SYMPOSIUM TO MARK THE 50TH ANNIVERSARY OF THE PUBLICATION OF *PROVINCE AND FUNCTION OF LAW* BY PROFESSOR JULIUS STONE

REMARKS AT THE JULIUS STONE SYMPOSIUM

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Tony Blackshield and Justice Michael Kirby have spoken of the impact of Julius Stone's work, especially *Province and Function of Law*,[1] on the High Court and Australian law, so I thought that I might speculate what Stone, who anticipated so much of modern legal scholarship, might make of some current approaches to the study of law.

Shortly after Stone died in 1985, I suggested that Stone had raised many issues of concern to the Critical Legal Studies movement in *The Province and Function of Law*:

> ... the issues raised are recognisably the same issues, and they are raised in a context of profound scholarship, free from the theoreticism and abstraction which characterises so much of what passes for scholarship today. In Stone's discussion, the place of the legal order remains central, though he does not make the mistake of confusing legal form with substance. Nor did he make the mistake of treating the

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1 J Stone, *Province and Function of Law*, Maitland Publications (1946).

> legal order merely as an instrument or agent of oppression, though clearly he was conscious that in many cases law was oppressive. It was typical of Stone that he avoided sweeping, abstract statements. His approach was to some extent the eclectic approach of the common law jurist, selecting what was good and supportive of his argument, from the widest possible range of sources and, after reasoned discussion, discarding that which he found to be unsupported or invalid. Stone was never prepared to 'trash' a theory or argument with which he did not agree. In his writing there are few unsupported assumptions, and no instances of reliance on any grand, all-encompassing theory. Rather, there is an awareness that there is usually some benefit and contribution to be gained from any scholarly work no matter what tradition produced it. His work demonstrates an attention to detail coupled with an awareness that the legal and social orders are complex and not capable of explanation without recourse to some knowledge not encompassed within their own boundaries...[2]

Tonight I merely amplify that. In this country at least, Julius Stone, rather than any other single individual, created a consciousness that law could only be understood in the light of what other disciplines could tell us. That view is now widely accepted, even in the Department of Law at the University of Sydney, at the Bar and, as Tony suggests, for longer than we suspected on the benches of Australian courts.

Stone was the first legal scholar in Australia to confront what he called the "hegemony of Austinianism" directly, though Geoff Sawer and others were to do it indirectly. Austinianism and its derivatives still find a place in some Australian Legal Theory and Jurisprudence courses, but they are rarely the exclusive approach to legal theory, and what might be called "contextual" approaches spread into the teaching of the whole range of subjects of law school study. These days, in all but a few of the more traditional schools, law students realise that understanding the principles of liability insurance is as essential to understanding tort law in action as understanding *Donoghue v Stevenson*,[3] that understanding issues of inequality in economic power and information is just as important in coming to terms with contract law in action as understanding *L'Estrange v F Graucob Ltd.*[4]

Legal academics today are in danger of leaving the central path of legal scholarship and becoming scholars of something else. The dominant theme of Stone's jurisprudential work was that we must keep law central, and not become historians, philosophers, sociologists or economists. We learn from those other disciplines. For Stone, jurisprudence consisted largely of applying to law what can be learnt from other disciplines. In this way, Stone made theorising relevant to generations of practising lawyers. By relating the ideas of scholars to practical legal problems, he was able to communicate ideas to lawyers and to enable them to make use of ideas with which they would otherwise have had no contact. This is true scholarship.

Either in *Province and Function of Law*, or one of the three successors, Stone raised or adverted to most of the issues and concerns of the Critical Legal

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2 J Goldring, "Julius Stone and the Study of Law and Society in Australia" (1985) 2 *Australian Journal of Law and Society* 2 at 4, 9.

3 [1932] AC 562.

4 [1934] 2 KB 394.

