The Province and Function of Law: Law as Logic, Justice and Social Control, by JULIUS STONE, Challis Professor of Jurisprudence and International Law, University of Sydney; pp. 785 and Indices; Associated General Publications, Sydney, 1946.

The professional lawyer has little time for the " up in the air twaddle " that customarily goes by the name of Jurisprudence. He can get by in the practice of his craft without irksome soul-searching over " What is law ?" Besides, he is too busy with " legal problems proper " to keep up with speculative or academic writings on the law. And those of us who do occasionally read a book on legal theory do so as part of the cultivation of our leisure, in preference to golf or, according to taste, a symphony concert, a whodunit or Lord Thingummy's memoirs. As students we regarded " JP " as a subject over and above the " real " law course, in which only the keenest student would aim at more than a modest pass. In short, neither student nor practitioner has regarded Jurisprudence as basically influencing his approach to the law. Theory and practice need seldom be undivorced—so the comfortable argument runs.

If anything can be done (and why shouldn't it ?) to compel attention to the legal process as a whole and not merely to some fragment of doctrine or practice, then Professor Stone's much discussed work: " The Province and Function of Law " may well provide the text and the " know how." The reader will need a stout heart and a resilient mind, and even then the traumatic effects of the experience will be severe. But there are rich rewards for the brave.

To the task of appraising this remarkable volume few reviewers could come without humility. The world of legal scholarship is likely to take years to digest and adjudge it; and, in any case, the author's phenomenal learning garnered during his teaching and research in England and U.S.A., and his familiarity with Continental systems of law and ideas, make it difficult to meet him on equal terms.

The introductory chapter: " The Province of Jurisprudence Redetermined " (would Austin have liked that one ?) sets out the purposes of the book and delimits its scope. The learned author keeps clear of the slanging-matches between the various " schools " which are so common in juristic literature. Indeed, his thesis is the inadequacy of any single school to explain the phenomenon of law, and he cuts through the wilderness of schools and branches to suggest a three-fold division in the subject —analytical jurisprudence (an analysis of legal forms and an inquiry into the logical interrelations of legal propositions); theory of justice (what " ought to be " in the law as distinct from what " is "); and sociological or functional jurisprudence (the effect of law upon men and of men upon law). The book follows this plan and is divided into three parts as indicated in the sub-title.

Jurisprudence is defined as " the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law."[1] Even here on the threshold, we begin to sense that we have gone a long way since our first lecture on JP.

1. at p. 25.

(" Law is the command of a determinate superior, etc."). This impression grows as we see how catholic are the Professor's interests in the law—his touch is as sure with problems of " socio-ethical conviction " as with the refinements of the *res gesta* doctrine ; with the rule of exclusion of similar fact evidence as with the " depersonalization and trans-personalization of power " ; with Pound's theory of justice as with industrial arbitration or collusion in divorce law.

In Part I.—Law and Logic—Professor Stone subjects the analysts to analysis. He takes the worthiest names in the analytical field—Austin, Roguin, Kelsen, Hohfeld—and mercilessly exposes the inadequacy of the formal approach. But he is never uncharitable. He concedes that the " logical form " is not fallacious within its own proper " universe of discourse." So it is not proper to criticize its validity or usefulness " in terms either of societies or of purposes which lie outside its own postulates." At the same time, he pins Austin and the others down to their own assumptions. He scrupulously ensures that the writer under criticism is not, like the politician, misreported ; he grants the time and place and society for which the theory was formulated ; he places the writer fairly and squarely within his proper sphere of discourse ; and then he lets him have it with both barrels. Thus, with Austin : " insofar as the propositions whose logical inter-relations Austin sought could be arranged in a single autonomous self-consistent system they must almost certainly be divorced from social facts and social needs ; and insofar as they correspond to social facts and social needs they almost certainly would be incapable of arrangement in a single autonomous self-consistent system."[2] Indeed, the learned author returns again and again to the proposition that there is no simple generalization about the nature of law which is valid for all times and places and for every society.

