LOGIC AND THE LEGAL PROCESS

A critique of "Law and Logic" as expounded by Professor Julius Stone.

The widespread approval which Professor Julius Stone's "Province and Function of Law"[1] has received from learned publications renders a consideration of his doctrines as to the relationship between law and logic of some practical importance. This is the more so because he has not been content to enunciate his views in general terms but has made a detailed application of them to certain cases decided in the English Courts. The approval that Stone's work on the relationship of law to logic has received from fellow jurists shows that his views have general support among the experts in the field.[2] Its importance in crystallising the revolt against rationalism in law and in popularising the anti-rationalism now developing in the United States may be considerable.[3]

In summarising Stone's views it is difficult to be fair because he is an eclectic thinker and has gone to the logicians and philosophers for advice; but this expert advice has been taken without discrimination—often, one suspects, without understanding of the position being adopted. Fundamentally inconsistent conceptions of the nature of logic appear at different parts of his work, often in the very same chapter, so that the critic is compelled to select what he regards as the basic trend. In so doing he may be missing what Stone would probably call one of his deeper "insights."

It is Stone's eclecticism which has compelled the writer to resort to the plan of a running commentary and to conclude with a summary of the more important objections to Stone's position.

It is not possible to discuss the relationship between law and logic without taking a positive attitude to logical as well as to legal issues. For example, one field in which legal and logical theories are closely connected is the theory of precedent. It is not possible to discuss the logical problems of the theory of precedent without coming to grips with the theory of induction. If analytical jurisprudence were the criticism of the law in terms of logic there would be as many analytical theories as there are logical positions, and the thinker who accepted, say the Hegelian logic, would accept the analytical

[1] Referred to in the footnotes to this article as *Province*.
[2] e.g., Keeton, *Elementary Principles of Jurisprudence* (2nd edn.), 6.
[3] This influence has begun to be felt, as shown for example in Dennis Lloyd's article, *"Reason and Logic in the Common Law,"* 64 L.Q.R. 468.

jurisprudence based thereon. Even if a ready-made logical position were not adopted, some coherent views on basic logical issues and on the nature of logic itself are required. One will look in vain for any coherent logical views in Stone's work, and if any attention had been given to these questions the work would never have been written in its present form. Whatever view suits the purpose in hand is invoked, and completely incompatible views as to the nature of logic jostle each other in the one paragraph.

At times Stone is a follower of Dewey, at times he draws upon the ideas he has picked up from the Andersonian realists[4] in Sydney, at times he identifies logic with scholasticism; but in the main by logic he does not understand any body of doctrine upon a definite field of knowledge but uses the term in the popular sense as broadly equivalent to coherence. A work which starts with such basic confusions cannot cast much light upon the problems it attacks. It is not too much to say that Stone's work has only rendered more obscure a difficult field. This is all the more unfortunate because there is much subtle and original thought on legal issues hidden in the maze. Though Stone describes analytical jurisprudence as a criticism of the law in terms of logic, his own work amounts to a criticism of logic on the basis that certain legal material is incompatible with existing logical views. Stone again and again says that evaluative judgments are non-syllogistic. As the basis of logic is that any fact can be a term and any term can function in a syllogism, such a view amounts to a repudiation of existing logical doctrine. Stone gives no sign of being aware that he is challenging the very basis of scientific thinking, and in no way makes any attempt to justify such an assumption; but without it his whole assault on the role of the syllogism in legal thinking is quite pointless. The writer is unaware of any serious attempt to justify the assumption that evaluative judgments are, in Stone's somewhat question-begging term, non-syllogistic. Logic arose out of the attempts of Socrates and Plato to clarify issues, including moral and political issues, and since that time all types of controversy have been subjected to logical analysis.

As Stone has not favoured the reader with an explanation of his reasons for this assumption, all one can do is to hope that subsequent editions of his work will clarify this basic point. If this basic distinction between evaluative and non-evaluative judgments is unsound, most of Stone's work on the effects of logic on the law goes by the board.

Stone's work on law and logic falls into two parts; in the first instance he works out a theory whereby analytical jurisprudence is treated as a result of certain logical operations, in the second he puts forward certain views upon the role of logic in the development of the law by the judiciary and especially by the English judiciary. The

[4] i.e., disciples of John Anderson, Professor of Philosophy in the University of Sydney.

first part is not wholly unconnected with the second. The writer has analysed elsewhere Stone's conception of analytical jurisprudence[5] and would refer any interested reader to that article for a more detailed exposition of certain views advanced here.

Stone's exposition of the nature of law and logic is complicated by the fact that he accepts a number of inconsistent conceptions of logic. The dominant conception, the conception that pervades his account of analytical jurisprudence, is that logic consists of the construction of deductive systems without relation to empirical historical fact, i.e., that logic is a purely rational activity. This view has had much support among logicians, though it is generally rejected at present except in relation to the logic of mathematics. However, the belief that this is what logic consists of, and the general belief in the possibility of constructing deductive systems, even in the empirical sciences which this view encouraged, has had an effect upon thinking which is not by any means dissipated. Stone rightly sees the belief that the law could be a wholly deductive system to be an obstacle to the acceptance of his aim, which is to amend accepted ways of legal thinking by concentrating it upon a "here and now" consideration of social issues. Instead of repudiating the belief in the possibility of deductive systems and accepting the empirical approach to logic, he retains a belief in the possibility of deductive systems though at the same time treating them as untrue.

This evasive attitude to the problems of logic greatly weakens the force of his own criticism of analytical jurisprudence. As Stone's own account of the processes of analytical jurisprudence indicates, the deductive system of which each work of analytical jurisprudence is supposed to consist just does not exist. Insofar as the deduction is not logically fallacious there is a continuous importation of empirical material in the form of political demands. The weakness of the whole position is especially obvious in Stone's exposition because he identifies logic with syllogistic deduction.