Studies Movement, (like himself, a product of American Legal Realism) and reached many of the same answers about the contingency of law, though he advocated a different solution to the problems this posed. In *Law and the Social Sciences*,[5] he elaborated on the impact that linguistics might have on the study of law and the legal order - matters fundamental to his ideas about the "categories of indeterminate reference" in Chapter 7 of *Province and Function of Law*. His remarks seem to foreshadow a great deal of what has come from linguistics, semiotics and post-modernism. Post-modernism has had an influence on the study of law, but does not claim to be an overarching theory that would explain all.

I will speculate on what Stone might have made of two other schools of thought about legal study that have gained prominence since his death - feminist jurisprudence and the 'law and economics' movement.

Feminist legal writers seem primarily not concerned with theory as such, but with reversing and correcting the omission and silencing of women in scholarly and professional legal writing and discussion. They insist that the law, and legal scholarship, should recognise not only that women are human beings, but also that the mode of thinking that has constructed legal rules, legal processes and legal education has been male-dominated. Stone's works, unfortunately, form part of that male legal tradition, even though he clearly acknowledges that laws have at times oppressed people who are different, and in such cases do not serve the interests of justice. Typically of his generation, his works simply overlook the silencing or omission of women from most discussions of the law.

In *Province and Function of Law*, and, indeed, in the three successor books, Julius mentions women principally in the context of the law of divorce and inheritance - the traditional areas where the law did not omit women, but mentioned them only to consign them to a role, which, like their social role at the time, was decidedly inferior.

Feminist legal scholarship is not grand theory; it does not seek to establish itself as a separate 'discipline' or to be other than part of legal scholarship as a whole. It admits other forms of legal scholarship, seeking its own rightful place, but not denying the contributions of other approaches to that scholarship. Feminist legal scholarship says something important about both law and scholarship.

Had Stone lived longer, the work of women legal scholars (including his daughter-in law and grand-daughter) might have convinced him that women counted and feminist jurisprudence might be accommodated within his writing, as so many other branches of thinking were. There is little in feminist writing about law that he would have disapproved of, had he thought about it.

That, I suspect, would not have been true of the 'law and economics' approach - the other significant new approach to law. Stone acknowledged that economics could assist in understanding law. Indeed, had not Holmes said that the future belonged as much to the economist as to the lawyer? Much of *Province and*

5 J Stone, *Law and the Social Sciences in the Second Half of the Century*, Minnesota University Press (1966).

Function of Law is devoted to the relationship of law and economics. Economics was important to Stone both in the discussions of justice as perceived in the welfare state, a concept which in 1946 was only gaining acceptance, let alone legitimacy, in the social classes from which most lawyers were drawn. It was also important in Stone's detailed discussions of restrictive trade practices law. In this area, traditional legal techniques often did not provide solutions and new adaptations of legal thinking were required if law were effectively to serve justice. Restrictive trade practices law therefore challenged Stone.

The 'law and economics' movement, or at least its major advocate, Judge Posner, claims that the economic analysis of law is different from and superior to other "perspectives on law", especially those of history and sociology.[6] The movement offers economics as a measure of law's efficiency: "the science of rational choice".[7] In it, economics rather than law becomes central. That alone would have made Stone wary, for he insisted on the centrality of law.

The 'economics' of the 'law and economics' movement is inevitably the 'free-market' economics of the Chicago School. Though there is a tradition of economics which does not make a fetish of the market, or assert the market's supreme and irresistible power, the legitimacy and often the existence of that tradition as part of the discipline is denied by the Chicago school and most orthodox economists. It is no coincidence that Posner was a law teacher at the University of Chicago when the first edition of his book appeared. Chicago-style free-market economics has now achieved political, and a degree of intellectual hegemony in the West. It has a prescriptive value in policy-making circles unrivalled by any ideology other than Marxism in the former communist bloc. It has been warmly embraced by the political interests - especially large business - that never accepted the legitimacy of the welfare state, and like Mrs Thatcher, that denied the existence of a social realm. The market-based economics associated with the Chicago School is as ideologically loaded and as deterministic as any Marxist economic theory.