The chapter on " Fallacies of the Logical Form," while it fits readily into the arrangement of this Part, could well stand as a treatise in itself. Here is a contribution *par excellence* from the English common lawyer. In assessing the " magnificent achievement " of English law in evolving great bodies of rules reasonably adapted to changing conditions, Professor Stone confronts us with the problem posed by Lord Wright and others, of " how this perpetual process of change can be reconciled with the principle of authority and the rule of *stare decisis*." We all know that the act of " judging " in a legal situation does not consist merely in " adding up sums correctly " (a felicitous phrase of O. W. Holmes, Jr.), and that no one answer is necessarily yielded by the syllogism ; and on the other hand there are few who would go all the way with the super-realist jazz jurists who acknowledge no theory but that of " the boil on the Judge's posterior." Stone shows how the creative element in judicial activity is concealed by the so-called " logical form." Taking the analysis beyond the generalization, he identifies a number of " categories " of reference[3]—meaningless reference, concealed multiple reference, competing reference, concealed circuitous reference, indeterminate reference—which startlingly illuminate the *ratio* of a number of recent cases. His conclusion is that the application of law to actual problems " may require the multiplication

2. at p. 72.
3. at p. 171 et seq.

of concepts and working categories, not the logical working out of the one first discovered."[4] The whole analysis will readily be seen as a sophisticated refinement of the " inarticulate major premise " theory, and no lawyer can say it is not " lawyer's law."

If Part I. deals with the logical form of the legal system as it is—the formal, the analytical—Part II. deals with the " ought to be "—the theories men have held at different times and places of what law ought to do for those whose conduct it governs. By " theories of justice ", Professor Stone means " the evaluation of law in terms of standards of goodness or badness external to the law itself."[5] This involves some attention to the disciplines of ethical, political and social philosophy. In this Part, too, the author recognizes that criteria of justice cannot be entirely independent of the actual condition of man's social, economic and political life in particular times and places, and he commends the approach which, instead of pursuing universal principles of justice, seeks some method of reaching a just solution in a given society at a given time. Starting with the natural lawyers, we are taken *seriatim* through Kant and Bentham, with an individualist bias, to Ihering, Stammler, Kohler and Duguit, who stress the social component of justice, and finally to the pragmatism of Pound. The same awareness characterizes the Professor's careful criticisms of each of these giants. Thus, with Stammler : " his goal of ' natural law with a changing content ' has become a slogan of 20th century jurists, satisfying compromise that it is between the emotional yearning for a universal ideal, and the caution of scientific relativism."[6]

Part II. leaves us with a central problem carried over to Part III.—the operation of law in society. For, while it is permissible, from one point of view, to separate the " is " and the " ought " for purposes of study, still the " ought " remains a part of the larger " is ". For the sociologist, the point is not whether the " ought " is valid or otherwise ; but the fact that some writer or group or court upholds that " ought " is a fact to be considered with all other facts governing the operation of law in society.

Part III. might be called the definitive part of Professor Stone's work. Here the Professor traces " the actual effects of the legal order upon the attitudes and behaviour of men in the particular society, and the effects upon the legal order of men's attitudes and behaviour." The reader may be assured that there is more in this than verbal gymnastics. For example we are reminded that social security legislation is important not only because it alters existing law ; it is also important because in the long run it will influence the human wants and desires which press upon future law."[7] The inquiry launched in this Part concerns many people—philosophers, psychologists, historians, economists, anthropologists, sociologists—and not the least it concerns lawyers.

No attempt will be made here to traverse the scope of Part III. One or two aspects, however, demand attention. First, the extremely valuable and recurring discussion on discrepancies between law in the

4. at p. 203, cf. E. N. Garlan, *Legal Realism and Justice*, at p. 11.
5. at p. 209.
6. at p. 327.
7. at p. 785.

books and law in action. Professor Stone deplores the waste of energy in controversy between Pound and the realists led by Llewellyn. Difference in hypothesis and emphasis there may be ; but the point, Stone insists, is not whether there may be divergences between law-making behaviour, law-applying behaviour and law-observing behaviour, but the extent of and the reasons for the divergence. And he suggests that better results will be achieved by taking smaller segments of the law and its operation as the fields of inquiry than by " promiscuous fact-gathering."[8]