It is Stone's assumption that in some way logic can form a regimen by which systems of law can be extracted from certain principles. Admittedly he combines with this a view that the result of the operation of logic is not to produce any actual system of law, but merely to exhibit possible systems of law. Thus he envisages Roguin as exhibiting "the logical possibilities" of types of legal system and describes the work of Roguin thus: "Its role is as a contrasting logical structure standing over against the actual law, giving by the contrast new insights into the actual."[6] The materials from which these logical structures are built are possible variations of the institutions in actual legal systems.

Actually there is nothing "logical" about the possibilities with which Roguin deals, and logic has nothing to do with this work

[5] See F. C. Hutley, *The Nature of Analytical Jurisprudence*, 26 Australasian Journal of Philosophy, 20.
[6] *Province*, 87.

except to the extent to which it is involved in any argument and any plan. All that Roguin, as expounded by Stone, is doing is to propound a series of hypotheses and considering their consequences. These hypotheses do not create any special logical problem and are only significant insofar as they deal with concrete institutions. Every carefully worked out proposal for a change in the law would amount to a logical structure giving insight into the actual if Stone's argument had any substance. Proposals of this nature are "logical" or "illogical," depending upon whether they are internally consistent, and their internal consistency depends upon the facts of the institutions which are being dealt with.

In proper focus Roguin's work would discredit the constructors of rationalistic legal systems in that he assumes that every legal problem can have a multitude of solutions and criticises such "self-evident" propositions as "the sovereign cannot have rights and duties." As Stone is committed to the view that the operations of analytical jurisprudence are concerned with "logic" he does not draw these conclusions though they would be in accordance with much of his general position.

In his account of Kelsen and of Austin, Stone conceives of logic as the means whereby a whole legal system is drawn out of certain basic assumptions. The logic which yields these bounteous returns is the familiar syllogistic logic derived from the work of Aristotle. For reasons which the writer has set out elsewhere this extraction just cannot take place and, far from being logical, cannot survive logical scrutiny. In the case of Austin, Stone's account is quite misleading, but it does show how baseless is his identification of analytical jurisprudence and logic in the exact sense of that term.

The empirical view of logic is that it is the science of the formal relations between propositions. One variety of the empirical view, the most distinguished exponent of which is Professor John Anderson,[7] also regards it as the study of the categories or conditions of existence. The role of logic in the empirical sciences is not upon this basis to provide the presuppositions of argument, but simply to check certain defects in the connection of propositions. It follows from this position that logic can provide no guide as to the truth of any particular proposition but can at best show that not all propositions in a given argument can be true. Even if it shows that not all propositions can be true it can give no indication as to which, if any, proposition should be accepted as true.

Stone does in places accept this account of logic,[8] but this concession as to what the writer believes to be the correct view is not consistently made, and if made would require the re-writing of the whole section of the work dealing with law and logic. Even so, many of Stone's views would not require radical alteration, for such a

[7] Professor of Philosophy in the University of Sydney.
[8] E.g., *Province*, 137.

conception of logic is more consistent with his positive position than with his rationalism, which may be regarded as a "hangover" from the confused position on logical questions taken up by Holmes. Writing at a time when rationalism was still strong in the social sciences, Holmes challenged it in the same ambiguous manner as does Stone—with more justification, in that it is in the last fifty years that the repudiation of rationalism has become general.

Logic as the theory of the formal relations between propositions is intimately connected with logic as the study of the conditions of existence; hence the view which is taken of the nature of the proposition will affect the view which is taken of the formal relations between propositions. It is from the form of the proposition that the point of departure for the discovery of the conditions of existence is made. The study of the conditions of existence can have certain significance for jurisprudence Any theory of the conditions of existence excludes certain types of beliefs; for example, belief in natural law is incompatible with the view that change is a character of all existence; belief in a divinely inspired law is incompatible with the view that there are no divine or supernatural entities. Theories of the conditions of existence affect jurisprudence in two ways; any theory accepted as true eliminates certain views, e.g., natural law, and most theories of jurisprudence are connected with and inspired by some view of things in general. For example, the Absolute Idealism of Hegel has inspired legal work such as that of Kohler,[9] and any thoroughgoing analysis of such a theory cannot ignore the basis from which it sprang. Speaking broadly, the solidarist theories of society and of law are connected with forms of philosophical monism. Stone, however, does not come to grips with the logical background of the various solidarist theories he touches on, and in the various ways in which he uses the words "logic" and "logical" he never uses the terms in this philosophical sense. When he speaks of "logical possibilities" he is not considering deriving law or the content of law from the character of reality itself.

Stone does not confine logic and logical to formally valid argument. His fundamental idea that analytical jurisprudence is criticism of law in terms of logic is quite inconsistent with this narrow use of the term as the writer has endeavoured to show in the article previously quoted. Despite his explicit statement that he means by logic "syllogistic deduction,"[10] it is quite impossible to make sense of his work if logic is given this meaning.

There is another conventional use of the term logical in legal and jurisprudential discussion, namely, "logically consistent with." This use is clearly illustrated in the first chapter of Cook's *Logical and Legal Bases of the Conflict of Laws*. There Cook discusses, with great dialectical skill, the propositions upon which the "conflict of

[9] Discussed by Stone in *Province*, c. xiii.
[10] *Province*, 206.

laws" decisions have been rationalised. These propositions are regarded by Cook as the logical bases of the "conflict of laws" rules. Actually this is an inaccurate use of the term logical as the bases are not yet yielded by logic, nor could logic exclude the possibility that there might be other propositions consistent with the rules.

