WHY LEGAL SCHOLARSHIP MATTERS: JULIUS STONE, A LEGAL SCHOLAR WE ADMIRE

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ABSTRACT

Julius Stone identified the extent to which the law might constitute a self-contained logical system, the ideals to which a legal system ought to conform, and the law's interaction with social behaviour and attitudes. He is firmly established as one of the leading legal philosophers of his day. Stone's impact on the teaching and practice of law in Australia truly is unique, and is unlikely hitherto to have been exceeded by any other Australian legal academic in the country's history. This paper examines the extent (if any) to which two criticisms of Stone, namely that he undermined the rule of law by his critique of precedent and that he failed to establish his own definitive school of jurisprudence, are at all sustainable. In response to both of these criticisms, it is suggested that they bypass Stone's central thesis, namely that law is inherently dynamic, only able to be understood relatively and incrementally. Philosophy, as a discipline, exemplifies this kind of approach by Stone.

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I INTRODUCTION

Julius Stone profoundly influenced generations of students and made major contributions to the law.[1] In 1986, the then Prime Minister RJL Hawke described Stone as being firmly established as one of the leading legal philosophers of his day.[2] Hawke spoke of how Julius' spirit inspired students to translate the Stone philosophy into reality.[3]

Stone enlightened his students as to the moral responsibility of those who advance legal arguments or who sit in judgement upon them.[4] Stone rebutted the notion that for every legal problem there is a determinate solution. Stone brought out the institutional legal constraints within which judges had to exercise their decision-making responsibilities.[5]

II STONE'S APPROACH

Stone's central contribution is that some creativity is inevitable and desirable through which courts must exercise their interpretative latitude. Within broad contexts, there is an openness in judicial decision-making. Adjudication inherently involves a concern for policy. The social sciences have an influential role to play in the adjudicative process. The core of appellate judicial tasks is not any mechanical implementation of precedents. The task that distinguishes appellate judges is 'the choosing between alternatives left open by the shortfalls of precedent or by the fertility of language in which precedents are expressed'.[6]

A *Pound's Sociological Jurisprudence*

Stone came to Australia and New Zealand bringing with him the challenge of Harvard University Professor Roscoe Pound's school of jurisprudence.[7] Pound led a school of legal theory that originated in the United States known as sociological jurisprudence. This school posited the idea that law is a social institution; the law has to satisfy social wants. The school

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[1] Stone's published works include 34 books, treatises and monographs and over 120 principal articles, chapters and papers. Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control: A Study in Jurisprudence* (Associated General Publications, 1946) won worldwide recognition. The great Stone trilogy of the 1960s — Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland, 1964), Julius Stone, *Human Law and Human Justice* (Maitland, 1965), and Julius Stone, *Social Dimensions of Law and Justice* (Maitland, 1966) — has been described as the most comprehensive account yet written on modern jurisprudential thought, by the publishers of Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985). A biography of Stone has been written by Leonie Star, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992). A relatively recent collection of essays commemorating Stone's impact has been published by Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010).

[2] RJL Hawke, 'Julius Stone: Humanist, Jurist and Internationalist: Inaugural Julius and Reca Stone Memorial Lecture' (1986) 9 *University of New South Wales Law Journal* 1, 2.

[3] Ibid 8.

[4] Anthony R Blackshield, 'The Legacy of Julius Stone' (1997) 20(1) *University of New South Wales Law Journal* 215, 218.

[5] Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9 *University of New South Wales Law Journal* 26, 37.

[6] Stone, *Precedent and Law* (n 1) 105.

[7] Justice Michael Kirby, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' (2005) 27(2) *Sydney Law Review* 323 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/SydLawRw/2005/14.html>.

analysed the social foundations and consequences of the law, studying the relationship between legal systems and the cultures in which they are embedded. It studied law in its social context,[8] how the law operated by reference to 'the postulates of civilisation in the time and place … for the purposes of systematic exposition of … the law governing individual interests and relations of individuals with their fellows'.[9]

As described by Stone, in a given controversy Pound's first step was to ascertain what interests were in conflict and to state them in common terms. As a practical matter, it was usually simplest to put them all in terms of social interests. Any solution of this particular case was going to give legal effect to part of the scheme at the expense of some other part, so the solution that had to be chosen was one that would cause the least disturbance to the scheme of interests as a whole. Therefore, the process was one of evaluating the conflicting interests against each other in terms of the scheme of interests as a whole.[10]

