby) begins with a reexamination of the so-called "corporate problem." He does such by briefly reexamining the historical roots of the "corporate problem" going back to the nineteenth century. He observes that corporations perennially are near or in the center of important social actions. In fact, they are some of the most influential "private forces" for

9. See W. ROGERS, *CORPORATE COUNTRY, A STATE SHAPED TO SUIT TECHNOLOGY* (1973) [hereinafter cited as ROGERS], and N. CHAMBERLAIN, *THE LIMITS OF CORPORATE RESPONSIBILITY* (1973) (as well as the citations contained therein) for recent treatments of the often deleterious impact on the society. Many other prominent writers could be added to this list.

10. Ambrose Bierce, in his *DEVIL'S DICTIONARY* (1926) once captured the lack of social accountability in his statement that "[corporations are] an ingenious device for obtaining individual profit without individual responsibility."

11. The following quotation helps define the term:

Prescription refers to theory about the factual prospects of bringing about desired conditions. Thus, it tells you that if you wish to reach certain goals (either ultimate or instrumental), you should undertake such and such a prescribed course of action. To put the case in a slightly different way, prescriptive theory predicts the relative costs of alternative means to valued ends.

D. MINAR, *IDEAS AND POLITICS THE AMERICAN EXPERIENCE* 8 (1964) [hereinafter cited as MINAR].

12. *Id.* Similarly, Minar defines this term thusly: "Normative theory, on the other hand, deals with questions of what should or ought to be rather than what is—with matters of moral quality." *Id.* Note, this focus on moral questions is conceived as consistent with the view some persons have of the law teaching profession. See, HOFSTADLER, *THE AGE OF REFORM* 158 (1956) (calls law professors "keepers of the professional conscience.")

both social good and harm. Hence, modern attempts to solve the myriad of social problems really involve efforts to solve the "corporate problem." Nonetheless, Stone believes the term "corporate problem" requires a deeper analysis than most writers present. Neither simply rehashing the numerous examples (consequences) of the corporate problem, nor viewing it from the more modern angle of the cold light of "statistical tables and graphs" showing the growth of concentration is beneficial. In his estimation, deeper analysis drives the observer to conclude that the core of the problem is a cancerous, "untrammelled influence" lacking any sense of responsibility for its actions,¹³ fueled by modern technology and increased social needs.¹⁴

More importantly, and moving beyond the essence of the corporate problem, Stone asks himself a question which serves as the springboard for his perscriptive and normative analysis. Why has society failed to control this influence? He concludes the failure is a result of the inability of the main institutional control of society, the law,¹⁵ to regulate the influence. He postulates that his own analysis must focus on the actual operations of corporations, in light of this failure to discover how to compel this heretofore uncontrolled influence to exhibit more social accountability. And, he observes that no models exist to guide him. He states that to date no systematic jurisprudential examination of how to inject social accountability into this influence has been made.¹⁶ Much of

13. To demonstrate the fact that the corporate problem has existed some time and that others observed its earlier existence, we can examine the following quote:

Unlimited competition seems to press too hardly on the weak. The power of groups of men organized by incorporation as joint-stock companies, or small knots of rich men acting in combination, has developed with unexpected strength in unexpected ways, overshadowing individuals and even communities, and showing that the very freedom of association which men sought to secure by law when they were threatened by the violence of potentates may, under the shelter of the law, ripen into a new form of tyranny.

J. BRYCE, *THE AMERICAN COMMONWEALTH* 26-77 (1888). See also Oleck, *Remedies for Abuses of Corporate States*, 9 WAKE FOREST L. REV. 463, 464 n. 3 (1973).

14. Herbert Marcus, in his book *ONE DIMENSIONAL MAN OF STUDIES IN THE IDEALOGY OF ADVANCED INDUSTRIAL SOCIETY*, (1964), states the point thusly: "Our society distinguishes itself by conquering the centrifugal social forces with Technology rather than Terror, on the dual basis of an overwhelming efficiency and on increased standard of living." *Id.* at x.

The reader should note that the book review closely connects technology and the corporate problem. Actually technology is a broader term when it takes into account governmental involvement, the science profession, institutions of higher learning in which a good amount of scientific work takes place, and private science foundations in which a smaller amount of scientific work takes place. Nonetheless, the growth of and development of large aggregations of resources into corporate forms is so closely intertwined with the developments and expansion of technology that they can be very closely connected. In fact, a large part of the analysis of the evolution of a technological society involves a focus on the corporate problem. See e.g., notes 9 *supra*, and 76 & 86 *infra*.

15. Professor Harold Laski quizzically and sardonically commented on the interplay of corporations and the law in the following manner: "Corporations will have a curious habit of attempting perpetually to escape from the rigid bounds in which they have been encased. May we not say that, like some Frankenstein (sic), they show ingratitude to their creators?"

Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 407 (1916).

16. See Cary, *A proposed Federal Corporate Minimum Standards Act*, 29 B³⁴. L. 1101 (1974); Oleck, *Remedies for Abuses of Corporate Status*, *supra*; Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CAL. L. REV. 375 (1975); *The Greening of the Board Room: Reflections on Corporate Responsibility*, 10 COLUM J. L.

the traditional social, political, and jurisprudential thinking has focused solely on the "question of individual freedom." Moreover, the valuable works on individual and group behavior from the disciplines of sociology and psychology have not been assimilated within jurisprudential ideas to help us to comprehend how to define social accountability.¹⁷ In sum, his task is to extend "Sociological Jurisprudence" or expand the more recent "Psychoanalytic Jurisprudence."

In order to demonstrate the value (and comparison) of his suggested jurisprudential approach, Stone delves into an examination of this historical development of the jurisprudential concept of the corporation. In Part I of his book, he argues that the law was concerned initially with "individual identifiable persons, operating outside of complex institutional frameworks"¹⁸ who inflicted harm on fellow humans. To control his problem, the legal system "responded with rules and concepts built upon contemporary notions about individuals."¹⁹ At this juncture in history, the impact and consequences of corporate behavior had yet to be viewed seriously due to the then recent development of corporations. Instead, the law focused on the corporation's legal capacity. Gradually, however, this view changed as society began to perceive corporations as actors in the social drama. In short, society began to see the social problems resulting from corporate activities. Yet, he argues that this second wave of response was not inconsistent with earlier legal development. Still corporations were visualized as expanded human beings with a similar legal personality to that possessed by humans.

Even as the social pressures increased in an allegro manner, Stone observes that the society made only minor adjustments in the conceptual framework of the law. In Part II of the book, he argues that the main focus of the adjustments was on restructuring "shareholder- management relations."²⁰ For example, the response to rampant public investor fraud was to arrange the "organizational structure and decision process."²¹ But he notes, this readjustment mainly sought to protect the private investor. Injuries to the general public were still viewed as actions of "persons" or "individuals." Accordingly these actions received the traditional legal treatment which was given socially undesirable human conduct by the civil and criminal laws.

& SOC. PROB. 15 (1973), N. CHAMBERLAIN, THE LIMITS OF CORPORATE RESPONSIBILITY, (1973) [hereinafter cited as CHAMBERLAIN] and R. NADER, M. GREEN, & J. SELIGMAN, TAMING THE GIANT CORPORATIONS, (W.W. Norton & Co. 1976). This is not an exhaustive listing. These writings however, are some of the more stimulating and well written views. In addition, Chamberlain does attempt to analyze and critique some of these proposals in his chapter 9.