What Cook does show is that certain of the propositions regarded as the bases of the rules of the conflict of laws are inconsistent with certain of the rules of the conflict of laws. As the rules of law are unchallengeable the bases have to be discarded. There still remains the possibility that some propositions which are consistent with the established law can be found. Such as are found are called the logical bases. If by logical basis is understood simply a proposition from which no conclusion can be deduced which is the opposite of the law, no difficulty can occur. However, it is usually assumed that these bases are in some way found in logic and are not mere empirical hypotheses. It is also assumed that by some logical operations these rationalisations can be made to yield the detailed rules of law. Both these assumptions have affected the actual administration of the law, encouraging rigidity in administration. Insofar as Stone's work tends to discredit these ideas it is valuable. As he accepts the initial confusion and acknowledges the logical character of these operations, nay more, founds his whole case on the confusion between the popular and the exact meanings of logic, his attack is far weaker than it need be. It is generally true to say that "logic" and "logical" are used by lawyers with the above meaning or with the still cruder meaning of "consistent with principle." Thus it is thought that it is "logical" that only the parties to a contract can enforce its terms, and that a trustee cannot convey the trust property to himself; innumerable examples of a similar kind can be found.

History provides an explanation of this use of the term "logical." While the doctrine of "essences" or "simple natures" was believed, anything outside the "essence" or "simple nature" could not as a matter of logic be part of the "essence" or "simple nature." Once a kind was fixed it was in the nature of things eternal. Legal like other thinking was affected by the rigid conceptualism which was upheld by logical theory, and is still affected by it.

Though it is only in footnotes and in overtones that one can really detect it, the writer feels that Stone's understanding of logic is dominated by the conceptualism which he is trying to expel from the law. In no case does he expound his position with any awareness of the difference between logic based on the proposition and logic based on conception. In many parts he indulges in conceptualistic terminology, which is all the more revealing for being very probably unconscious.[11]

[11] For example, "The Category and its logic," *Province,* 184; "The categories . . . have been in fierce competition", *ibid,* 177; and particularly the identification of the doctrine of essence with the syllogism.

In addition to these meanings of the term "logical," Stone also uses it where "ideological" would be more correct. This particular misuse of the term "logic" is not so evident in the passages of his work with which the writer is here concerned, but is particularly evident in his discussion of the work of Austin and Kelsen. The Austinian theory of sovereignty and the Kelsen theory that law is a pure hierarchy of norms are not accounts of any actual legal system but are extractions from certain factors at work in society, and the construction of a coherent legal order on the basis that these factors become completely dominant, i.e., radical parliamentary democracy in the one case, and State solidarism in the other. The confusion between logic and ideology provides the basis for Stone's identification of analytical jurisprudence with the criticism of the law in terms of logic.

Even if one took the view that analytical jurisprudence were concerned with the construction of coherent legal systems, it still would not be a criticism of law in terms of logic but would be the working out of certain views as to the order of institutions in society in a coherent manner and in detail. Logic does not provide the views; it may assist in excluding certain views as inconsistent with the views which it is assumed ought to prevail, but the basic factor, the "ideology" or "social picture," is not in any way contributed by it. That this confusion between legal principle and logic pervades Stone's work can be illustrated from his discussion of the "Fallacies of the Logical Form in the Uncodified Modern Roman Law."[12] After explaining that the pandectists "sought to organise the materials of the old Roman law into a coherent system taking as axiomatic the conception that law is concerned with the realisation of the just individual will,"[13] and illustrating from their writings some of the inconvenient results that flowed from their work, he concludes: "Their writings, therefore, quite innocent as analytical logical constructions, were treated as having some special claim to be regarded as the law governing the life of the community. . . . Insofar as they sought *a logical scheme for law*,[14] their constructions had no special title to become law. Insofar as they were merely arranging logically the existing propositions of the Roman law they were abstracting from the propositions their very content (which had reference originally to the Roman social contexts)."[15]

In the light of Stone's own definitions of what he means by logic there is no justification for the use of the term "logical" in the above passage. What the pandectists were concerned with, as appears from Stone's own argument, was the rationalisation (i.e., rendering consistent) of the Roman law upon certain ideological standpoints. Logic had place in the work (i.e., testing the consistency of the pro-

[12] *Province*, 160 et seq.
[13] *Province*, 160.
[14] Writer's italics.
[15] *Province*, 162.

positions), but the scheme was only logical in the popular sense. The scheme the pandectists sought was a scheme dominated by certain legal ideals and principles. For those who believed that a consistent legal system had been created and who made the will the central institution of society, the constructions of the pandectists had every claim to be law. Those who, like Stone, do not give the same status to the will, and those who are not impressed by the claim that the systems were consistent, are entitled to reject the claim that the pandectists' constructions should represent the law.

It might be objected that there is no objection to Stone's using popular meanings of the word logic. There would be no objection in certain contexts, but the conclusion of Stone's argument is that strict syllogistic logic must not be allowed to dominate legal thinking. Any conclusions which Stone may draw as to the place of logic, in his own sense of the term, in the law can have no relevance at all when applied to logic in the exact sense of the term; otherwise the argument would involve the fallacy of the ambiguous middle. It is, however, quite impossible to defend Stone's position along these lines; firstly, because he does not recognise the difference between the exact and the popular meanings of the term logic, and secondly, because if it were not for the confusion there would be no argument at all, the confusion is not an accidental slip but the very gist of his position.

Stone's discussion of the New York *Springboard Case*[16] clearly illustrates his confusions. The enunciation of a legal rule and its application to the facts of a particular case is a familiar exercise of elementary deductive reasoning. The logical process is not different when, owing to the complexity of the facts or the law, there are a number of propositions which appear to cover the case. There is the special class of case in which there is in the first instance no doubt about the rule of law and of its applicability to the facts, i.e., the major and minor premisses of the syllogism are accepted and the reasoning is valid, yet the Court refuses to accept the conclusion. The *Springboard Case*[17] is an example of this; in that case the Court changed the law. As the law is a system of administration and the judges in their various grades have different degrees of initiative, the system is not an utterly rigid one and in certain circumstances the judges can, even according to the rules of the system itself, change the law. Every practitioner and every student know this fact. What the Court did in the instant case was to deny the conclusion, which meant that it affirmed that either the major or the minor premiss was false. In fact it denied the major premiss so that as the result of the decision it is no longer true to say that, in the State of New York, whatever is attached to land is part of the land under all circumstances. The analogy to the modification of a hypothesis in science as the result of an experiment yielding results

[16] Hynes v. N.Y.C.R.R. (1921) 231 N.Y. 229.
[17] See *Province*, 140-141.

inconsistent with it is obvious. In the actual procedure of the New York Court there is nothing which in any way bears adversely upon the role of formal logic in legal reasoning. On the contrary, the whole reasoning is easily cast in syllogistic form.