B *Stone as an Antidote to the Established Legal Positivism School*

Stone was seen as a vital antidote to the established school of legal positivism that had taken root in Australia.[11] Its finest practical expression in judicial decision-making might be seen as reflected in the enounced commitment of Chief Justice Sir Owen Dixon to the resolution of great disputes by 'strict and complete legalism'.[12]

Positivism's origin may be found in the works of the English utilitarian philosopher John Austin.[13] Austin regarded jurisprudence as an analytical study, its purpose being to clarify meanings. Austin rejected the idea that there was a necessary relationship between law and morality. What was relevant was the identification of a 'command': a demand that a person act in a certain way or abstain from some action accompanied by the threat of sanction in the event of disobedience. Since 1946, Stone had been pointing out that modern scholarship had not

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[8] Ray Finkelstein et al, *Australian Legal Dictionary* (LexisNexis, 2nd ed, 2016) 1178, 1435.

[9] Roscoe Pound, *Social Control through Law* (Yale University Press, 1942) 112–16: these postulates included such precepts as 'that others will commit no intentional aggressions upon them', 'that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order', 'that those with whom they deal in the general intercourse of society will act in good faith', 'that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others', and 'that those who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds', with it having 'become more and more evident that the civilization of the time and place presupposes some further propositions which it is by no means easy to formulate, since the conflict of interests involved has by no means been so thoroughly adjusted that one may be reasonably assured of the basis upon which the adjustment logically proceeds' where, eg, in relation to 'a postulated claim of a job holder to security in his [or her] job … exactly in what sort of job holders and in what sort of jobs, a right is to be recognized is far from clear' as is the extent to which 'the risk of misfortune to individuals is to be borne by society as a whole'.

[10] Stone, *The Province and Function of Law* (n 1) 361–2.

[11] Kirby (n 7).

[12] Sir Owen Dixon, 'Jesting Pilate' in Susan Crennan and William Gummow (eds), *Jesting Pilate and Other Papers and Addresses by the Right Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019) 74.

[13] These works include John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995); Robert Campbell (ed), *John Austin's Lectures on Jurisprudence: The Philosophy of Positive Law* (John Murray, 5th ed, 1885).

adequately acknowledged Austin's early recognition of judicial creativeness and his call for judges to take responsibility for the results.[14]

Positivism can be contrasted with other legal theories such as metaphysical realism — namely that words refer to objects whose existence and properties are independent of conventional beliefs or observers' beliefs about the objects[15] — or neo-scholastic theories associated with natural law and natural rights.[16] Philosophical jurisprudence is based on a philosophical foundation.[17] It is possible to give a rigorously philosophical account of a legal theory including many versions of legal positivism while being flexible in identifying the foundations or lack of any single foundation of any given legal system.[18]

Positivism comprises various schools of legal theory that subject laws to structural analysis, and positivism in jurisprudence comprises widely divergent approaches to law. For example, there is 'scientific positivism', focusing on empirical bases and founded on the concept of social solidarity — law is an aspect and requisite of social solidarity, with there being a duty to maintain social solidarity thereby allowing judges to be creative in such a respect.[19]

Positivists reject the view that the dependence of legal validity on moral considerations is an essential feature of law. Inclusive positivism maintains that the dependence of legal validity on moral considerations is contingent; it does not derive from the nature of law or of legal reasoning. Moral considerations affect legal validity only in certain cases. The rules of

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[14] Stone, *Precedent and Law* (n 1) 93.

[15] Brian H Bix, 'Natural Law: The Modern Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 61, 91 ('*The Oxford Handbook*').

[16] Eg, John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980); John Finnis, 'Natural Law: The Classic Tradition' in *The Oxford Handbook* 1.

[17] Finkelstein et al (n 8) 124, 1153, 1173.

