

JULIUS STONE AND THE END OF SOCIOLOGICAL JURISPRUDENCE: ARTICULATING THE REASONS FOR DECISION IN POLITICAL COMMUNICATION CASES

NICHOLAS ARONEY*

In the area of free speech properly so-called, the constant weighing of values through an adjustment of the particular interests in conflict will inevitably go on. More rational sub-categories of free speech are likely to emerge only if the adjustment of conflicting interests involved in particular cases is consciously made, and not concealed by illusory general tests and slogans.¹

— *Julius Stone* (1966)

ABSTRACT

It is often said that the High Court of the early 1990s, particularly under Chief Justice Anthony Mason, was deeply influenced by the jurisprudence of Julius Stone. It is also sometimes suggested that the ‘discovery’ within the *Australian Constitution* of the implied freedom of political communication provides an illustration of Stone’s influence. This article is concerned with two problems associated with these claims. The first has to do with Stone’s jurisprudence itself and, in particular, the relationship between its normative and descriptive dimensions. The second problem concerns the application of Stone’s jurisprudence to the implied freedom of political communication. The main body of the article makes two principal claims. First, it is argued that at the heart of Stone’s jurisprudence is an equivocation in his recommendation that, rather than rely on various categories of illusory reference in their decisions, judges *ought* to articulate the real reasons for their conclusions, and that they *can* do this by balancing the social interests involved in any particular case. The equivocation has to do with both the *normative grounding* of this recommendation and the *very possibility of its coherent implementation*. Second, it is argued that, while the cases on the implied freedom are often fêted as examples of Stone’s

* Reader in Law and Fellow, Centre for Public, International and Comparative Law, TC Beirne School of Law, The University of Queensland. This article is based on a paper that was first presented to a faculty seminar held at the Faculty of Law, University of Auckland on 5 June 2007, at a public lecture organised by the New Zealand Society for Legal and Social Philosophy at the School of Law, Victoria University of Wellington on 6 June 2007, and at the Julius Stone Centenary Conference, Sydney Law School, 5–7 July 2007. My thanks to Tony Blackshield, Jay Tidmarsh, Paul Rishworth, Jim Evans, Maurice Goldsmith, Alan Cameron, David Hamer and Russell Hinchy for their comments on earlier versions of the paper. Special thanks are due to Alan Cameron for organising the two presentations in New Zealand. I also wish to thank Bridget O’Brien for her very capable research assistance.

1 Julius Stone, *Social Dimensions of Law and Justice* (1966) 230. Stone also observed at 323 that ‘free speech is a very foundation of all our political institutions and of political progress’.

influence, the reasoning in these cases is ironically a classic example of a court relying on a whole series of categories of illusory reference, culminating in the formulation of balancing tests themselves and in the application of those tests in specific cases. The article then concludes by asking: how is this irony to be explained? Is it a failure of the courts to apply Stone's jurisprudence consistently? Is it a failure of Stone's jurisprudence? Or is it a triumph of Stone's analytical realism over the normative and sociological dimensions of his jurisprudence?

I INTRODUCTION

I think it is a fair and adequate generalisation to say that the jurisprudence of Professor Julius Stone was marked by two broad characteristics: first, an attention to minute detail (which at its best reflected the meticulous nature of his mind and thought, but at its worst could border on the pedantic) and, second, a breadth of vision and purpose which is both breathtaking and awe-inspiring.² Stone's suggestion, cited at the head of this paper, that a more rational development of the law relating to free speech is most likely to emerge only if the adjustment of conflicting interests involved in particular cases is consciously and candidly made, is perhaps typical of Stone's capacity both to address the intricacies of particular areas of law and to propose solutions which bear a direct and logical relationship to the wider themes and goals of his jurisprudence as a whole.

And yet, here we encounter the first problematic in Stone's jurisprudence to which I wish to draw attention in this article. In the quotation above, with regard to the particularity of the issue at hand, Stone did not hesitate to propose a more or less specific solution: namely, to engage in a conscious adjustment of the conflicting interests involved. Stone said that to do so is likely to yield a more rational categorisation and development of the law relating to free speech. It is difficult to resist the inference that Stone meant to recommend that legislators and judges *ought* to pursue this course. In other words, it appears that Stone positively set forth a particular normative proposal, reflective of a jurisprudence at first guided (as will be seen) by analytical and realistic criticism, but decisively directed to its end by an uncompromising moral judgment. However, a close reading of Stone's corpus as a whole reveals a problematic at precisely this point.