Stone's conclusion is, however, that "In short, rejecting the implied assumption that all propositions of all parts of the law must be logically consistent with each other and proceed on a single set of definitions, he (Cardozo, J.) refused to regard a proposition as to the ownership of fixtures in the law of property as applicable to ownership in a case of negligent injury to an alleged trespasser. In short, he denied that the law is actually what the analytical jurist, *for his limited purposes,* assumes it to be."[18] While it is not pretended that in any legal system there are no contradictory rules of law, there are none in this case. The two propositions, "all things attached to land are land except for the purpose of the law of trespass," and "some things attached to land are not land for the purpose of the law of trespass," are not contradictory propositions and the law of New York was as self-consistent after the decision as before. Stone's conclusion is a *non sequitur*.

There is nothing in the history of analytical jurisprudence to suggest that it is committed to giving a single meaning to each word. It has sought to make verbal precision an objective of lawyers, and a too cavalier attitude to words is incompatible with any precise terminology. The object of analytical jurists such as Hohfeld, Kocourek, and Wigmore has been to increase the fund of words at the disposal of lawyers rather than to make the one word serve many purposes.

The significance of the *Springboard Case* for Stone lies in its repudiation of conceptualism and the acceptance by the Court of the task of adopting terms to fit what the Court regards as the justice of the case. Now when we remember that for Stone analytical jurisprudence is the criticism of the law in terms of logic and presumably valid logic, we see that Stone regards logic and analytical jurisprudence as committed to the doctrine that terms in law can have only one meaning. Upon such an assumption the case is a repudiation of analytical jurisprudence; otherwise the whole discussion is pointless in relation to logic or analytical jurisprudence.

Under the rubric of "The Fallacies of the Logical Form" Stone discusses a miscellaneous collection of legal ills which he considers are induced by logic. The phrase "fallacy of the logical form" is a venerable one, being used by Holmes, J., in his famous address, "The Path of the Law"; it is misleading for the so-called fallacy was not a fallacy in anything but the popular sense of the term. The fallacy of the logical form as Holmes understood it consisted in ignoring the working of the rules of law in their present social context and

[18] *Province,* 141 (Stone's italics).

being content with the deduction of consequences from the received rules, without any reconsideration of the rules themselves. He also describes the fallacy as "the notion that the only force at work in the development of the law is logic."[19] Insofar as Holmes, and Stone following him, attack the view that the work of the judiciary is simply the application of an all-sufficing law to the facts, the writer is fully in sympathy. Holmes may in his day have been combating a strongly held view, but the idea that the development of the law is purely deductive has been so long dead that one has difficulty in seeing what body of legal thought Stone is attacking. If he is not attacking a body of legal thought but is attacking the unconscious presuppositions of much actual legal thinking, then the use of the term fallacy is unfortunate in that it suggests transparent defects in thinking. Stone does not explain just what he means by "the fallacy of the logical form." He takes over from Holmes the assumption that there is such a fallacy and illustrates its operation. It appears to the writer that Stone regards as the fallacy of the logical form the idea that a judge can perform his function by the application of the existing received materials of the law to the case on hand, without regard to social policy. A case such as *Rose v. Ford*[20] illustrates the fallacy of the logical form; *Nokes v. Doncaster Amalgamated Collieries*,[21] the avoidance of the fallacy. If this is what the fallacy of the logical form really amounts to, the fallacy is not a fallacy and is not concerned with logic. The real point of difference is the degree of judicial freedom and the type of consideration which the judiciary regard themselves as permitted to take into account in deciding an issue. Logic does not dictate the ignoring of social policy nor, despite Stone's confident assumption to the contrary, are arguments on social policy incapable of treatment by a syllogistic logic. The approach by the judiciary to questions of social policy, especially in relation to statutes, is itself a delicate question of policy which, because of Stone's treatment of it as connected with logic, gets no proper attention. Such a policy question has to be discussed in relation to recognised institutions and social objectives with a knowledge that the judiciary are a social force engaged in preserving their position and influence in society. They are devoted to diverse social ideals and do not necessarily fulfil their most important purpose by helping the planned society and the bureaucratic state to flourish. The realistic study of the judiciary in society, to which the work of Stone makes some contribution, is impeded by the wrong focus which comes from Stone's connecting the establishment of judicial freedom with the depreciation of the role of logic.

In some parts of the work the "fallacy of the logical form" appears as the belief that the formal reasoning by which a decision is reached is the real determinant of the result. Thus Stone deduces

[19] Holmes, *The Path of the Law*, 10 H.L.R. 457, at 465; quoted from *The Mind and Faith of Mr. Justice Holmes*, 79.
[20] [1937] A.C. 826; discussed by Stone in *Province*, 196.
[21] [1942] A.C. 284; discussed by Stone in *Province*, 194 et seq.

from the existence of "meaningless categories" that the belief that a meaningless category is the cause of a decision is an example of the fallacy of the logical form. The question of what is the real cause of a particular decision is a sociological and psychological question, and the sociology and psychology of judicial decision may be an important field for jurisprudence. However, the material put forward by Stone provides no basis for his conclusions unless he first shows that the meaningless category is recognised as meaningless by the persons using it.