[18] Eg, Kenneth Einar Himma, 'Inclusive Legal Positivism' in *The Oxford Handbook* 125; Gerald J Postema, 'Philosophy of the Common Law' in *The Oxford Handbook* 588 ('conventional foundations of common law and their more familiar rivals, positivism and natural law theory' would all benefit from spending 'philosophical energies' on conceptions of law); Benjamin C Zipursky, 'Philosophy of Private Law' in *The Oxford Handbook* 623 (private law is available only through our entire public system concentrating valid exercises of power in the state); Arthur Ripstein, 'Philosophy of Tort Law' in *The Oxford Handbook* 656 (questions of how people treat each other and whose problem it is when things go wrong are the same question); Jody S Kraus, 'Philosophy of Contract Law' in *The Oxford Handbook* 687 (philosophical foundations of the economic analysis of law); Peter Benson, 'Philosophy of Property Law' in *The Oxford Handbook* 752 (fundamental question must concern justice of private property as a main institution that distributes benefits and burdens through social cooperation); Larry Alexander, 'The Philosophy of Criminal Law' in *The Oxford Handbook* 815 (philosophical underpinnings of criminal law pertain to what justifies the legality of punishment); Allen Buchanan and David Golove, 'Philosophy of International Law' in *The Oxford Handbook* 868 (why contemporary philosophers of law should proceed as if there were an international legal system to be theorised about); Christopher L Eisgruber, 'Should Constitutional Judges be Philosophers?' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006) 5 (an argument for the moral reading of the Constitution must explain why it reasonably prescribes specific rules only with respect to some issues, leaving others for debate); James E Fleming, 'The Place of History and Philosophy in the Moral Reading of the American Constitution' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006) 23 (the Constitution should be interpreted in the best way for the present time, rather than enshrining the original, now imperfect, interpretation that does not deserve fidelity).

[19] David M Walker, *The Oxford Companion to Law* (Oxford University Press, 1980) 969–71.

recognition of a given legal system may require resorting to moral considerations. Accordingly, for inclusive positivists, the relevance of morality is determined in any legal system by the contingent content of that system's rules of recognition. Exclusive legal positivism maintains that a norm is never rendered legally valid solely by any moral content. Legal validity is dependent only on the conventionally recognised sources of law.[20] Conventional morality, the ideals of particular social groups and moral criticism by individuals transcending currently accepted morality can influence the law's development at all times and places. It does not follow that the criteria of legal validity of particular laws must require their basis in morality.[21]

C *Stone's Contention that a Jurist Should Garner Wisdom from Philosophy*

Stone enunciated that it was the place of a jurist to garner what wisdom the jurist could from the philosophers. It was permissible to recall that some distinguished philosophical minds had by another path reached a conclusion that had been reached in juristic terms. Stone cited Bertrand Russell, who had described the *a priori* demonstration of ethics as one by which the philosopher first invents a false theory as to the nature of things, and then deduces that wicked actions are those that show that the philosopher's theory is false. A metaphysic could never have ethical consequences except in view of its falsehood. If it were true, the acts by which it defined as sin would be impossible.[22]

In so far as existential phenomena are subject to any *a priori* criterion by reference to the existential world, the theory would have no ethical consequences, because it would be for that reason there has to be obedience. With positivist theories that purport to derive their criterion exclusively from supposed scientifically observed facts, the criterion would have no ethical effectiveness, there being no tendency to disobedience to call it into play.[23] 'Due process', 'reason', 'the common good' and 'public policy' are no more determinate than formulae of 'legal justice' and 'philosophic justice'. The varied content of abstract principles of law give a superficial appearance of stability in change.[24]

III ESTABLISHMENT CRITIQUE

A *The Establishment Case*

The classical theory of adjudication is that the function of the courts is to settle disputes between members of a social order by the application of principles of law to findings of fact. It is not to design a new order to be imposed upon society; that, if it is to be done, is for

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[20] Andrei Marmor, 'Exclusive Legal Positivism' in *The Oxford Handbook* 104, 105.
[21] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 185. Cf HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593; LL Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630 (whether law can be built only on a foundation of 'law' or whether law ultimately must always have a foundation in 'morality').
[22] Stone, *The Province and Function of Law* (n 1) 373 n 6, citing Bertrand Russell, *Sceptical Essays* (George Allen & Unwin, 1928) 91.
[23] Stone, *The Province and Function of Law* (n 1) 373.
[24] Ibid 374 n 11.