17. *But see* A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE (1972). Professor Ehrenzweig attempts to merge jurisprudence with Freudian psychology. He does not however, explore the law of corporations in light of this merger.

Professor Laski, *supra* note 15 at 424 stated a similar point at an earlier time:

After all, our legal theories will and must be judged by their applicability to the facts they endeavor to resume. It is clear enough that unless we threat the personality of our group persons as real and apply the fact of that reality throughout the whole realm of law, what we call justice will, in truth, be no more than a chaotic and illogical muddle.

18. C. STONE, WHERE THE LAW ENDS I, 1 (1975).

19. *Id.* See also J. HURST, THE LEGITIMACY OF BUSINESS CORPORATIONS IN THE LAW OF THE UNITED STATES 1780-1970, (1970) [hereinafter cited as HURST].

20. *Id.* at 27.

21. *Id.*

Furthermore, Stone argues that this response continued unmodified until the late nineteenth and early twentieth centuries. The antitrust legislation of this period demonstrated greater concern for the wider social impact of corporate actions. Nonetheless, he postulates that this response, as well as latter twentieth century responses, missed the mark. He concludes that the law fails to comprehend that it cannot confront "big business" in a modern society "with a negative profit contingency (a civil judgment, a criminal fine)"²² for social violations. Nor can the law confront "big business" by threatening the loss of monies or imprisonment directed at "key" executives.²³

Turning his attention to the late twentieth century, Stone mentions various proposals which have been suggested to solve the corporate problem. But he argues that these proposals amount to the use of shibboleths such as "shareholder democracy," "federal chartering," or "corporate responsibility" to cover vague notions of corporate control.²⁴ These proposals fail to make a more systematic examination of the functions of federal chartering of corporations, and the functioning of the boards of directors hence, they fail to achieve a more meaningful system of social controls. Moreover, they fail to carefully examine the "notion of corporate social responsibility;" they do not discover "its scope and purpose with enough precision that its *spirit* can be translated into tangible institutional reform."²⁵

Building on this analysis, Stone gets to the heart of his prescriptive and normative analysis in Part IV of the book. He argues that the other proposals do not make allowances for the complexity of the corporate problem. In essence, the corporate problem is an amalgam of many problems of untrammelled influence. Due to the diversity of present day corporate operations, modern corporations perform various roles, *inter alia*, as producers, consumers, and employers. Moreover, the measures which might be used to bring about regulation in one of these spheres of activity may not be adequate to address problems in other spheres. For example, the measures which might be used to address consumer or employer problems may not be the same measures used to address the problems of the production of dangerous goods. Furthermore, he stresses that "corporations vary among themselves."²⁶ Closed corporations with greater merging of the shareholder and manager roles "... are likely to be more sensitive to profit threat strategies than are the giant broadly held corporations, in which the managers are basically employees, their salary and tenure more or less independent of the corporation's legal damages."²⁷ Finally, corporations also differ according to the particular industry. For instance, a drug industry corporation may operate

22. *Id.* at 29.

23. *Id.* The recent bribery and slush fund scandals which involve huge payoffs by major American corporate executives to foreign agents to obtain business and to American political candidates substantiates this point. Election laws, federal criminal laws, and the securities laws have barely controlled this behavior. The worse losses suffered by these individuals were the *momentary* public embarrassments after disclosure, and in a few cases, job terminations.

24. *Id.* at 71. See also CHAMBERLAIN, *supra* note 16.

25. HURST, *supra* note 19, at 72.

26. *Id.* at 119.

27. *Id.*

and create problems alien to the steel industry. Hence, uniform responses with general measures may have inherent failure factors.

Therefore, Stone concludes *a fortiori* that vague proposals underneath attractive slogans "masquerading as a solution" are misconceived and impotent. These ideas are hardly able to impact on the "traditional legal strategies," to facilitate creation of "...the internal institutional configurations that are necessary if some problem is to be remedied, that is, to induce the ideal authority structures, pattern of information flow, and the like . . ." ²⁸ critical for reforming socially undesirable behavior. What is needed is recognition that the problems now require a more meaningful remedy which must involve the use of "... some institutional analogue to the role that responsibility plays in the human being, guiding action toward certain values where the ordinary legislative prohibitions are unavailable or, on balance, unwise." ²⁹ In short, the society must seek those "critical organizational variables" which lead to corporate responsibility in addressing specific problems. Only then, after completing this construction, should "traditional legal strategies" be used as supplements.

Before proceeding further to critique this analysis, several germane ideas ³⁰ which permeate and undergird Stone's analysis must be interposed. This brief discussion serves three purposes. Firstly, it helps elucidate further the role of *Bartleby* as the focal point of the book review. Secondly, it helps elucidate the objectives and goal of Stone's analysis. And thirdly, it helps to lay the foundation which the book review will use in critiquing Stone's analysis.

The adopted starting point of this discussion is an examination of the selected literary and philosophical expostulations (excerpts from an intellectual continuum) on the technological society/corporate problem. A good launching point is a further examination of Melville's *Bartleby*. As stated above, *Bartleby* can be interpreted as the quintessence of modern alienated man set within the

28. *Id.* at 120.

29. *Id.*

30. Briefly stated, these ideas can be grouped loosely under the classification of intellectual writings which form a continuum of thoughts on man's existential predicament. The relevant sub-categories are literary, philosophy, psychology, sociology, politics, and jurisprudence. Literary writings refers to those attempts by great storytellers to seek a knowledge of mankind, and make philosophical statements about the human condition. Philosophical writings refer to those attempts to state organized beliefs in the recognized philosophical tracts. Psychological writings refer to those attempts to examine the "underworld" of man's psyche or the motivational character. Sociological writings refer to those attempts to explore individual and group behavior within and without social institutions. Political writings refer to attempts to reflect on how men organize into power relationships for their own development and the needs to reach their goals by making authoritative decisions. These writings pay special interest to liberty, authority and order. Jurisprudence refers to both the philosophy of law, and the attempt to scientifically apply the concept of law to social engineering.

Close inspection uncovers the fact that the above categories greatly overlap each other. Instead of causing uneasiness, this helps to underscore the fact that Stone's book is part of a broad, unified heritage of ideas on man's existence which sometimes, for convenience sake, is segregated into the above mentioned shorthand subcategories.

evolving legal-commercial world.³¹ His employer, a "Wall Street" lawyer,³² is, in turn, enraptured by an important tenet at the heart of technological advancement, "... that the easiest way of life is the best."³³ Unchallenging adherence to this tenet leads the employer to easily become a "robot handmaiden" to large business interests, and to amass material wealth to the exclusion of the public interest. Bartleby, however, refuses to adopt this attitudinal framework. This contrapuntal juxtaposition of Bartleby with his employer dramatizes Bartleby's alienation from this work setting, his employer's values, and the subtle oppression and deterrence he suffers in his quest for joining truth and social reality.³⁴ At the same time, Melville causes Bartleby to rebel against the stifling environmental strangulation of life within this commercial setting. In this sense of opting for rebellion Bartleby becomes the missing conscience of the lawyer qua mankind.³⁵ (Ironically, the amanuensis reasons and rebels, while the legally trained analytical mind slavishly follows the "captains of industry.")