The confusion between logical, psychological, and policy issues facilitates the acceptance of Stone's ideas, it enables him to pass from the demonstration that an idea is not dictated by logic to the position that it is something which should be realised on social and political grounds. This confusion is made easier by Stone's treatment of features of the legal system as being the result of logic but which are quite unconnected therewith. In most instances what he is attacking is a policy or set of demands disguised as an exposition of logical fact. The demonstration that the demands are not absolute does not dispose of them at all as policies. It is not sufficient to show that the logic does not demand a policy to justify the adoption of an opposite policy. *Elegantia iuris* is condemned unheard by Stone's method of arguing. Generally in his thinking there is an easy transition from the role of the legal scientist to the role of the advocate of a particular policy. This easy transition conceals the difficulties in the policies he is advocating, and often makes the policies appear not as mere policies but as analyses of fact. The writer has already discussed one instance of this confusion in Stone's work.[22] Even if we accept the view that the processes of legal reasoning cannot be reduced to simple deduction, it does not follow that any particular view as to the creative role of the judiciary should be accepted. In particular it does not establish that the judges should be creative, that they should give effect to their or the community's sense of justice, and it provides no answer to the delicate question as to the weight to be given to the legal ideal of "symmetry and consistency." Stone does not keep these questions distinct; conceiving logic as the constrictive force upon the free evaluation of the justice of particular situations, he concludes that, if its proper role were understood, the way would be open for the ideal of the law which he advocates to be accepted. If, in his assault upon the role of logic, he does explode the unconscious presuppositions which are at work in the courts, it may be that this result will happen. This happening will be a result more of skilful pleading than of cogent argument, for even if his criticisms were accepted as a fact, the policy he advocates has still to be considered as a policy.

The extent to which special pleading masquerades as argument is illustrated by Stone's discussion of *elegantia iuris*.[23] Though he

[22] F. C. Hutley, *The Nature of Analytical Jurisprudence,* 26 Australasian Journal of Philosophy, 30 (footnote).
[23] *Province,* c. vii, sec. 25.

is perfectly correct in his conclusion that logic provides no basis for *elegantia iuris,* this fact provides no basis whatsoever for the conclusion that "Ideally . . . their (i.e., the courts') theory of justice. whatever it be, should prevail. What this dictates in the infinite variety of emerging circumstances will not, except by chance, coincide with the tendencies to extend conceptual analogies, to restrict the introduction of new premisses in new situations, to keep premisses in different subject-matters logically consistent, or to keep the body of legal rules in a form deducible from a few main principles. To the extent, then, that the latter tendencies dominate decisions to the exclusion of due consideration of the social facts and of the problem of values which is an essential pre-requisite to the creation of a rule for a new situation, the court is indulging a spurious substitute for its true judicial activity."[24] This conclusion is all the more startling when one remembers that Stone can give no positive account of justice at all. His survey of the theories of justice yields no positive result, or even the hope that an objective theory of justice is possible. Admittedly Stone does not come to this depressing conclusion but speaks of a "trek towards justice."[25] However, for those who are not content with mere professions of faith, there is nothing in his work to enable one to characterise anything as just or unjust. Unless he can bring forward a positive theory of justice as a fact he is merely expressing his own preference for one type of judicial activity as against another. It is by no means self-evident that "ideally . . . their theory of justice, whatever it be, should prevail." The lawyers and judges who have preferred consistency to individualised justice have put their theory of justice into effect by rejecting the latter, and should have the blessing of Stone. This objection is not so carping as may appear. Unless Stone can bring forward a positive theory of justice he cannot criticise any particular line of conduct upon the basis that it fails to realise justice. Otherwise every decision can be represented to be the result of a theory of justice. Even if one took the view that justice was not an absolute but described a particular relation in society, some account of the character of that relation must be given. It is a bold theorist who, with the work of Socrates and Plato before him, assumes, without being able to produce a theory of justice, that justice is to be predicated of a situation as between individuals. The possibility that justice is an attribute of societies and not of situations between individuals cannot be ignored. Until such an account is given a theorist should defer criticism of this nature.

In fact there is implicit in Stone's criticism of logic in the law a conception of the way society should go, of an ideology. The criticism of logic is for the purpose of opening the way for the easier adoption of this policy. Logic is felt to be an obstacle to evaluation on the basis of the calculus of interests. Though there are many objections to the jurisprudence of interests, some of a logical

[24] *Province,* 190-191.
[25] *Province,* 375.

character based on the relativistic conception of interest, the situations classed as interests by Stone can be discussed in language open to logical analysis. The escape from logic and the syllogism is impossible.

Accepting, for the purpose of argument, the view that the English judiciary have a sound record of the adaptation of law to social change,[26] one is by no means committed to acceptance of Stone's account of the reasons for this. In fact, Stone's elaborate theory (the "legal categories") is created to cover an imaginary problem. As he regards continuous social adaptation as inconsistent with a purely deductive development of the law, he finds it necessary to invent certain escape categories to permit that adaptation to occur. If the deductive development is a myth, the problem does not exist. Even accepting the reality of the problem it is submitted that he does not show how his categories of escape operate to achieve the result.

In the light of his general position the antinomy is curious, because the burden of his whole work is that the administration of the law is not a process of deduction. The writer feels that no one disputes this. Stone, however, makes the point that "Most British judges and lawyers all the time, and all of them some of the time, do regard judicial decisions as either direct applications of existing law, or logical deductions from some existing principle."[27] It is not clear from Stone's work what portion of the proposition he regards as incorrect. It could hardly be denied that in some cases a judicial decision is the direct application of existing law, or a logical deduction from some existing principle. If it means that some British judges regard *all* decisions as being of this character, the writer feels that Stone is incorrect. There is dispute about the range of novelty but not about the fact of novelty. Be that as it may, the actual character of the legal process and the ideas of judges and lawyers about the process are two entirely different things. If the ideas of the judges and lawyers are wrong, the fact that if they were correct there would be theoretical difficulties in explaining the history of English law gives rise to no problem at all. If it is a fact that practical adjustment does take place, despite the fact that the accepted theory would prevent such adjustment, certain conclusions might be drawn as to the role of legal theory but nothing could be concluded as to the relationship of law and logic.

If the judges and lawyers believe that the whole of the developing system of law can be deduced from existing principles, they share the illusion as to the nature of the logical process of deduction possessed by Stone himself; in other words they attribute to logic a power which it does not possess. As the creation of novel rules is a well understood fact (it is not even an accepted myth that the rules of equity existed from time immemorial), any theory of the

[26] *Province*, 168.
[27] *ibid.*

judicial process must allow for the invention of rules. A new rule might, in a particular case, be logically deduced from some principle, but the writer believes that in the great majority of instances there is no question of the deduction of a new rule; the rule is just invented.