It is true that Stone never wavered throughout his academic career from the analytical critique of legal reasoning that he most systematically set forth in Part One of *The Province and Function of Law* (1946), again in more detail in *Legal*

2 Tony Blackshield has observed that the 'vast breadth' of his vision 'was matched by the infinite encyclopaedic accumulation of detail with which Stone filled in its outlines'. Blackshield continued:

And if Stone's accumulation of detail at times seemed overwhelming (in the sense that it sometimes seemed too much for lesser minds to cope with), it was, in at least two crucial areas, overwhelming also in the more positive sense that, as example was piled upon example and illustrative case upon illustrative case, the underlying argument gathered cumulative and ultimately irrefutable force.

Anthony R Blackshield, 'The Legacy of Julius Stone' (1997) 20 *University of New South Wales Law Journal* 215, 219.

System and Lawyers' Reasonings (1964), and hammered home in his last publication, *Precedent and Law: Dynamics of Common Law Growth* (1985).³ However, the situated relativism and 'enclaves of justice' with which Stone concluded *Human Law and Human Justice* (1965),⁴ meant that in his monumental *Social Dimensions of Law and Justice* (1966) Stone drew back from making a definite case for any particular normative jurisprudence, not even the jurisprudence of his revered mentor, Dean Roscoe Pound.⁵ In *Social Dimensions of Law and Justice* (1966)⁶ we certainly have a comprehensive description of the law as an adjustment of conflicting interests and an exhaustively detailed analysis of these interests in their 'individual' and 'social' dimensions.⁷ We also have a similarly meticulous account of the role of judges and administrators and of the task of legal ordering and of law as an instrument of social control.⁸ But nowhere, so far as I can ascertain, do we find a definite *prescription* endorsing a particular normative jurisprudence or a settled account of what the role of judges *ought* to be. At best, normative conclusions such as these are left to inference and to the indirect influence of Stone's very evident sympathy for Pound's sociological jurisprudence,⁹ together with specific suggestions relating to particular areas of law, such as Stone's suggestion in relation to the law of free speech considered above. And, even here, Stone's appeal is to the 'rationality' of the categorisation, an ambiguous claim which, on at least one reading, is reducible simply to the proposition that a conscious adjustment of the conflicting interests at stake will enable the courts to avoid perpetuating appeals to the various 'categories of illusory reference' for which Stone became famous.¹⁰ The law will become more 'rational', on this reading, not because such a balancing act will yield definite, logical and most importantly *just* conclusions, but merely because it will avoid self-deceptive appeals to the illusory categories of legal formalism. For it is difficult to read Stone here as firmly offering a particular normative jurisprudence, given the indecisive conclusions at which he arrives in *Human Law and Human Justice* and *Social Dimensions of Law and Justice*. And yet, embarking on such a balancing act is the normative prescription which so many of Stone's readers have been inclined to draw from his writings. As one of his most prominent students has observed, Stone's writings 'conveyed an

3 Following and developing the argument set out in Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605.

4 Julius Stone, *Human Law and Human Justice* (first published 1965, 1968) 322–55.

5 See Julius Stone, 'Roscoe Pound and Sociological Jurisprudence' (1965) 78 *Harvard Law Review* 1578; Stone, above n 4, 105–46; Stone, above n 1, 164–98. Blackshield, above n 2, 220 says of Stone's lifelong relationship with Pound's jurisprudence: 'Never satisfied by the theory, he could never bring himself to abandon it either.' See also Anthony R Blackshield, 'The Pious Editor's Creed' in Anthony R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (1983).

6 Stone, above n 1.

7 Ibid 164–469.

8 Ibid 643–95.

9 Blackshield, above n 2, at 220 observes that it was 'through [Stone's] pedagogical use of [Pound's] theory as an explanatory sociological framework that much of his impact as a teacher was achieved'.

10 See Julius Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control: A Study in Jurisprudence* (2nd ed, 1946) 149–214; Julius Stone, *Legal System and Lawyers' Reasonings* (1964) 235–300; Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) 61–80.

irresistible picture of how the law responds – and in order to avoid pathological strain must inevitably respond – to the pressure of social and cultural change'.¹¹ The tendency of so many Australian judges through much of the second half of the 20th century to formulate and apply balancing tests for the resolution of cases cannot be separated from Stone's influence.¹² Australian constitutional law, as with so many other areas of the common law of this country, has been shaped by Stone's jurisprudence in this way.

And this brings me to the second problematic that I wish to address in this article. On the analysis that I will summarise shortly, it will be my thesis that, particularly in the area of the implied freedom of political communication,¹³ balancing tests have done nothing more than *perpetuate* the same illusion of rationality and transparent decision-making which Stone had attributed to the jurisprudence of legal formalism. My argument will be that a close and critical analysis of the reasoning in freedom of political communication cases – from the drawing of the inference in the first place, right through to the formulation of tests and their application to specific cases – reveals a jurisprudence shot through with all manner of categories of illusory reference. This is a conclusion which I readily admit, and indeed would want to emphasise, is highly ironic, given that we think of the courts and judges who have developed this jurisprudence as deeply influenced by Julius Stone. That the jurisprudence of Stone applied to a particular body of law should produce yet more categories of illusory reference is at least confusing, if not perplexing, and perhaps also a little amusing.