Taking up where Melville leaves off in his examination, other later writers perceptively expand on the predicament of Bartleby. They complete the picture of the functioning of alienated mankind within the technological society/corporate problem. Nonetheless, due to a shortage of space and because of personal preference, only two of these writers will be examined. The selected combination sufficiently amplify and expand on Melville's ideas to form a bridge to Stone's analysis.

In his book *The Sane Society*, Erich Fromm picks up the thread of Melville's ideas. Fromm postulates that in creating his industrial complex, man made this complex his "new god." Thusly, man gravitated from an egocentric world which, revolved around his spiritual deliverance and search for the Almighty to which seeks material gain. In doing this, man increasingly became alienated from himself. Over time, man's worth became an integral part of this search for the industrial nirvana. In Fromm's analysis, the end product of this transmogrification was not simply a slave, but a "robot."³⁶ Man's industrial machine now operates to control man by establishing his worth and needs, mainly in con-

31. H. MELVILLE, *supra* note 3, at 104. This placement of Bartleby is interpreted in the following manner:

Melville's execution of "Bartleby" is rigidly controlled by the subject of the story—the moral relativism . . . The Wall Street setting evokes the new religion of materialism, and John Jacob Astor, the high priest of financial duplicity, incarnates the ruling ethic of callous self-interest. Melville therefore assigns the role of the protagonist to a disciple of the businessman, a lawyer . . . With the appearance (a stranger in fact and private identity), the lawyer's bland assumptions of respectability are challenged, and he is forced into an involuntary questioning of his hitherto unexamined attitudes and values.

32. *Id.* at 106. Stein notes that the lawyer's location serves to show the debasement of life by commercial activity. The wall cuts off "all natural light" and life, the office "is literally walled in by the wealth of Wall Street."

33. Melville, "Bartleby, the Scrivener," *supra* at 546.

34. Significantly, this can be interpreted to place the "legal custodians of the public conscience" under the "stupendous power exercised by capitalistic enterprise." Stein, *supra* at 105. See Note 7, *supra*.

35. *Id.* at 106.

36. Fromm, *The Sane Society*, p. 312 (1975).

sumption terms; now man is converted into an economic commodity. Fromm concludes that man's salvation lies in creating a "Humanistic Communitarian Socialism"³⁷ to help release his society from this bondage.

The other writer, Herbert Marcuse, adds still another dimension to these ideas. In his book *One Dimensional Man*, he postulates that any critical analysis of modern society needs to confront certain realities. Advanced technological society is resilient, plastic, and completely capable of absorbing the opposing forces of change.³⁸ Technological society gives birth to new "forms of life (and power) which appear to reconcile the forces opposing the system and to defeat or refute all protest . . ."³⁹ Any critical analysis could find itself addressing a basically happy, complacent society. In fact, the society may have lost the impetus for rebellion. The modern critical observer may encounter a society which is radically transformed from the period when the "need for refusal and subversion was embodied in the action of effective social forces."⁴⁰ As he postulates, the "categories of critical social theory . . . were essentially negative and oppositional concepts, defining the actual contradictions in nineteenth century European society."⁴¹ Now, social realities cancel the thrust of these categories.⁴² Marcuse, therefore, postulates that any meaningful critical theory which seeks to overcome the above must transcend simple idle speculation. He concludes, as Stone demonstrates, that an effective critical theory must focus on the "historical position in the sense that it must be grounded on the capability of the given society."⁴³

Although the above has been couched in literary, philosophical, and sociological terms, permeating Stone's analysis are decisions on what Marcuse calls "political economy."⁴⁴ Thus, any brief discussion of the intellectual backdrop requires an equal examination of the political ideas. The need is to illuminate the society's views on the proper uses of power, its aspirations, its needs, and its goals.⁴⁵ For a critical theory of any merit must confront these political realities of our society. These ideas are the base used to construct our social-political culture. Phrased differently, they yield ". . . clues to such things as the trajectory of development of institutions and the root sources of value commitments."⁴⁶ In

37. *Id.* at 315. Minar, *supra* at 375 has defined communitarian in the following fashion:

"By communitarian we refer to the perspective that interprets the community collectively as the fundamental building block, the primary unit of theoretical analysis of the social world. Such theories posit a higher rationality, an integrity, and/or a higher value to the community than to individual men."

Likewise, John Dewey, *infra* Note 53, uses a communitarian perspective. Minar, *Id.* at 373-375.

38. Marcuse, *supra* at xii.

39. *Id.*

40. *Id.* at xiv.

41. Marcuse states "(t)he category 'society' itself expressed the acute conflict between the social and political sphere—society as antagonistic to the state. Similarly 'individual,' 'class,' 'private,' 'family,' denoted spheres and forces not yet integrated with the established conditions—spheres of tension and contradiction." *Ibid.*

42. *Id.*

43. *Id.* at XV.

44. *Id.* at XIV.

45. Minar, *supra* at 1.

46. *Id.* at 5.

sum, they lead to an analysis of "culturally shared beliefs, expectations, and group commitments," as well as an analysis of the structuring of the authoritative decision making apparatus.⁴⁷ Furthermore, any critical theory must make allowances for the impact of social interaction on the political ideas. Sometimes new social groupings, or social interaction cause renewed examination of the political ideas. Indeed, in the Poundian sense, the resulting "competing social interests" often drive us pass renewed analysis to vey for political and legal recognition.⁴⁸

Speaking more specifically, American political thought contains several germane ideas whose separate development and interplay permeate and undergird Stone's critical theory. First, American political ideas stress a belief in the concept of a "National Covenant" which creates a beatific community. Early puritan inhabitants of America strongly believed that this shared a "National Covenant" with God.⁴⁹ Men who participated in the good works under a state of grace could strive to maintain a sense of national community. Second, to this view must be added another "communitarian" perspective. Similar to the organicism of the puritans, and grafted on to it are the ideas of Rousseau. More importantly than taking individuals out of the state of nature and placing them in a political community, Rousseau premised the operations of this political community on the exercise of the sovereign power which flows out of the spiritual force of the unified individuals. To this spiritual force, he appended the title "General Will."⁵⁰

Third, another set of ideas develops a significant contrapuntal strain to the above two. These ideas flow from Locke's view of the political community. Briefly stated, his individualistic orientation focuses on the protection of the individuals' inalienable rights. To accomplish this goal, they constructed a political community which was endowed with the power to place restraints on the deprivation of these rights.⁵¹ In turn, the political community mandates the development of constitutional devices, structures, and guides to circumscribe the exercise of legitimate political power.

47. *Id.* at 9. "by culture [we mean], the repository of habitual ways of looking at things and responding to stimuli; by social structure, patterns of interaction."

48. E. ROSTOW, *THE SOVERIGN PREROGATIVE; THE SUPREME COURT AND THE QUEST FOR LAW* xiv, xv (1962). Rostow stated the same point thusly:

These cardinal ideas of the law—ideas about justice and order, and about procedure for seeking them—have great stability. Legal institutions change, as they should, in response to changing social pressures and changes in moral attitude. Yet behind the movement of change there is a body of norms, or aspirations, to which our law and our people are tenaciously loyal. These basic ideals of law must be reinterpreted and achieved anew as they are used by each generation in seeking to solve the problems of its own experience.