The existing law is in process of change, some parts more rapidly than others. On occasion this change may leave the words of the rules of law intact but may transform their practical significance. As Stone points out, there is in this change a challenge to theory, but the challenge is not to logical theory but to social theory, for what you have is a system which pretends to be rigid but which is at the same time covertly adaptable. To suggest as Stone does that this situation contains any logical difficulty, or that the more rigid elements which impede the adaptability of the system are to be traced to the syllogism, is quite incorrect.

In his assault on logic Stone, following his American teachers, is struggling to widen the range of materials which should be considered by the judges in administering the law and to introduce a new approach based upon the conscious evaluation of the interests involved in a legal situation. It is not directly suggested that the new material which he desires to have recognised as proper for the judges to consider is in any way incapable of logical treatment, though if this position had been boldly put forward the position he takes up would be more intelligible. Without such an assumption it is difficult to see why he makes his assault on logic, for on the usual understanding of the field of logic as the study of the formal relations between propositions, any form of legal argument could be subjected to logical analysis and cast in logical form, i.e., in the appropriate case, the syllogism. Syllogistic logic, which Stone seems to imagine is a special variety of logic, is not so. On the contrary, every logician recognises that there are valid forms of argument of which the syllogism is one. The syllogism is a form of argument almost universally recognised as valid. Though no attempt is made by Stone to justify his assault on logic one can see that the habits of precise argumentation are an obstacle to innovators. The careful and exact formulation of general propositions, which are the grounds of decision and which the intellectual traditions of the West have made obligatory on judges, is a very different activity from the *ad hoc* weighing of interests. The assumption that every case is a particular instance of some general rule, that every decision is one of a general class, which is the basis of the system of precedent, is being challenged by the adherents of the calculus of interests.

The intellectual habits which the logical tradition of Western Europe has encouraged are obstacles to their particular social plan. It is tentatively suggested that the widespread acceptance, particularly in the United States of America, of the naive and transparently unsound attacks upon logic indicate that a profound social movement is at work in the law schools and among the academic lawyers. The

social basis of this "antilogic" has as yet not been investigated. However important for non-intellectual reasons as a stage in the battle to achieve a change in the traditional procedure of decision, the assault on logic is quite without theoretical justification. For logic does not determine what materials are and what are not to be included in legal arguments and decisions. It is not logic, but the legal tradition, which requires decisions to be reasoned. Rules of law, the received tradition of the courts and the profession, limitations of court procedure, and many other factors bear upon these matters, but not logic. This point was made forcefully by Hoernle in his review of *Science of Legal Method*[28] where, dealing with antilogical doctrines of a kind similar to if not identical with those of Stone, he points out, "What our authors criticise as bad logic is really bad premisses, not a faulty technique in deducing conclusions, but a faulty subject-matter,—what I described above as a mistaken concept of the function of laws and lawyers, expressing itself in trickiness of 'interpretation,' the devices and make-believes necessary for twisting the terms of a statute so as to apply to novel situations, the abstractness and rigidity of legal formulas, which, artificially tied down to the legislator's 'intention' . . . inevitably lag behind the mobility and fluidity of actual life. What our authors call for, and seek to secure, is better premisses, a fuller and completer range of *material* considerations out of which to elicit 'substantial justice.'" This point of Hoernle's is particularly apposite to Stone's section on the "Effects of Lack of Conscious Attention to the Non-Syllogistic Elements in Judicial Reasoning."[29] The title of the section is intriguing. What is a non-syllogistic element? To the logician any proposition may appear in a syllogism as major or minor premiss or conclusion. A non-syllogistic element is not a proposition and is in fact unthinkable. Stone explains the position thus:—"A first main type of abuse (i.e., of logic) is the making of logical deductions from existing legal propositions and assuming, without more, that these are law. The so-called problem of *Rose v. Ford*[30] which has plagued the courts in recent years springs, it is respectfully believed, from such a fault. In terms of deductive logic the reasoning may well be quite unexceptionable."[31] The reasoning is then summarised in a footnote. Continuing, Stone says, "But the actuality is that expectation of life while the deceased lives represents an actual human interest of the deceased. After his death *his* interest ceases. Any interest which his dependents have in his death is quite distinct in fact if not in logic and is already provided for, more or less, by the Fatal Accidents Act. Further, it can scarcely have been the intention of the legislator in 1934 to allow this speculative action for the benefit of the general creditors. The 1934 Act did not explicitly cover the matter, and was open to be interpreted so as to exclude it; and we

[28] 31 H.L.R. 807, at 810; reprinted in Hall, *Readings in Jurisprudence*, 380.
[29] *Province*, c. viii, sec. 28, pp. 196 et seq.
[30] [1937] A.C. 826.
[31] *Province*, 196.

have been authoritatively informed that the Law Revision Committee . . . did not intend to recommend that actions for pain and suffering and the shortened expectation of life should survive . . . In short, by a supposedly compulsive deduction from existing propositions which did not compel it, and which no one intended should compel it, there have resulted embarrassments for the courts and little justifiable benefit to anyone else."[32]

Assuming the logic of the court is unexceptionable, what non-syllogistic element have we here? Actually we have two arguments: (1) All statutes are to be interpreted so as to give effect to the intention of the legislature. This is a statute. Therefore this statute should be interpreted so as to give effect to the intention of the legislature. (2) The intention of the legislature was not to permit one person to recover for a deceased person's loss of expectation of life. Therefore this statute ought to be interpreted so as not to permit a person to recover for another person's loss of expectation of life.

These arguments could be answered by another. All statutes are to be interpreted so as to give effect to the intention of the legislature if the words of the statute so permit. The words of this statute do not so permit. Therefore this statute is not to be interpreted so as to give effect to the intention of the legislature.