Parliament, the legislature. Nor is it to execute the commands of such an imposed order by calling into account those who infringe its commands; that is a task for the executive branch of government.[25]

The trenchant opposition of the legal establishment to Stone would seem well summarised by Professor Geoffrey de Q Walker:

> Legal realism came to Australia through the works of Professor Julius Stone who … had a profound influence on forty years of Australian law graduates. Stone did not describe himself as a realist, but as an exponent of sociological jurisprudence. But sociological jurisprudence was just a variant of realism. It postulated a pseudo-scientific and essentially retroactive approach to adjudication involving a notional weighing of competing interests. Stone was clever enough to hedge his theory around with so many qualifications that its implications for the legal order were not immediately apparent …. But is more obvious in the works of his followers …[26]

Walker describes Justice Michael Kirby as taking Justice Lionel Murphy to be 'his Australian exemplar of this approach',[27] namely that a judge should seek and implement the policy behind an Act of Parliament, rather than confining the Act's construction to its actual words.[28] Walker describes the activist judge as trying to enlarge the court's power at the expense of other institutions of government; and, he claims, at the expense of the people. He draws an analogy with totalitarian regimes that stretch the law to meet the forensic situation.[29] Conflating 'judicial activism', 'sociological jurisprudence' and 'legal realism' seems unwarranted. 'Judicial activism' might reasonably be said to be involved in any application of a method of constitutional and legal interpretation that seeks to discern the original meaning of the words being construed, as that meaning is revealed in the intentions of those who created the constitutional provision or other law in question.[30]

Any claim that Stone was a 'legal realist' is difficult to reconcile with the claim that he was a 'sociological jurisprudent', given the ongoing disputes between proponents of these two broad schools. This claim therefore can be challenged due to significant differences in approach by the two broad schools.[31] In Justice Kirby, Walker claims 'the judge is told not to shrink from being a sociologist'.[32] As presented by Walker, a judge is scolded for persisting in the mechanistic application of legal principles. A judge is exhorted to have confidence in his or her ability to reform the law.[33] However, Justice Kirby might more accurately be described as

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[25] Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 162.
[26] Ibid 175–6.
[27] Ibid 176.
[28] Ibid. Cf Stone, *Precedent and Law* (n 1) 53 on the *Acts Interpretation Act 1901* (Cth) s 15AA(1) requiring that, in statutory interpretation, 'a construction that would promote the purpose or object' of an Act (even if not expressed in the Act) be preferred to one that would not promote that purpose or object.
[29] Geoffrey de Q Walker (n 25) 176.
[30] Gary L McDowell, 'Original Intent' in Kermit L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press, 2nd ed, 2005) 711.
[31] Eg, Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) *Harvard Law Review* 1222 (description of Pound as a man caught in traditional precepts of a passing age).
[32] Geoffrey de Q Walker (n 25) 176.
[33] Ibid 175–7.

opposed to those who sought to obfuscate value judgements through a contrived fiction of mechanistically applying the law. He did not refuse to apply 'unfair' legal rules where it was sufficiently clear that any such result was required for legal reasons.[34] He was a deep traditionalist who was grounded with faith in maintaining the status quo in so far as that status quo pertained to the actual structure of legal institutions, as exemplified by the faith extending to include even the monarchy as the apex of Australia's legislative, executive and judicial branches of government.[35]

Walker's view of the established approach to adjudication is that judges should apply, and not create, the law. Common law rules were not invented by the judge; instead, they were identified by the judge as appropriate to be applied to resolve the case at issue. A judge is someone whose training and experience has given him or her a special skill in eliciting facts in identifying the legal principles at work in the particular transaction; and in selecting the correct one to apply to the facts. The principles or rules that the judge applies are found in custom and practice, or in prior decisions where they have been identified or articulated. The court's decisions are not retroactive even when dealing with new situations.[36]

There has to be adjudication under statute, with the traditional approach emphasising how the courts are independent of the executive and the legislature. The courts therefore have an essential part in the application of statutes; they are an intermediary between government and people; they bring independent and time-tested values to bear on the actions of legislature and executive; they receive evidence of the facts; and they apply what they see as the correct construction of the statute or regulation. On this basis, the courts make a determination that is authoritative, affecting all persons administering the statute. The courts are a mediating influence between the executive and the legislature on the one hand, and the citizen on the other.[37]

B *Stone's Critique of Legal Positivism*

Even positivists acknowledge that judges have to create law in certain circumstances. When a purported rule is inadequate to decide a particular case, a judge's creativity must be exercised only within recognised institutional legal constraints.[38] For Stone, those institutional constraints extend beyond what traditionally has been considered 'lawyer's law'. The institutional legal constraints include within their ambit consideration of the social and other

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[34] Eg, in *Ostrowski v Palmer* (2004) 281 CLR 493; [2014] HCA 30 (16 June 2004) where Kirby J joined with Gleeson CJ in handing down a joint judgement that if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence. This point also is illustrated by dicta in *Kuwait Airways Corporation v Iraqi Airways Company & Ors* [2002] UKHL 19; [2002] 2 AC 883, [195] per Lord Scott of Foscote (although courts may refuse to give effect to odious or barbarous foreign legislation, the existence of the legislation may nevertheless have to be recognised as a fact).