49. MINAR, *supra* note 11, at 22-31.

50. D. NOBLE, *HISTORIANS AGAINST HISTORY* 10 (1965).

51. MINAR, *supra* note 11, at 31-54. John Locke is most significant. His adaptation of Hobbes' "interest concept" to include property—life, liberty and estates—forms the basis of the social compact. In turn, the social compact seeks to establish the limits of civil society, the basic political community; it seeks to control socially the individual and other important social actors (entities). Conversely, this civil society or political community is a key to the harmonious development of the individual. *Id.* at 48. See note 4, *supra*.

MINAR, *supra* note 11, at 132, mentions Locke's views represent the "central tradition of American political thought."

Fourth, coexisting with the above is the set of ideas called pragmatism or instrumentalism. This highly significant, but not always fully understood or appreciated, twentieth century philosophical movement had a large impact on the political and jurisprudential thought of the early twentieth century. Condensed for present purposes, pragmatism, or instrumentalism as its adherents viewed the ideas,⁵² sought the useful instead of the ultimate values for themselves. The stress was placed on the nature of experience,⁵³ the "workability and reality of dynamic" interactions,⁵⁴ and the role of human creative force and will.⁵⁵ The aim was to seek a dynamic theory of society; to break away from the absolutism of past thinking to systematize, synthesize, and formulate responses to Spencerian Individualism and Classical Liberalism.⁵⁶ Thusly, in its social statement and political call to action, instrumentalism sought to challenge the ideas which underlie the technological society/corporate problem.⁵⁷

Jettisoning the other members of this school of philosophy to focus on the more germane ideas for the present discussion, John Dewey primarily exploited the potential of instrumentalism to create a socio-political theory.⁵⁸ Tersely stated, he sensed experience, interpreted as an organic interaction and interconnection with the human mind playing an important role, served as a basis for social action. In essence, creative change springs forth from the interaction of the human mind with the environment. Thus, the key to the interaction and change is human intelligence.⁵⁹ And intelligence is viewed as a learned disposition, not a faculty of the mind exercised at will.⁶⁰ This fact means that humans are able to establish and highlight whatever behavior they want to stress to reconstruct their environment and experiences.⁶¹ Rather than remaining as docile, passive victims of modern technological society who sometimes despair or escape from challenges to intelligence,⁶² humans should persist in efforts to discover the more ideal and valuable patterns of behavior.

In light of this view, Dewey concluded that Classical Liberalism is a faulty conceptualization of how society should operate. He believed that the two strands of Classical Liberalism,⁶³ one political and the other economic, "thought

52. J. DEWEY, ON EXPERIENCE, NATURE, AND FREEDOM xiv-xv (1960) [hereinafter cited as DEWEY].

53. *Id.* Experience to the instrumentalist meant more than it did to the Nineteenth Century British positivist. Instrumentalism sought to broaden conceptions of experience beyond sense perception.

54. MINAR, *supra* note 11, at 358.

55. *Id.*

56. MINAR, *supra* note 11, at 357-58.

57. *Id.*

58. *Id.* at 362.

59. J. DEWEY, THE QUEST FOR CERTAINTY 26-27 (1960).

60. DEWEY, *supra* note 52, at x.

61. *Id.* at xii.

62. *Id.*

63. *Id.* at 267-68. Dewey stated his point in the following manner:

This philosophy is sufficiently well presented for our purposes in the idea of John Locke, the author, one may say, of the philosophy of Liberalism in its classic sense. Freedom is *power to act* in accordance with choice. It is actual ability to carry desire and purpose into operation, to *execute* choices when they are made . . . In the later eighteenth century,

of individuals as endowed with an equipment of fixed and ready made capacities, the operation of which if unobstructed by external restrictions would be freedom, and a freedom which would almost automatically solve political and economic problems."⁶⁴ But he noted, this is not the true net result. Instead, class oppression continued with the substituted privileged economic class oppressing the non-privileged class in new and different ways.⁶⁵ Moreover, because this theory thusly misconceives freedom, the social institutions, infused with these attitudes cannot solve the problems which are created by a technological society. Classical Liberalism prevents us from discovering how our social institutions function most effectively when infused with a sense of human freedom which is premised on the dynamic "development and use of intellect."⁶⁶ As Dewey stated the point, "[l]aw, government, institutions, all social arrangements must be informed with a rationality that corresponds to the order of the whole, . . ."⁶⁷ discovered by the intellect. He deduced that social "[f]reedom is a growth, an attainment, not an original possession, and it is attained by idealization of institutions and law and the active participation of individuals in their loyal maintenance, . . ."⁶⁸

Fifth is the important merging of pragmatic political thought with the Established European socialist thought to create the populist, New Deal political ideas. This development, together with its offshoot the spate of New Deal social legislation, probably represents one of the best examples of the creative political will of humans expressing more communitarian orientations.⁶⁹

Sixth, and last, is the diverse body of jurisprudential thinking euphoniously called "American Legal Realism."⁷⁰ Succinctly stated, these ideas struggled to bring law into line with social needs. Rather than ignoring the social facts or experience, the effort was made to stress them as the *sine qua non* of the legal prescriptions.⁷¹ Hence, the law took on a dynamic character ever capable of

attention shifted from power to execute choice to power to carry *wants* into effect, by means of free—that is, unimpeded—labor and exchange. The test of free institutions was the relation they bore to the unobstructed play of wants in industry and commerce and to the enjoyment of the fruits of labor. This notion blended with the earlier political idea to form the philosophy of Liberalism so influential in a large part of the nineteenth century. (*italics in original*)

64. *Id.* at 269-70.

65. *Id.* at 270-71.

66. *Id.* at 273.

67. *Id.*

68. *Id.* at 275.

69. MINAR, *supra* note 11, at 381. The view of experimenting with communitarian orientations is not discussed by Minar. This view is set forth by the book review. *But see* SOCIALIST THOUGHT at 534 (A. Fried & R. Sanders ed. 1964).

70. *See*, J. STONE, THE PROVINCE AND FUNCTION OF LAW (1961) [hereinafter cited as STONE], for a full discussion of this and the broader topic of sociological jurisprudence. *See also*, MINAR, *supra* note 11, at 386, and Pound, *Scope and Purpose of Sociological Jurisprudence* 25 HARV. L. REV. 513 (1912).

71. A favorite quote of writers to demonstrate this era is Mr. Justice O. W. Holmes: "[t]he life of the law has not been the life of logic: . . . it has been experience." O. W. HOLMES, JR., THE COMMON LAW I (1881).

changing social conditions and having social conditions change it. The conjunction of "‘realities’ of societal needs and societal relationships"⁷² was viewed as the wellspring for the law.

Having set forth the above ideas, attention can return to a critique of Stone's analysis. But specifically, what questions can be asked about his analysis? Perhaps, what is the value of his ideas? Does he recommend a realistic social control scheme which will regulate large corporations in a manner geared to achieve their social accountability? Then too, does he give us a jurisprudential explanation of how to restore partial harmony to the modern alienated person who *Bartleby* represents? (The focus is not simply on the rebellious, sensitized person who *Bartleby* represents, but on all modern exiles who he also represents.)