This analysis brings to light the real points at issue, which are quite obscured by Stone's statement that the propositions of the court did not compel the result. The court, faced with a series of formally valid arguments leading to contrary results, accepted one major premiss as correct; in so doing they may have erred, but they did not neglect non-syllogistic elements. Faced with a "choice of soul," they chose in a way which Stone considers incorrect. Whereas Stone says they were not compelled to defeat the intention of the legislature, the court finds that they were. One can agree with Stone's strictures on the decision, but logic entered to an equal degree into the argument of which he approved and into the argument of which he disapproved. The other examples given in the section have nothing whatsoever to do with law and logic, and still less to do with the syllogism. The examples given do illustrate the fact that Stone identifies logic with conceptualism.

Another confusion present in Stone's work is the identification of scholasticism with syllogistic logic. In a revealing passage Stone says, "The kind of logical deduction and demonstration which has been mainly operative in the judicial process, and which is in question in these pages, means that granted a certain rule of law (major premiss) a certain conclusion follows with regard to the facts at bar (minor). It is essentially the old scholastic logic."[33] In a footnote he adds, "See the able demonstration in G. L. Williams, *The Doc-*

[32] *Province,* 196-7.
[33] *Province,* 171.

trine of Repugnancy, (1943) 59 L.Q.R. 343, esp. 347-48."[34] Reference to this article of Williams shows that neither at the pages specially noted, nor anywhere, is he dealing with deduction. He is concerned to show that the doctrine of repugnancy is a consequence of the acceptance by lawyers at certain critical periods of the scholastic doctrine of essence. It is quite erroneous to identify syllogistic logic with the doctrine of essence.

Belief in the validity of the syllogism is not a distinctive feature of mediaeval scholastic logic, and the value of the syllogism is acknowledged by modern logicians.[35] Even though the mediaeval logicians gave a greater importance to the syllogism than would be conceded by many modern logicians, the syllogism is not compatible only with scholastic logic; on the contrary, the syllogism is inconsistent with a belief in essences. The doctrine of essences is regarded by modern philosophers of the realist school as reducing predication to identity thereby rendering inference of any kind impossible.

Williams's article does point to a fruitful line of inquiry, namely, the influence of false logical theory and philosophical theory upon the substance and administration of the law. It is in fact one of the very few pieces of work which come within Stone's definition of analytical jurisprudence, namely, a criticism of law in terms of logic. In order to develop this line of inquiry in a fruitful way it is necessary for the thinker to have a theory of logic as well as a knowledge of the law.

Some of the agencies by which the English judges have adapted the law to changed social conditions are discussed by Stone under the head of "Legal Categories." The first difficulty which faces the reader is to determine just what is meant by "category." The second difficulty is to see how the categories really enable the process of adaptation to proceed. The writer believes that in most cases it simply means "term" and that the discussion of the categories is a discussion of certain types of legal term. More broadly it is a study of the character of certain legal terms as affecting their use in legal arguments.

Under the rubric "Category of Meaningless Reference" Stone discusses words which denote nothing and supposed distinctions between legal terms which do not exist in fact, e.g., the supposed distinction between limitations and exceptions. The use of a meaningless term in a formally valid syllogism is possible, and the mere demonstration that the object denoted by a word does not exist does not show that the argument in which it is used is fallacious. Where judges believe that a term which is in fact meaningless has meaning and act on that belief, a series of apparently capricious and pettifogging distinctions results; but it is not correct to assume, as does

[34] Stone refers to Williams's work in Sec. 28 (p. 198) in a similar way so that the confusion is not an accident.

[35] E.g., Stebbing, *A Modern Introduction to Logic* (5th edn.), 102.

Stone, that the real determinant of the decision is outside the reasoning, and it is a still bolder assumption that if this is so, there is one determinant of the decision, or that the ignorance of the judges assists them in their task of adapting the law to present social realities.

Stone's consultation of the logicians oversimplifies the problem of meaningless terms in law, because, particularly in the case of the legislature and to a lesser degree in the case of the judges, the bodies using the terms can manufacture distinctions where none exist independently of the lawgiver's fiat. The creation of legal differences of a quasi-logical kind where none exist in logic leads to difficulties in formulating the legal distinction, but the fact that a logician sees no difference does not conclude the matter.

Stone concludes his exposition of the category of meaningless reference in these words, "The present submission is that if the legal category is meaningless from which the courts purport to deduce their decision, the decision must be attributed to some other mental process than that within which the orthodox English view would seek in practice, if not in so many words, to restrain judicial decision."[36] If this proposition is an analysis of judicial psychology it is unsound, because it ignores the fact that the meaningless references are accepted as true; it is also question-begging because, even if in every case there is another cause operating, it need not be a mental process, it may be social—and, what is more important, there may be many different causes in different cases such as the state of his Honour's liver, the status of the counsel who is the advocate on one side, etc.

The discussion of the categories of meaningless reference in the general context of the fallacy of the logical form, upon the basis that there has been a successful adaptation of the rules of law (by the judges) to the contemporary situation, creates a quite misleading picture. The mal-adaptation which the verbal confusion itself brings is ignored, and the adaptation which does occur is attributed to the categories without any clear demonstration of how they contribute to it.

A "Category of Concealed Multiple Reference" is a term with many meanings, a situation by no means peculiar to the law, so that it is prone to produce argument containing the fallacy of the ambiguous middle. This category is the same as the single category with competing versions of reference. It is amusing to find the fallacy of the ambiguous middle erected into an engine whereby the judges make the punishment fit the crime. Stone gives as an illustration of this category the *res gesta* doctrine and, after referring to Wigmore's analysis, concludes, "So long, however, as the courts and writers failed to recognise that the *res gesta* doctrine covers not only factual situation *E1,* but also situations *E2* to *E7,* they were able in

[36] *Province,* 174.

effect to reach pseudo-logically a wide variety of conclusions on any single set of facts by treating any of the inconsistent *res gesta* rules as applicable to any of the varied *res gesta* situations. Since many solutions can equally be reached by this logical mode it must be apparent that it is extra-logical factors which determine the issue in a particular case."[37] Assuming Stone's account of the *res gesta* doctrine to be true, it is apparent that the reasonings which produce these results are examples of the fallacy of the ambiguous middle. Fallacious reasoning might be called an extra-logical factor, but this is not what Stone means. The extra-logical factors to which he refers are outside the reasoning altogether. Contrary to his view, the argument he presents does not show that there is any factor at work except the entangling effect of confused terminology.