[35] Eg, AJ Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011); Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009).

[36] Geoffrey de Q Walker (n 25) 162–3.

[37] Ibid 170–1; cf comment in n 28 above.

[38] Krygier (n 5) 37.

sciences, and of philosophy, when such considerations become evident as necessary to resolve the case. The institutional constraints recognised by Stone therefore extend jurisprudence's potential for applying law as a social process and resolving cases by resorting to other disciplines of relevance to the law.[39] Walker provides a similar critique in respect of the application of legal positivism beyond its confines of formal legal validity:

> The growth of the common law is seen not as a process resulting from the application of pre-existing principles, but as the cumulative result of individual, conscious decisions by judges to make new law by drawing on standards located outside the legal system.[40]

Stone came to influence increasing numbers of Australian judges and lawyers.[41] His impact included his identification, as being dominant in the ordinary course of judicial decision-making, of such categories as indeterminate reference and considerable leeway for choice. The manner in which the *ratio decidendi* of a case could be found, extended or restricted provided judges with substantial leeway. The considerable leeway of choice that Stone identified was never to be totally open-ended. He did not support the tyranny of judicial whim, but always emphasised the importance of the rule of law. Any suggestion that Stone ever favoured unbounded judicial creativity would be a total misrepresentation of his legal theories.[42] All jurisprudence emphasises the importance of the rule of law.[43]

A general feature of jurisprudence is an emphasis on the importance of the rule of law. The various schools within jurisprudence differ as to what the rule of law involves and how to progress study into its various aspects. Jurisprudence involves the study into the science or theory of law. It asks: is the law there to present a science of the just and the unjust? It delves into the philosophical aspect of the knowledge of the law, fostering studies into the historical development of law and comparative legal systems. It aims at discovering the principles regulating the development of legal systems, studying the origin of legal institutions with a view to explaining the conditions of their existence and development. Jurisprudence is the scientific synthesis of the essential principles of law.[44]

A central feature of Stone's works and of a broad range of legal philosophers is that the real risk to the rule of law occurs by disguising normative assessments behind a veneer of mechanistic legalism. Any such disguise thereby can exclude any capacity to contest those normative assessments within the framework of judicial adjudication. Questions of theory

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[39] Upendra Baxi, 'Revisiting Social Dimensions of Law and Justice in a Post-Human Era' in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010) 69; Alan C Hutchinson, 'The Province of Jurisprudence (Really) Redetermined' in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010) 87.
[40] Geoffrey de Q Walker (n 25) 142.
[41] Kirby (n 7).
[42] Ibid.
[43] Cf Lord Lloyd of Hampstead and MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Stevens & Sons, 5th ed, 1985) 952 (Marx's theory of law and state might be described crudely as an economic theory).
[44] Summary of 'jurisprudence' adapted from PG Osborne, *A Concise Law Dictionary* (Sweet & Maxwell, 5th ed, 1964) 143.

constantly spring up in legal practice.[45] Stone's central innovation was to demonstrate comprehensively that some creativity in the process was desirable, as well as being inevitable and inescapable. The judgements of the High Court of Australia in more recent decades must be understood in the context of the impact of Stone's work on the judiciary and the legal profession.[46]

Stone drew back from making a definite case for any particular normative jurisprudence, and from advocating even the jurisprudence of who has been described as 'his revered mentor' Roscoe Pound.[47] Stone systematised a comprehensive description of the law as an adjustment of conflicting interests. He analysed these interests in their 'individual' and 'social' dimensions.[48] He described how the roles of the law, legal order, judges and administrators operated as instruments of social control. Nowhere is there found in Stone's work a definite prescription of his endorsing a particular normative jurisprudence or a settled account of what the role of judges ought to be. At best, there are normative conclusions drawn by inference that may be ascribed to the indirect influence of Stone's very evident sympathy for Pound's sociological jurisprudence. While specific, these conclusions were no more than suggestions relating to particular areas of law.[49]