A helpful gauge in assessing the realism and efficacy of Stone's analysis is a very penetrating thesis developed by Neil W. Chamberlain in his book *The Limits of Corporate Responsibility*.⁷³ In this book, Chamberlain similarly seeks to discuss the subject of regulating corporate behavior. His thesis is that corporate social responsibility is extremely difficult to achieve. Large corporations can do little to solve social problems. Neither the "Corporate Responsibility Thesis," or "Social Engineering Thesis" can sincerely affect social ills.⁷⁴ Big corporations are trapped in a business system energized and measured by profit maximizing. They inherently function on the principle of returning profit for original capital investment. Hence, the public cannot anticipate or expect them to be socially responsible. Then too, Chamberlain notes several other limitations. These corporations lack true unification and aggregation of resources to seriously plan, coordinate, and control remedial actions. Also, they possess an "internal community" which serves as a restraining force. Furthermore, the corporations will frequently close ranks with a mesmerized government to injure the public interest.⁷⁵ Finally, the corporations provide for the needs, psychologically and materially, of most Americans, which means outward pressure to change can be discouraged.⁷⁶ Taken together, Chamberlain's perceived con-

72. See MINAR, *supra* note 11, at 388-89.

73. CHAMBERLAIN, *supra* note 16.

74. *Id.* at 7-8.

75. *Id.* See ROGERS, *supra* note 9. His thesis is that the technological grip on society is possible because government gives large corporations a "beneficiary and a government sponsor." He notes that "technological politics" becomes the rule of the day with corporations minimizing and coopting the government by the techniques of "political influence, concoction of technical data, and propagandist appeals." *Id.* at 411.

76. CHAMBERLAIN, *supra* note 16, at 201, states this point:

The large corporations are dominant in American culture because they have won widespread acceptance for the values that they champion—the notion for a good life whose focus is material accumulation and consumption, the ideal of a constitutional order based more on private autonomy and freedom of action than on the hierarchical order the government control, a conception of distributive justice that rests on equality of opportunity for all to make as much of, and for, themselves as their capabilities and motivation permit.

These values obviously conduce to the corporations' own advantage: the materialistic ideal generates support for their expansion and security; the extension to them of roughly the same autonomy accorded the individual gives them a philosophical basis for the greater power that in fact they possess relative to the individual; equality of opportunity

straints paint a picture of external and internal communities locked in a mad embrace (*danse macabre*?) which severely limit the corporation's capacity to affect social problems. The net result is that corporations must follow what Chamberlain calls the "Limited Responsibility Thesis."⁷⁷ He concludes, therefore, that the most meaningful manner to assert control over these mammoth business machines and their effect on social problems is by "... rewriting the rules (constraints) under which all corporations would operate."⁷⁸

Do Stone's ideas transcend this "Limited Responsibility Thesis"⁷⁹ (which Chamberlain does not attempt systematically to do)? If so, how well do they achieve this end? In point of fact, Stone's ideas in Part IV of the book, his *piece de resistance*, do attempt to transcend this thesis. He "rewrites the rules." Pointedly, he does so by focusing on those "critical organization variables" mentioned previously; the internal structures and operations of corporations or "key decision making positions" where change can be effected. He admits, however, that according to actual operations of modern megacorporations the management structure is the important decision making center.⁸⁰ Nonetheless, he believes the optimum place to initiate a change is at the legal repository of authority, the board of director level. But he acknowledges that past experiences demonstrate the limits of this calculated effort; the environment and dynamics of present board of director operations will not permit much change. Still, he argues that the board level reforms coupled with other changes in the corporate operations are necessary for a unified attack on the problem.

maintains the egalitarian flavor, but continues to accord special advantage to those who start from a privileged position.

Because social values and corporate interests coalesce, each reinforces the other. Because the welfare of so many is anchored in corporate society, those who would radically alter that society are relatively few in number.

In sum, he notes, in an oxymoronic manner, that the corporation "has sought to confer, in Milton's poignant line from *Samson Agonistes*, 'bondage with ease in a land of plenty.'" (delicious cruelty) (Citations omitted) *Id.* at 96.

77. *Id.* at 7-8.

78. *Id.* at 7.

79. Others attempt to transcend this "Limited Responsibility Thesis" by similarly "rewriting the rules." See note 16 *supra*. Some of the attempts might be interpreted as more exhaustive scholarship because the writers delve more deeply than Stone into one or more points. See Vagts, Book Review, 49 So. CALIF. L. REV. 635 (1976). Nonetheless, how many others have attempted to penetrate so deeply into the inner workings of the corporation while using psychoanalytic jurisprudence and Deweyian philosophy to reconceptualize the rules? How many others attempt such a broad attack (in contrast to depth of research) on not only the authoritative decision-making process within the corporation, but also the ethics and behavioral patterns of the corporate culture? In sum, Stone's attempt to rewrite the rules stretches from a reexamination of the corporate problem, through a reexamination of the legal personality of the corporation, through a reexamination of the concept of social responsibility, through a reexamination of the decision making process of corporations, to an analysis of the control of the behavior of the corporate culture. Few, if any, can make such a statement on the breath of their analysis.

80. See Chamberlain, *supra* note 16, at 181-83. He quotes one business executive who notes: "Management as long as it's successful and things are going well, is more than likely to have reversed the flow of authority from the boards to management so that it runs from management to boards." *Id.* at 182.

But see, Needham, *Does the Board Need Waking Up?* N.Y. Times, Nov. 28, 1976, § 3, at 14, col. 2. (Business and Finance). The use of audit committees conceivably signals some attempt to return, albeit limited in scope, authority to the Boards.

To accomplish the broad reform, he recommends initially isolating the corporate behavior most objectionable (and obverse desired). Restated, he means behavior in which public interest and corporate interest overlap to some degree. He cryptically types the various behaviors Class A and Class B.⁸¹ Class A behavior represents the type where the public interest and corporate interest most parallel and overlap. For example, Class A behavior would involve avoiding such things as gross financial manipulation, criminal violations, or racial discriminations.⁸² Class B behavior represents the type where greater conflict between public interest and corporate interest exists. For example, Class B behavior would involve pollution and other environmental harms.⁸³ Then, following a mapping out of the controllable behaviors, he discusses the control of these classes of behavior. Starting with Class A behavior (simpler to control), he argues that this behavior can be controlled by such broad changes as eliminating inside directors, and redefining broad functions. Class B behavior, however, involves more subtle, complex problems less subject to the Class A approach. To counter the problems created by Class B behavior, he recommends that a careful reworking of the "General Public Directorship" (GPD)⁸⁴ concept coupled with the use of the "Special Public Directorship" (SPD)⁸⁵ concept where applicable. Nonetheless, he recommends that the GPD receive a much clearer and sharper redefinition of its functions to avoid the past limitations and failures. For instance, these directors *inter alia*, can serve as the corporate superego, liaison to the legislature, and "hot line" for the "whistle blowing" employees.⁸⁶ In addition, these GPDs need to be invested with special powers. For instance, the GPDs can hire their own staff, requisition corporate surveys, and be assured of placement on the relevant corporate committees.⁸⁷

Unlike the GPD, Stone argues that the SPD is a unique mechanism to be used in very special circumstances. As he notes, this device should represent reactions to society's "... identifying critical areas of social concern that are deemed most likely amenable to their influence."⁸⁸ In short, these circumstances represent moments when the law seems unable to control adequately a particularly troublesome form of corporate behavior. (Repeated and recurring violations of pollution laws, product safety laws, and the like.) Moreover, he perceives astutely

81. STONE, *supra* note 70, at 136-38.

82. *Id.* at 135-37.