Economics is abstract, and its assumptions therefore are, or at least appear to be, unrealistic; but, proud of the essential reductionism of economics, Posner asserts, "abstraction...is the essence of scientific inquiry, and economics aspires to be scientific".[8] Some 'law and economics' adherents assert that efficiency is virtually a necessary condition of justice. What is more, they assert that economics can claim, because of its 'scientific' rationality, a moral superiority to law because it provides, at least in theory, a scientific means of making normative comparisons between different ways of social ordering. What is known as 'law and economics scholarship' is an interesting intellectual exercise that has produced some interesting, if yet untested, theories. However, as a leading law and economics scholar, Jules Coleman, admits, "most scholarship in law and economics remains theoretical rather than empirical".[9] This concession also would have raised Stone's suspicions. He saw the value in empirical studies

6 RA Posner, *Economic Analysis of Law*, Little Brown & Co (3rd ed 1986) p 24.
7 *Ibid*, p 3.
8 *Ibid.*
9 J Coleman and J Lange, "Introduction" in Coleman and Lange (eds), *Law and Economics I* (1992) p xi.

of law and would have agreed with Justice Murphy's warning, "any theory that has no relation to realities is suspect".[10] Nowhere is this more pertinent than in discussion of economic theories. Stone always tried to relate theory to realities.

Despite economists' claims to be scientific, economic hypotheses have not been and cannot logically be submitted to the same rigorous tests as those used by laboratory scientists. Its subjects are not human beings with lives and emotions, but disembodied intellectual constructs that bear few resemblances to real people. Most economists often forget they are dealing with intellectual constructs and prescribe what works in models as a recipe for real life - often with disastrous human consequences. Most lawyers deal with human beings regularly, and allow for human irrationality and emotionalism. For Julius Stone these human factors were always present, not outweighing rationality, but always to be considered along with rational ideas and theories, especially in discussions of the nature of justice.

The purpose of this brief description of the 'law and economics' school is simply to suggest that Julius Stone would have treated this body of thinking about law as he treated other absolutist or all-encompassing theoretical approaches. He made a sharp distinction between the descriptive and the normative. In *Province and Function of Law*, Stone expresses scepticism about the now fashionable, even hegemonic, libertarianism of Hayek, and discusses the 'economic determinism' of Marx and its relation to law. He is able to locate some internal inconsistencies in these theories, and dismisses them as unable to explain all social developments, while conceding that they have contributed to our understanding of law and society. Probably he would treat the economic determinism of the Chicago School, as he did that of Hayek, in the same way.

In the preface to *Province and Function of Law*, Stone denies both the assertion that legal history and historical jurisprudence are identical, and that historical jurisprudence alone should form the core of the study of jurisprudence. We can assume that he would have denied the claims of the law and economics movement, especially Posner, to enlightened or privileged insights that give the economic analysis of law any logical or moral priority. Rather, he probably would have acknowledged the value of some of the insights of this approach, pointed out its obvious ideological biases and the unreality of many, if not most, of the assumptions upon which contemporary economics is based, and returned to his quest of understanding law and justice.

One could never accuse Stone of anti-intellectualism, and he would have been proud to be labelled 'eclectic'. Eclecticism is the method of the common law, which, though he criticised, he clearly loved and often admired. The common law system has survived, has done at least as good a job of ministering to justice as any other system, and can only improve by absorbing what other disciplines can teach it. Stone's genius was to appraise and appropriate to the service of justice and scholarship the best elements of the constantly emerging ideas produced by jurists of all persuasions. So he would have used the best that has

10 *Bisrricic v Rokov* (1976) 135 CLR 552 at 567.

been produced by both feminist jurisprudence and the 'law and economics' school.

Stone taught that no unidimensional approach could lead to a full understanding of law. To do that, we need a variety of intellectual tools and approaches, and a critical openness to what those in other disciplines say about matters relevant to law. Each time I read Stone's work, I am more convinced that those who purport to have all the answers cannot possibly be entirely right, but that they may have something useful to say.