Nicholas Aroney describes Stone's appeal to the 'rationality' of categorisations as 'an ambiguous claim which, on at least one reading, is reducible simply to the proposition that a conscious adjustment of the conflicting interests at stake will enable the courts to avoid perpetuating appeals to the various "categories of illusory reference"'.[50] This contention is that the law would not become more rational only by avoiding self-deceptive appeals to the illusory categories of legal formalism. A first step for the law to become more 'rational' is that 'such a balancing act will yield definite, logical and most importantly *just* conclusions'.[51] Beyond that, Stone did not seem to provide a firm offer of any particular normative jurisprudence.[52]

Stone established a general hypothesis that the common law has been able to sustain a perpetual process of change despite an appearance that all movement in the common law is controlled by the principle of authority and the rule of precedent. The appearance of adherence to precedent is fostered by the seeming stability and continuity in the great body of authoritative materials, especially the law reports as the literary sources of new decisions. Stone identified

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[45] Lloyd and Freeman (n 43) 5, citing as an example *Oppenheimer v Cattermole* [1976] AC 249 (a Jewish man who was born in Germany but was stripped of German nationality by German racial laws during the 1930s and 1940s and had since become a naturalised British subject was unable to claim dual nationality, which would have entitled him for exemption from UK tax on his post-Second World War German pension).
[46] Kirby (n 7).
[47] Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) 31(1) *University of New South Wales Law Journal* 107, 109–10.
[48] Stone, *The Province and Function of Law* (n 1); Stone, *Social Dimensions of Law and Justice* (n 1); Julius Stone, *Law and the Social Sciences: The Second Half Century* (University of Minnesota Press, 1966).
[49] Aroney (n 47) 109–10.
[50] Ibid.
[51] Ibid (emphasis in original).
[52] Eg, in Stone, *The Province and Function of Law* (n 1); Stone, *Human Law and Human Justice* (n 1); Stone, *Social Dimensions of Law and Justice* (n 1); Stone, *Law and the Social Sciences* (n 48).

the elements that produce leeways of choice for later judges to use these authoritative materials to base their new decisions.[53]

Stone maintained that the syllogistic reasoning commonly used by judges to reach their conclusions are barren. Logic has no existential or value reference; conclusions that are ostensibly reached by logic are in fact not determined by logic. Each such conclusion inevitably has to be reached through the premise chosen by the judge as his or her starting point. This choice typically is made by the judge either from more than one available legal proposition from which he or she could determine the starting point, or from similar starting points.[54]

Stone identified the semantic fertility of language as intensifying this effect of the barrenness of language in which the authoritative legal materials are expressed. Words are durable symbols. Words systematically produce choices between different meanings. These choices arise according to the context in which words are used and also according to movements in time and place. All may vary with each later judge. Each later judge successively must ask: what is the meaning of the language in the precedents he or she is asked to apply?[55]

Stone identified categories of illusory reference as endemic and ever-recurring in the authoritative legal materials. There are certain patterned features of legal materials that mean language found in legal contexts signal that leeways exist for choice by courts. Within those leeways, courts could choose which one or ones they are to use as a basis of decision. It is rare for either logic or law or language to compel a court to reach only one correct decision.[56]

According to Stone, these features could be found sometimes in a single word or a phrase or a distinction used in formulating legal propositions. The legal propositions could be detailed rules, or they could be more abstractly stated principles. The word or phrase could be one referring to lay notions such as ‘reasonableness’, but could also be one referring to technical legal notions such as ‘trust’, ‘quasi-contract’ or ‘estoppel’. Any relations *between* legal propositions, by way, for example, of a distinction or overlap, would also give rise to leeways of choice. Even if separately each proposition might appear to leave no or minimal leeway of choice, leeways would still arise from their coexistence or interaction.[57]

What Stone’s writings convey irresistibly is how the law must inevitably respond to the pressure of social and cultural change inherently requiring courts, particularly appellate courts, to embark on a careful balancing act as the normative prescription. Many Australian judges through much of the second half of the twentieth century formulated and applied balancing tests for the resolution of their cases. Their judgements cannot be separated from the influence

[53] Stone, *Precedent and Law* (n 1) 61.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid 61–2.

of Stone. Many areas of the common law of Australia, and Australian constitutional law, have been shaped by the jurisprudence of Stone in this way.[58]