83. *Id.* at 137-38.

84. *Id.* at 152-73. Stone resorts to a sales or gross revenue test to determine corporations who would qualify for use of GPDs. Similarly, he mentions a Federal corporations Commission as a body entrusted with authority for nominating these GPDs. *Id.* at 158-59.

In the 94th Congress, 1st Session, May 22, 1975, the Honorable James V. Stanton introduced to the Judiciary committee H.R. 7481, relating to the establishment of a Federal Chartering Commission. The Commission would not have the authority relative to nominating GPDs, but the bill used a sales test (annualized) to determine regulated industrial corporations (motor vehicle, petroleum, and steel industries). p. 20.

See also, Stone, *Public Directors Merit a Try*, 54 HARV. BUS. REV. 20 (1976).

85. STONE, *supra* note 70, at 174-83.

86. *Id.* at 160-71.

87. *Id.* at 171-73.

88. *Id.* at 174.

this behavior can be classified into two general types of fact patterns, the “demonstrated delinquency situation” and the “generic industry problem.”⁸⁹ Meaning of course, Stone has supplied us with helpful categorizations of this special behavior which can be used to activate and tailor the SPD to regulate this behavior.

Despite stressing the board level for initiating changes, Stone does not ignore the management structure. He recommends that the law mandate creation of certain offices within the corporate structure beneath the board level as the foci for initiating additional changes. (Intertwine with the corporate charter privilege for example.) As in the case of the board, he suggests creation of offices to be invested with authority to operate at certain key points where experience has demonstrated that trouble easily develops. Hence, the corporation should be required to identify and select persons with unique qualifications to fill positions such as corporate officers responsible for pollution and product safety.⁹⁰

Realizing that a broad based approach must be undertaken to solve the complex corporate problem, Stone recommends *three* additional complimentary changes. First, he recommends a restructuring and revitalizing of the flow of information in the corporation.⁹¹ As he argues, society needs to consider “mending the information net”⁹² to properly channel data about the corporation’s activities to and from the decision making centers. And to accomplish this objective, he recommends the creation of an “office responsible for gathering and collating”⁹³ data contained within and without the corporation. In addition, he recommends creation of a statutory requirement that “. . . *the organizational pathways have to lay certain information at the feet of specified people . . .*”⁹⁴ within the corporation. The last idea for accomplishing this objective is the suggestion to disseminate information out of the corporation into the general public. In sum, he argues for statutory requirements which mandate three things: that the corporation periodically disclose certain information; that it fairly submit to government inspection; and that the “whistle blower”⁹⁵ be protected.

The second complimentary change is the redesigning of the decision making process. And very importantly, redesigning it to instill responsibility in a *Deweyian sense*. As Stone forcefully states in this brief quote:

“ . . . the proponents of corporate responsibility do wrong to put so much emphasis on what corporations are deciding rather than on how they are deciding—the corporate decision process itself. The sort of

89. *Id.* at 175; See note 84 *supra*.

90. STONE, *supra* note 70, at 184-98.

91. *Id.* at 199-216.

92. *Id.* at 199.

93. *Id.* at 203.

94. *Id.* at 204.

95. *Id.* at 209.

*'responsibility' we ought to be developing in our corporations is not exclusively responsibility in the rule-following sense but also responsibility in its cognitive aspects . . .*⁹⁶

In essence, the goal is to transform the corporate decision making process; make it approximate the deliberative process which responsible human beings follow. Thus, we should expect, *inter alia*, that the corporation will use perception, that it will weigh the consequences of its actions, that it will consider a moral calculus, and that it will make a justification for its action. Moreover, he recognizes that cognition is a multifaceted process which has various levels. He argues that the process actually was begun with the restructuring of the information retrieval system of the corporation. This was the entry level conduct which is equivalent to the low level cognitive activity of human perception.⁹⁷ But he notes, however, the challenge is to move beyond this low level function to "higher" level cognitive functions.⁹⁸ To accomplish this evolution into the other facets of the process of cognition, he recommends the adaptation of several approaches. One approach he recommends is to remove certain ". . . decisions of large social concern out of the hands of lower-level functionaries and insist they be put in the hands of others higher in the organization."⁹⁹ A second approach he recommends is to broaden the number of interested and affected groups "who might with legitimacy be brought into"¹⁰⁰ the deliberative process. The final approach he recommends is the use of the device of "mandated findings."¹⁰¹ He seeks statutorily to require the corporation to justify its conduct in a prepared impact statement which outlines the ramifications of the proposed actions prior to undertaking them.

With the third complimentary change, Stone demonstrates (reminiscent of Chamberlain) his appreciation of the subtlety of the psychological aspects of modern corporate operations. He argues that the various recommendations he sets forth, although meaningful corrections to present systemic deficiencies, are insufficient *alone* to effect social control. As he notes, "[t]o be really effective, the law has to be able to persuade, or at least make sense to the community it is supposed to govern."¹⁰² But as he continues, "[S]o long as the underlying attitudes are left untouched, some measure of resistance—of circumvention, disregard, and foot dragging—is inevitable . . ."¹⁰³ In short, the law must seek to control these attitudinal vectors converging on the collective will to change by reforming them. To accomplish this reformation, his first suggestion is to recommend moral exhortation. Society should demand voluntary reformation for

96. *Id.* at 217. See also SCIENCE AND THE CREATIVE SPIRIT (K. DEUTSCH, F. PRIESTLY, H. BROWN, D. HAWKINS, & H. BRAND, ed. 1958). Deutsch States "[t]o act morally is in one sense the opposite of acting blindly. It is acting in the presumed knowledge of what it is that we are doing." *Id.* at 121.

97. STONE, *supra* note 70, at 217.

98. *Id.*

99. *Id.*

100. *Id.* at 220.

101. *Id.* at 221.

102. *Id.* at 228. Stone posits a separate existence and ontogeny for the aggregation of persons and objects which surround the corporate activity. See also CHAMBERLAIN, *supra* note 16, at 80-96.

103. STONE, *supra* note 70, at 229.

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the corporation culture by imploring its members to exhibit a Deweyian sense of intelligence. Pointedly, the culture should subordinate and sublimate "certain ego-centered goals/drives"¹⁰⁴ for particular purposes to achieve more socially responsible activities. For example, the "profit orientation"¹⁰⁵ can be limited by a concern for health of workers and pollution of the environment. Nonetheless, Stone alerts his reader this focus can be deceptive. For society is confronted with more than simple "capitalist greed"¹⁰⁶ run amok. A multitude of attitudes and forces impact on the community's conduct. For instance, he notes that "profit-connected" motives such as desire for prestige,¹⁰⁷ "corporate insensitivity to their workers"¹⁰⁸ and worker irresponsibility and sabotage¹⁰⁹ fill this universe. Thus, the society must do more than attempt to focus on one attitude, or even leave change to the corporate culture itself. Society must take time carefully to delineate the "whole range of underlying attitudes and forces"¹¹⁰ and their manifestations in undesirable corporate activity. (In sociological and psychological terms a complex "group dynamics phenomenon" which requires complex responses.)