After a stimulating chapter on " Law and National Development," in which the influence of the Historical " School " is assessed (and which is notable for such insights as : " Savigny gave us in his stress on continuity of experience a pre-Darwinian concept of evolution in the juristic field"),[9] Professor Stone proceeds to the formidable task of rewriting (he doesn't put it that way !) Pound's theory of law as the adjustment of conflicting interests. Discarding Pound's classification of " public interests," he examines men's *de facto* claims pressing for legal recognition from the point of view both of individual interests and social interests. Lawyers will recognise much of the illustrative case-law here as " up their own alley," since all the accepted branches of private and public law are surveyed ; not as separate subjects, but from the viewpoint of the theory of interests. Under " Individual Interests " are considered interests of personality—claims to physical integrity and integrity of the will (nervous shock, privacy) ; honour and reputation (defamation) ; freedom of belief and opinion ; family relations (parent and child, husband and wife) ; and interests of substance—property ; freedom of contract and choice of vocation ; promised advantages and injurious reliance (including an illuminating excursus on the doctrine of consideration), to mention but a few of the topics.

Under " Social Interests," the author embraces the general security, safety and health ; security of acquisitions and transactions ; security of social, political and economic institutions. Here is not simply a description of the various claims pressing for recognition, but an analysis of the clashes involved between various claims. Thus, claims in respect of the security of economic institutions are seen as being challenged by the countervailing interests in a minimum individual life of all members of society.[10] Professor Stone views these problems as dynamic, and therefore changes in the economic structure must involve attempts to provide " new adjustments of the interests at stake as men's actual claims move away from points of former pressure."[11] Here the Courts lag behind the legislature and opinion.

The clashes of interests concealed by the formal and circuitous language of judicial decisions are thrown into relief in Professor Stone's treatment of the "conspiracy cases "—the *Mogul* case,[12] *Quinn v. Leathem*,[13] *Plant v. Woods* (U.S.A.),[14] up to the *Harris Tweed Case*.[15] He

8. at p. 417.
9. at p. 439.
10. at p. 579.
11. at pp. 585 et seq.
12. (1889) 23 Q.B.D. 598.
13. [1901] A.C. 495.
14. (1899) 176 Mass. 492.
15. [1942] A.C. 435.

stresses the inadequacy of the single formula which the Courts have sought to apply " for all trade cases, whether traders *inter se*, workmen against masters, workmen against workmen, or traders and workmen against rival traders, and perhaps even for all cases whatever of associated action."[16] He urges attention to the concrete interests in conflict in such cases, and the framing of sub-rules which, according to the nature of the conflict, " constitute the best adjustment possible for our times ".[16]

The concluding portion of the book—social, ethical and psychological factors in legal stability and change—draws together many strands of the earlier sections. Professor Stone faces the problem of the disintegration of so-called " socio-ethical conviction " in complex industrialized societies, producing a social insecurity not explicable merely in terms of economic want, or even rapid social change. This calls for re-examination of the respective functions of law and of other means of social control. And so the final question is posed—Is the further extension of social control through law consistent with democracy ?[17] The learned author believes that it is, with democratic checks, and within an agreed limited objective of an economic minimum for all. The choice is not between control and no control ; the law has its part to play in the " control of controls."[18] Some may relegate such discussion to the sphere of politics ; but in so doing they will be ignoring the problems which the broader contemporary social-political scene raises for lawyers.

There is an urgent challenge in " The Province and Function of Law " to lift the law and the other social sciences out of their watertight compartments and to develop their points of contact. Wider horizons are available to lawyers who are willing to move out of the narrow professionalism of the past, and to accept the implications of their position in a changing society. For the future lies not in the " Heaven of Juristic Conceptions," but along the paths which Professor Stone has done so much to clear.

One final word. The student will find in the voluminous footnotes references and suggestions for reading and research which will keep him busy for years to come. Not every reader, of course, will abandon all other activity to this end. But every lawyer should read this book, and having read it he will have less scorn for " jurisprudence." He will have glimpsed most of the important problems of law in contemporary society, and will have gained new insights into his own work and its techniques. No one, of course, should try to read Stone in bed. Education is a painful process.

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16. at p. 626.
17. at p. 775.
18. at pp. 767 et seq.