C *Stone's Critique of Sociological Jurisprudence*

Stone applied the same kind of critical approach to the sociological jurisprudence of Pound's school as he did to the declaratory theory in respect of the application of precedent to common law appellate decision-making. Stone described Pound's proposals as generalising an approach based on a familiar thought that the law should correspond with human demands in a given society at a given time. Stone described how Pound's approach drew out and suggested a process by which an approximation of this desired state of affairs may be attained. Stone pointed out that serious proposals for law reform reflecting opinions as to the 'soundness' of rules and as to their 'policy' are based on similar mental processes. According to Stone, it was the commonplaceness of Pound's thinking that made it important to eliminate vagueness and caprice, in so far as any such elimination would be possible. Stone's criticism of Pound's proposals centred on their being subject to difficulties that inevitably prevented them from producing a foolproof, mechanically operating value solution.[59]

Stone identified Pound's approach as one that involved bringing law into harmony with the conditions of the time. However, there had been retrogressive 'civilisations' that had moved from higher to lower levels. A process of bringing earlier law into harmony with a later 'civilisation' could be a process of degradation of the law from a higher level of harmony to that of harmony with a lower civilisation. Such a retrograde step might be considered to involve a 'betterment' in one sense of the law being in harmony with 'civilisation'. However, it would not be a betterment in the sense of more effectively maintaining, furthering and transmitting human powers to the betterment of humanity. This retrograde outcome should readily be seen given the difficulty involved by the ambiguity of the term 'civilisation'. Civilisation may mean the civilisation that is here and now. It may mean that which is about to be perceptibly emerging from present trends. It may mean some ultimate ideal of civilisation. Pound seemed to have abandoned any attempt to qualify any de facto civilisation by reference to an ultimate ideal civilisation. Pound would say, according to Stone, that to admit any notion of an ultimate civilisation would be to introduce by the back door the problem of absolute values, which Pound believed he had ejected through the front door.[60]

What Stone identified as perhaps even more decisive of Pound's attitude was the consideration that any attempt by the law to pull in the opposite direction to which society was moving was anyhow doomed to failure; and that the wise legislator would not do anything in vain. Stone noted that one who would test law by its conformity with the demands of a given civilisation at a given time had to recognise that the law would forever be a handmaid of society. The law

[58] Aroney (n 47) 109–10.
[59] Eg, in Stone, *The Province and Function of Law* (n 1) 362.
[60] Eg, ibid 362–3.

then would have no absolute ends that it would constantly be seeking to advance, and no minimum standard of ideals.[61]

Stone pointed out that the approach adopted by Pound focusing on harmony between the law and the civilisation where it is to be applied might eliminate any element of value judgement of claims. A claim is valid by the fact that it is made, and the end of law is to give effect, where and to the extent possible, to the claim. However, according to Stone, what follows inevitably from Pound's approach involves the inevitable judgement of what the *preponderant* mass of claims would presuppose. Conversely, what inevitably also would be involved is the judgement as to what claims may be ignored because of this preponderance.[62] Stone's crucial point was: 'This cannot be made without the intervention of a value-judgment drawn from outside the whole body of *de facto* claims.'[63]

A value judgement similarly has to be drawn, Stone pointed out, in the application of any relevant criterion to a particular case. There is a stage at which the element of cryptic evaluation could rarely be completely absent. Pound's school requires that, in a concrete controversy, conflicting interests are to be ascertained and referred to their place in generalised form in a systemic scheme of interests that the applicable civilisation has to secure. There then has to be a choice as to which of the conflicting interests is to be secured at the expense of the others, and to what extent. This choice is then to depend upon which solution would do least injury to the scheme of interests as a whole. There is a converse angle in this regard: the choice also would depend upon which solution would most effectuate the scheme of interests as a whole. Stone described these words 'most' and 'least' as 'a veritable hornets' nest'.[64]

Stone asked: do these words 'most' and 'least' point to a counting of heads? Or do these words point rather to a greater inherent significance of some parts of the scheme of interests? Here again, Stone pointed out, the whole problem of absolute values creeps in. Something more has to be involved than simply an arithmetical computation of each side of the ledger of the number of human beings affected, multiplied by the number of interests of each, even when these are precisely ascertainable. Stone concluded: 'Here, again, therefore, the value-judgments of judge and legislator extraneous to the jural postulates and the scheme of interests must operate in the apparently objective decision.'[65]

A law-maker's answer to what is justice is not dictated by compulsions that exempt the law-maker from the responsibility of choice.[66]

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[61] Eg, ibid 363.
[62] Eg, ibid 363–4.
[63] Ibid 364.
[64] Ibid.
[65] Ibid.
[66] Ibid 376.