To assist society in achieving this difficult task, he recommends two specific approaches. One approach is for society to identify and support the relevant "norms and/or subgroups"¹¹¹ which preexist within the corporation that can easily become associated with the desirable ideals and attitudes to be instilled. Theoretically, he envisions increasing the potency of these subgroups¹¹²;

104. *Id.* at 230.

105. *But cf.* Bowman & Howe, *Strategic Posture Toward Corporate Social Responsibility*, XVIII CAL. MANAGEMENT REV. 49 (1975). One of the interesting questions the authors examine is whether corporate social responsibility really conflicts with the investor interest in profitability. Using the categories and examples from the *Business and Society Review*, see note 115 *infra*, they conclude the stronger the social conscience the stronger the profitability of the corporation measured by return on investment.

106. STONE, *supra* note 70, at 235.

107. *Id.* at 234.

108. *Id.*

109. *Id.* at 235.

110. *Id.* at 236. Stone notes that we may need to specialize our study. We must locate and understand the group behavior and normative patterns of various types of corporations and of industries.

To map our way, we ought to begin by learning more about why different corporations—like different political administrations—seem to permeate themselves with their own characteristic attitudes toward law abidance and 'good citizenship' generally. 'Law breaking,' some sociologists have observed, 'can become a normative pattern within certain corporations, and violation norms may be shared between corporations, and their executives.' . . . One would want to know, too, why different industries manage to evolve their own customs, habits, and attitudes. *Id.* at 237-38.

And following this recognition through study, we must seek to positively exploit this knowledge. "Can we identify the variables that makes some more responsible than others, and put this knowledge to work by directly manipulating those variables?" *Id.* at 238.

111. *Id.* at 238.

112. The examples Stone uses to illustrate his point are engineers and lawyers. Interestingly, these groups are often called and view themselves as "professionals." He shows a perceptive grasp of professional group dynamics which can be used to countervail against institutional loosening of restraints on antisocial conduct. He infers that these groups' ethical codes, as well as the feared loss of prestige within and without their respective professions, can be manipulated to serve as stimuli to

the members can reinforce and further the existing relevant norms and desirable ideas and attitudes (modern day knight-errants). An example he uses is the discovery in one corporation that the engineer's desire not to lose personal esteem could have been associated with the attitude of pursuing competition as the path to profits, instead of pursuing a price fixing conspiracy.

The other approach he recommends attempts to address a more troublesome point. What should be done when the desirable ideals and attitudes to be adopted differ from the existing attitudes of the society and the corporate culture? He recommends that society control the corporate milieu by doing "... nothing less than providing the organization with a new internal rhetoric—the special 'vocabulary of motives' that every culture, and every cultural subgroup, provides its members with as its own 'legitimate' reasons for doing things."¹¹³ In essence, Stone semiotically stresses the society's need to provide the community with a vernacular which is energized with the desired social ideals; to recreate a clear road map of alternative behavioral patterns. (Does not involve an attempt to replace profit motive, however.) Examples of deliberate ways to bring about this change are the use of social audits, achievement awards (e.g. "good guys of the year"),¹¹⁴ and intracorporate interchanges (sensitivity sessions).

Concerning the success of Stone in transcending the "Limited Responsibility Thesis," several additional comments can be set forth.¹¹⁵ First, Stone does a very good job to transcend this thesis by constructing more effective accountability oriented controls which supplement the "traditional legal strategies." The intertwining and interrelating of the board of director and management changes with redesigning the information flow, the changing of the decision-making process, and the attempt to change the corporate community's attitudes is a recognition of the theoritical and practical problems which were posed by Chamberlain. Clearly, this scheme possesses the multi-faceted character necessary to address

make the members knights-errant. In essence, the institutional roles, with all the ethical, symbolic adherence to rules, and self-image trappings will override the irrational institutional aspects of the role of the "organizational man."

Nonetheless, the analysis is unclear specifically on how to accomplish this task. Apparently, he is indicating some statutory enactment (whose outlines are not given) is necessary. Conceivably, he is recommending also social rewards, public education, and sensitivity sessions. Possibly the former and latter should be combined. The particulars get lost in the euphoria of analysis. Irrespective, the typology appears worthy of consideration even if not fully blue-printed. For an interesting discussion of the typology of the corporate executive who would be exploitable for the same purposes. See M. MACCOBY, *THE GAMESMAN* 285 (1976).

113. STONE, *supra* note 70, at 242.

114. *e.g.*, *The 1975 Good Guys: 13 Companies Win Awards for Corporate Social Responsibility*, 16 BUS. & SOC'Y REV. 18 (1976).

115. Several miscellaneous criticisms may be lodged against Stone's analysis. See Vagts, Book Review, 49 SO. CALIF. L. REV. 635 (1976). In essence, Professor Vagts challenges Stone for failing to make a more comprehensive analysis and for not having more thorough scholarship. Some of the criticisms do raise genuine challenges to Stone's analysis and work. They demonstrate the need for more study and analysis. The challenges however, do not seriously overshadow Stone's achievements.

For those seeking to be more disparaging in their criticism, they will be hard pressed to demonstrate that the book is a populist diatribe replete with the triad of effusive rhetoric, poor scholarship, and the absence of common sense. Or as Chamberlain put it more gracefully, "touching in their (its) idealism, but out of touch with reality." CHAMBERLAIN, *supra* note 16, at 30. See note 79 *supra*.

the subtly complex problems of control which the more simplistic approaches lack. As Chamberlain admits, only thoroughly "rewriting the rules" in this manner will work. Moreover, Stone synthesizes many important intellectual ideas to formulate an approach which effectively rewrites the rules.

Second, Stone perceives the need to challenge the jurisprudential foundation of the corporation and of their behavioral regulations in order to construct more effective controls. Accordingly, his challenge to the traditional jurisprudential view of the corporation as having a legal capacity similar to humans intellectually awakens society to a different perspective. He argues persuasively that society is failing to come to grips with the fact that the megacorporations are really complex legal collectives. They must be viewed as multitiered collections of experiences, senses, and ideals which interrelate with society in complicated ways; they are utterly incapable of control through schemes constructed on classical liberal political or economic philosophies. A control scheme based on the classical liberal theory developed relative to humans is doomed to failure. Consequently, Stone's *tour de force* is his attempt jurisprudentially to view megacorporations and their control from a more "communitarian" perspective.¹¹⁶

Third, Stone perceives the need to challenge the jurisprudential foundation of social accountability in the concept of the legal controls of corporate behavior. He achieves a *tour de force* with the merging of the socio-psychological dynamics of these legal collectives and Dewey's view of individual responsibility; the end product is a legal conceptualization which emits greater socially responsibility. From his unmasking of the corporate problem to the arrival at his "conjunction of truth and social 'reality,'" i.e., the restructuring and redesigning the decision making process, and altering patterns of behavior of the various subgroups in the corporate community, he demonstrates an understanding of the sociology and psychology of social-responsibility in the modern context. Thus, he demonstrates again the failure of Classical-liberalism as the foundation of our social control mechanism; it leads to a definition of social responsibility which ignores the sense of the interrelatedness and interconnectedness of experience, and ignores the role of human intelligence. An in the process, Stone extends American Legal Realism, and gives greater meaning to Psychoanalytic Jurisprudence.