If a confused terminology had the effect of permitting the adaptation of the law to the justice of a particular case, the paradoxical result follows that the great work of Wigmore in sorting out the various meanings of *res gesta* would hinder the adaptation!

"Legal Categories of Competing Reference" are simply terms which can overlap, a very common situation in ordinary life and hardly calling for comment where the judges of the higher courts (especially if they adopt the cavalier attitude to terms which Stone advocates) and the legislature can use words like Humpty Dumpty. It is not at all surprising that you will have legal battles to have a situation characterised by one term or another, but it is surprising to have this situation described as "the simplest and most spectacular type of fallacy of the logical form."[38] There is an element of force in all naming, and it is especially obvious in the law where how the thing behaves may depend upon its name; but this fact has no logical significance. All that Stone is doing in this regard is to fight with his own illusions, as appears very clearly in the following passage: "It has well been pointed out that at a certain point, where the Courts declined to enforce contracts for the benefit of third parties, they rejected the competing category of trust and fastened on that of contract. Willy-nilly the Courts, not the syllogism, are responsible for that act."[39] It is only because Stone believes that logic is a kind of compulsive force operating over and above the facts that the statement is not pointless. Stone conceives logic as a power over and above things, forcing them into the way they should go. On this basis, he carefully piles up illustrations of "defiance" of the syllogism. The characterisation in legal terms of a novel situation by the judges or by the legislature is an act of policy. Consistency in policy is a factor to be regarded by policy-makers, but it is a question of policy what regard is to be had to it. Of course the courts made the decision, and they could have made a different one. Whoever imagined otherwise?

[37] *Province*, 176.
[38] *Province*, 176.
[39] *Province*, 178.

The arguments, however, used to deny to third parties the benefits stated to be given to them by contracts could be stated in syllogistic form, even though they may involve an element of will. It is a persistent and unfounded assumption of Stone's that argument about policy is in some way non-syllogistic or resistant to strict logical formulation. This is not so, though the ultimate propositions will be unjustifiable in that they express demands which those advancing them regard as their own justification. If these are not accepted by all parties discussion then collapses.

Stone's account of the "Legal Category of Indeterminate Reference" illustrates the assumption criticised above which is basic to his thinking that logic and evaluation are distinct. He says, "When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, *just* cause or excuse, due care, or adequacy, hardship, judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case."[40]

No proposition of law is a pure proposition of logic, and Stone probably means by "logical formulations and deductions" "formulations" and "logical deductions." In fact many formulations have been made, usually of a negative character, as to "hardship" or "clean hands." The syllogism, "No trustee is entitled to a profit from his trust. X. is a trustee. X. is not entitled to make a profit from his trust," is a formulation which is at the root of many applications and quite prevails over the determination of what "justice" may require in the instant case. Possibly Stone regards the hardening of standards into definite rules as a retrograde step. However, in every case, with sufficient care, a court can state in general terms what it regards as hardship, etc., and argue about these conceptions in the same way as about any other. In fact logical arguments about hardship are common in all courts which at the present time are required to deal with the law of landlord and tenant.

Unless the legal standards are to form the basis of purely "hunch" administration, unjustified and unjustifiable, the distinction which Stone draws between the formulation of logical deductions and evaluation is basically unsound. Legal standards are terms which cannot be understood without reference to current *mores* and ideals, but this does not mean that they can not be the subject and predicate of propositions and function like any other term in logical relations. To show that a term is evaluative does not show that it is not susceptible to logical treatment.

The exemption of the evaluation from logical criticism can only hinder the clarification of the social conflicts which law is trying to solve.

[40] *Province*, 186.

Summary of conclusions.

Stone's position depends upon a confusion between the popular and scientific meanings of the term logic. Accepting at their face value baseless claims that this decision and that are based on logic, he draws conclusions as to the relations between law and logic. Considered as a study of the relation between a logical theory (accepted as true) and the law, his work is almost without value. Considered as a study of the effect of a false logical theory upon the law, i.e., scholasticism,[41] it indicates that this theory has had effects upon the law; but as Stone has only the vaguest idea of what scholasticism is and identifies it with all forms of deductive logic, the work only succeeds in further confusing a field already confused. But Stone has in his section on the "legal categories" done valuable work in drawing attention to certain special characters in legal terms.

Though Stone does succeed in showing up many conventional views, he slips easily into mistaking the exposure of the conventional justification of a particular policy as a justification for pursuing a contrary policy. Thus, though he succeeds in showing that logic provides no check on judicial freedom, this of itself provides no reason for the expansion of judicial freedom. Once the view is accepted that logic can provide no basis for any particular policy in society or for any particular institution, the refutation of any policy on logical grounds can provide no basis for the opposite policy.

Logic impinges upon law in two ways. It eliminates certain types of legal theory, e.g., natural law, and by its canons the formal validity of arguments advanced by counsel or the court is determined. The material for these arguments comes from diverse sources, and includes many rules excluding from consideration propositions which could be advanced in other places. The relative weight to be given to these various propositions, the determination of kinds of considerations which may not be regarded by the judges, etc., are political questions which of themselves have nothing directly to do with logic. Arguments on these matters may or may not be logical, depending upon the formal relations between the propositions of which they consist. It is immaterial whether or not the propositions are factual or evaluative.

F. C. HUTLEY.

[41] *Province*, 206.
NOTE:—Attention is drawn to a review of Professor Stone's book by Max Rheinstein in 16 Chicago Law Review 756-7 where a criticism on similar lines to those propounded by the author will be found.—F.C.H.