IV LAW'S DYNAMIC NATURE SUBSTANTIATES STONE'S CRITIQUES

The question of what law is has persisted. Many various answers have been given; even lawyers can differ.[67] Law is not exhausted by any category of rules. Its attitude is constructive aiming, in its interpretive spirit, to lay down what commitments are required in a changing society for the best route to a better future. Law is how we are united in community; while grounded in the past, it is for the community we aim to have.[68] It includes the accepted practices common to the entire society on the basis of which communication, exchange and social activities generally are conducted. It does not have to be promulgated by a centralised government that stands apart from other social groups.

It can include customs made up of implicit standards of conduct; these standards are tacit, although often precise, guidelines for how individuals should act.[69] Islamic law distinguishes the areas of custom and religious laws from sovereign and administrative discretion.[70] Custom performed the major role in the development of Roman law; 'legislation played a very minor role'.[71] Customs may be instituted to safeguard Jewish law. A custom can override a legal precedent, and must be treated with the same gravity as all areas of Jewish law. The development, delineation and identification of customs in Jewish law is inherently dynamic;[72] particular customs or usages can vary between trades, professions and localities.[73] According to Stone, the diversity of rules and opinions that Jewish law contains make it 'the least monolithic system of law known to legal scholars'.[74]

V CONCLUSION

Stone pointed out that natural scientists recognise that both wave theory and corpuscular theory are to be used to interpret phenomena of light, and both physical-chemical and psychological theories for those of the mind. The jurisprudential study of law should likewise benefit from all theories, such as those of ethical and sociological concern.[75] Stone's approach to scholarship may best be exemplified by the motto: 'It is not for thee to finish the task; neither art thou free to desist from it.'[76]

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[67] Hart (n 21) 1.
[68] Ronald Dworkin, *Law's Empire* (Fontana Press, 1986) 413.
[69] Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, 1976) 48–58.
[70] Ibid. See also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, rev ed, 1991) xv (Stone is cited describing jurisprudence as 'a chaos of approaches to a chaos of topics, chaotically delimited').
[71] JAC Thomas, *Textbook of Roman Law* (North-Holland Publishing, 1976) 4–5.
[72] Rabbi Moshe Walter, *The Making of a Minhag: The Laws and Parameters of Jewish Customs* (Feldheim Publishers, 2018) 1–2.
[73] David M Walker (n 19) 328.
[74] Julius Stone, 'Leeways of Choice, Natural Law and Justice in Jewish Legal Ordering' (1988) 7 *The Jewish Law Annual* 210, 221.
[75] Stone, *Legal System and Lawyers' Reasonings* (n 1) 122.
[76] Blackshield (n 4) 7.

Philosophy arises from an unusually obstinate attempt to arrive at real knowledge. What passes for knowledge tends to be vague and self-contradictory. Philosophy consists in becoming aware of these defects, to substitute an amended tentative kind of knowledge:[77]

> A rule is properly formulated if it does its work in the context in which it was meant for. Our error is to ask for perfect and complete rules.[78]

This philosophical approach was taken by Stone in his teaching of law. There remains an element of indeterminacy in the physical world that cannot be explained solely in terms of predictable deterministic laws: natural science is not mechanistic; induction does not lead to the inference of rigid causal laws; there are good scientific reasons why in any physical event there remains an element of indeterminacy; the dogma of determinism has been destroyed by modern physics; verification is not always possible; all scientific theories (or laws) are to degrees tentative and provisional and liable to at least partial refutation in the future; and the achievement of progress with research and its application in respect of the natural sciences is not completely value-free.[79] An analogy can be drawn between Stone's approach in jurisprudence and Einstein's approach in physics: 'Newton's theory … represents the gravitational field in a seemingly complete way … I do not doubt that the day will come when that description, too, will have to yield to another one'.[80]

[77] Bertrand Russell, *An Outline of Philosophy* (Unwin, 1970) 1–2.
[78] David Pole, *The Later Philosophy of Wittgenstein* (University of London Press, 1958) 33.
[79] Lloyd and Freeman (n 43) 8–9.
[80] Albert Einstein, 'Letter to Felix Klein' (4 March 1917), quoted in Abraham Pais, *'Subtle Is the Lord …': The Science and Life of Albert Einstein* (Oxford University Press, 1982) 325.