Fourth, Stone affects our political philosophy, and therefore the vernacular and motivation of our rulemakers, in a manner reminiscent of Pragmatism and New Deal policies. His "critical theory" extends the instrumentalism of Dewey, thereby demonstrating its continued vitality in political philosophy, and the American political lexicon. At numerous points he interweaves into his analysis, *inter alia*, the concepts of human will,¹¹⁷ human potential,¹¹⁸ human experi-

116. See note 37 *supra*.

117. Minar, *supra* note 11, at 358.

118. *Id.*

ences,¹¹⁹ interrelatedness of experiences,¹²⁰ truth as a useful prediction of experiences,¹²¹ and human associations.¹²²

Fifth, Stone's analysis indicates his perception of society's need politically to reexamine the social interest in comparison to the corporate interest. Clearly, he takes a position on America's time honored wavering between the community emphasis and the individual emphasis. In his estimation, the only realistic and effective means to reassert control over corporate behavior is through elevating community interest over individual (corporation qua individual) interest.¹²³ To achieve his objective, he relies on ideas traceable to the "National Covenant" and "General Will" notions mentioned above. These shared beliefs strongly shape the community oriented view of power in the national dialogue over the impact of social interaction with large corporations. Consequently, Stone's analysis is further refutation of the classical liberal theory as a political basis of control for regulating corporate behavior. (retrieves and revives the basic political community—Tyranny ends, law begins.)

Sixth, Stone stimulates those legally trained on behalf of social change to overcome imaginatively the syndrome of complicity with large corporations. His analysis seeks to put lawyers (and urge them to be) in the forefront of clamoring jurisprudentially and politically for and evangelizing on behalf of a substitution of control mechanisms for corporate behavior. In sum, he renews the faith of some in the belief of the lawyer's capacity (also as a moral valuer) and willingness to intelligently use his/her powers of analysis on society's behalf. (Lawyer's social responsibility). Accordingly, he seeks to harness one of the most significant social forces in America, the shapers and keepers of the laws.

Concerning the second question posed about Stone's jurisprudential explanation of how to restore partial harmony to the alienated human, the book falls short. He fails because he does not take his jurisprudential analysis far enough. He obliquely treats the really significant matter of human freedom.¹²⁴ The book does not articulate the importance of and thusly take the opportunity to clearly reassess the concept of human freedom in the context of megacorporations. As he demonstrates the bankruptcy of Classical Liberalism as applied to corpora-

119. *Id.*

120. *Id.*

121. *Id.* at 359-61.

122. *Id.* at 366-79.

123. *Id.* at 366.

124. *Contra*, see notes 104-114, *supra*. Nonetheless, the author considers their discussion oblique. See, e.g. notes 67-69, *supra*. Inferentially, Dewey indicated that to infuse social institutions with the type of cognitive process he championed was to embrace his view of individual freedom. Accordingly, this might raise the argument that if Stone embraces the Deweyian analysis, he addresses the concept of individual freedom. But two replies can be made to this claim. One, Stone does not articulate clearly this point of Dewey in his book. He is silent about the other side of Dewey's analysis, leaving the great concern over individual freedom for inference. Second, Dewey clearly demonstrates the focus on social control of institutional behavior is relevant insofar as it assists us in analyzing the concept of individual freedom. Society's freedom or institutional responsibility are important by-products of the analysis of individual freedom. In fact, in a circular fashion, the society's freedom or corporate social responsibility can only be achieved if the individuals who populate such institutions fully understand and achieve their own individual freedoms. Thus, Dewey starts from an exploration of the primal question—what is individual freedom.

tions, Stone needs to do the same for humans relative to their involvement with corporations. Corporations are successful because of the ability to create and maintain "wide-spread acceptance for the values"¹²⁵ they promote. To be effective, he must strive to reach and weaken these values which are inculcated in the population at large, by stressing the necessity of reexamining the concept of human freedom. Aside from showing that "[h]uman beings must also create social institutions of production and life which affirm human values,"¹²⁶ he should demonstrate that the human beings must view themselves in the same manner; they must reexamine their human values as it affects their sense of individual freedom. But he stresses only the act of putting corporations back under the leash, not the defeat of those values of society through which corporations strangle human existence and thusly human freedom.¹²⁷

Reformulated, any jurisprudence that seeks to be effective must address the human needs of creating a concept of individual freedom in a human existence which is constructed on the "possibilities of loving, trusting,"¹²⁸ rather than exploitation and manipulation. Hence, Stone should explicitly state his appreciation of the fact that "there is no freedom . . . except in a society which struggles to create the social conditions, the economic conditions, and the jurisprudence of freedom, love and liberation."¹²⁹ In sum, he needs to underscore the development of a jurisprudence of human needs," or a "jurisprudence of insurgence,"¹³⁰ if for no other reason than to strengthen his arguments for urging the public to adopt his ideas to increase control of corporations.

In conclusion, Stone's *Bartleby* does have a clearer vision of the "conjunction of truth and social 'reality' " relative to controlling certain corporate behavior. He has given moving testimony to Mr. Chief Justice Marshall's earlier observation. Excitedly, Stone's *Bartleby* would leave his Wall Street job energized to share with society his critical analysis of social life and his critical theory of how to rectify certain ills. In short, he would want to share his road map for social reform. (Paraphrasing Beckett, "I can do it, I will do it!") Unwilling to play the role of Jeremiah sounding the trumpet of disaster, Stone's *Bartleby* (in a Deweyian fashion) would seek to lead modern man from the intellectual plane into the heart of social action.¹³¹ Thus, despite the book's short-comings, it is a valuable social, political, and jurisprudential discourse. But perhaps in the final analysis, all we need state about Stone (and see as his anthem) is what Henry David

125. CHAMBERLAIN, *supra* note 16, at 201. See, note 76, *supra*.

126. Tigar, Book Review, 86 HARV. L. REV. 785, 794 (1973) [hereinafter cited as TIGAR].

127. But see, E. DOSTOYEVSKY, *THE BROTHERS KARAMAZOV*, 233-34 (1957) and E. FROMM, *ESCAPE FROM FREEDOM* (1941). Not all men seek freedom of any type. In fact, some persons so "fear and dread" freedom that they easily seek "technological escapism" or some other form of escapism.

128. Tigar, *supra* note 126, at 794.

129. *Id.* at 795.

130. *Id.*

131. N.Y. Times, Oct. 24, 1976, § 6, p. 16 Headlines. What the New York Times editors stated about the writing of recent Nobel prize winner Saul Bellow seems appropos to Stone's *Bartleby*: he is "alienated, but not passive or apathetic"

Thoreau announced about his book *Walden*: "I do not propose to write an ode to dejection, but to brag as lustily as chanticleer in the morning standing on his roost, if only to wake my neighbors up."¹³²

ANDREW W. HAINES**

132. H. THOREAU, *WALDEN & ON THE DUTY OF CIVIL DISOBEDIENCE*, Holt, Rinehart and Winston 1965).

**Associate Professor of Law, William Mitchell College of Law; A.B. 1966, University of Minnesota; J.D. 1969, University of Michigan.