Finally, if I am correct about this conclusion, it provokes a further question: is this result due to some latent flaw in Stone's own jurisprudence, or is it the case that Stone could foresee (albeit in general terms) outcomes such as this, and that it is just that we have failed to attend sufficiently closely to what he was saying?

II STONE'S JURISPRUDENCE

Stone's enduring contribution to jurisprudence lies in three areas: analytical, normative and sociological, corresponding to the three volumes of his trilogy, *Legal System and Lawyers' Reasonings*, *Human Law and Human Justice* and *Social Dimensions of Law and Justice*.

In the first of these books, Stone sought to take up and expand upon the basic themes of Part I of his earlier work, *The Province and Function of Law*, which he

11 Blackshield, above n 2, 221.

12 Not to mention the oft-repeated refrain uttered by many of the judges themselves, that their business certainly is not to discover the law, but rather to make it. See, eg, Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Kim Preston and Charles Sampford (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13; Michael McHugh, 'The Law-making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 15; Michael Kirby, 'Julius Stone and the High Court of Australia' (1997) 20 *University of New South Wales Law Journal* 239, 239.

13 The implied freedom of political communication was first identified by the High Court of Australia in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. It has since been applied in a number of subsequent cases, the most important being the authoritative restatement of the doctrine in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

had subtitled 'Law and Logic'. Stone's objective here was, first, to subject mainstream analytical and positivist jurisprudence to an extended critique; and, second, to scrutinise the use and limits of logic in legal decision-making, particularly in appellate courts of common law legal systems, but also among the courts under the legal codes of the civil law systems of continental Europe. Next, in the second volume of the trilogy, *Human Law and Human Justice*, Stone developed the themes earlier enunciated in Part II of *The Province and Function of Law*, subtitled 'Law and Justice'. His objective here was to present a thorough-going critical analysis of prevailing conceptions of justice and, in so doing, to present the human quest for a transcendent justice as an innate aspiration, something for which human beings will always strive, but as it turns out never actually attain. Finally, in Stone's third volume, the mammoth *Social Dimensions of Law and Justice*, Stone took up the questions of 'policy' which he had first addressed in Part III of *The Province and Function of Law* under the rubric 'Law and Society'. Here, Stone's concern was with sociological jurisprudence – by which he meant, not a sociology of law, but an 'applied study of law in society', that is, a study of law in its application and function in society, conceived as a rational basis for the practical task of administering law and justice in contemporary societies.

It is convenient to deal with these each in turn.

A The Analytical

Stone's investigation of the use and limits of logic in judicial decision-making was concerned particularly with the problem of explaining the growth and development of the common law. The problem, in particular, was to explain how common law courts, with their strong commitment to *stare decisis* and logic, have managed to develop the law in step with perceptions of changing social conditions.

Stone considered that most common law judges 'regard judicial decisions as either direct applications of existing law, or deductions from existing legal principle', and he acknowledged that in some cases logical deduction may genuinely occur.¹⁴ In particular, logical deduction can occur, he said, when judges determine the matters before them by searching the cases to discover the appropriate rule or rules of law which logically govern the situation. Such rules of law function as major premises in a logical syllogism; the facts of the case operate as minor premises; and the conclusion to be drawn by the court follows necessarily. Thus, the appropriate rule of law might prescribe: 'In situations where A, B and C facts are present, the legal conclusion X must follow'. If on the evidence brought before the court the facts are shown to be A, B and C; then the court is bound to come to legal conclusion X.¹⁵ However, the difficulty is that if this logical program were strictly followed, there would be little if any scope for change and development in the law. And yet the fact is that the law *has* changed

14 Stone, *Legal System and Lawyers' Reasonings*, above n 10, 301–2.

15 Ibid 241, 301–2. Cf Neil MacCormick, *Legal Reasoning and Legal Theory* (1978) 19, 53 for examples of logical deduction in legal reasoning.

and developed. Stone wanted to explain how judges could ostensibly follow this logical program, yet enable the law to evolve. ‘How can it be’, he asked, ‘that a judge with a creative attitude can produce change within a framework of binding precedent or statutory expression?’¹⁶

Stone answered this question by saying that judges – and by this he particularly meant judges of courts of final appeal – have facilitated the development of the common law by having recourse to what he called ‘categories of illusory reference’. These are propositions of law which do not directly or necessarily support the decision, although they are used as if they did, thereby concealing the judicial choice which is actually involved.¹⁷ In legal reasoning these principles or rules are used as major premises, as if the combination of a particular major premise with the minor premise indicated by the fact situation under consideration produced – by way of logical deduction – a legal conclusion which is determined by the law, and not by the free discretion of the judge. However, Stone argued, a strictly logical analysis of the arguments used often reveals fallacious reasoning: the major premises do not logically require the conclusions.¹⁸ For Stone, the resulting judicial choice or discretion meant that judges regularly and inevitably, whether or not consciously, turn to considerations of ‘policy’ or ‘justice’ for the determination of the matters before them.¹⁹ As Stone observed:

If the supposed principle by reference to which a case is decided has no possible meaning which can base the decision, then even though the court purports to derive its decision therefrom, the real determinant of the decision must lie elsewhere.²⁰

As a result, Stone argued, judges – and especially appellate judges – are regularly confronted with ‘leeways of choice’, and it is this discretion which makes possible the evolution of the common law.²¹ The available choices, as Martin Krygier has pointed out, exist for Stone only *within* certain leeways: judges are usually presented with a choice among alternatives which the materials of law dictate, so that judicial creativity is generally interstitial and incremental.²² Moreover, as Stone acknowledged, the law consists not only of rules, but also of principles or standards, and judges are expected by the prevailing legal culture, expectations and modes of reasoning to make decisions

16 Stone, *Legal System and Lawyers’ Reasonings*, above n 10, 233.

17 Ibid 235, 241. Stone also pointed out that the ratio decidendi of an authoritative case can always be cast at different levels of generality. A creative judge has a significant opportunity to define the ratio either narrowly or broadly, and thereby to narrow or alternatively widen the situations to which the precedent applies. See, eg, Stone, *Precedent and Law*, above n 10, 123–39.

18 Stone, *Legal System and Lawyers’ Reasonings*, above n 10, 241, 298.

19 Ibid 14. Stone also referred at 241 to an ‘evaluation, conscious or unconscious, of the social situation confronting’ the court.

20 Ibid 241. This comment was made with respect to a particular category of illusory reference, but the general thrust of the observation is applicable to all of the categories.

21 By admitting that logical deduction can occur and limiting his claims about judicial discretion to courts of higher appeal, Stone’s position is to be distinguished from Legal Realism and Critical Legal Studies.

22 Martin Krygier, ‘Julius Stone, Leeways of Choice, Legal Tradition and the Declaratory Theory of Law’ (1986) 10 *Bulletin of the Australian Society of Legal Philosophy* 158, 165–8, citing Stone, *Legal System and Lawyers’ Reasonings*, above n 10, 282, 287–8; Stone, *The Province and Function of Law*, above n 10, 190.

which are defensible in terms of these principles.²³ But within these constraints appellate judges face choices, Stone insisted, and these choices enable them to develop the law in accordance with their perceptions of justice and social need.

Stone identified a number of different categories of illusory reference. These included what he called: (1) categories of competing reference; (2) the single category of competing versions of reference; (3) the single category of concealed circular reference; (4) the category of indeterminate reference; (5) the category of meaningless reference; (6) the category of concealed multiple reference; and (7) illusory categories incorporated into the notion of the ratio decidendi of a case.²⁴ While these categories are meant to explain distinct ways in which legal materials can be indeterminate, Stone acknowledged that it was often possible to classify a particular rule or principle of law as it applied in a particular case in terms of more than one category, and that precise classification was for this reason sometimes debatable.²⁵ Moreover, Stone's explanation of these categories varied over time. Explanations in *Legal System and Lawyers' Reasonings* generally expand upon and are analytically clearer than those to be found in the earlier *Province and Function of Law*, whereas the later *Precedent and Law* presents the categories in much simpler terms, but with less precision and not a little confusion at times.

Stone's 'category of competing reference' is perhaps both the most common and the most easily explained among the categories of illusory reference.²⁶ Categories of competing reference arise in situations where two or more legal categories, expressed as two or more distinct verbal formulations, can both apply to a particular fact situation; in other words, the course of events before a court fits the description of facts in either verbal formulation.²⁷ However, each of the verbal formulations prescribes different legal consequences. Thus, categories of competing reference arise where two or more legal rules, principles or precedents arguably apply to a fact situation of the kind presented before the court, and the judge has to decide which one to apply. Stone provided several common examples of the tension produced by such situations. Thus, where the owner of land operates an elevator which he makes available to those coming onto the premises, should the standards imposed by the law upon common carriers or the standards owed by owners of land to licensees or invitees apply? As Stone

23 Krygier, above n 22, 167, citing Stone, *Legal System and Lawyers' Reasonings*, above n 10, 23, 238, 325–37; Stone, *Precedent and Law*, above n 10, 23, 89, 97–107, 240.

24 Stone, *Precedent and Law*, above n 10, 62. Stone also identified the phenomenon of what he called *converging categories*, meaning formulas arising from different cases which, when applied to an instant case, yield the *same* result. Such categories *converge*, rather than *compete*. See Stone, *The Province and Function of Law*, above n 10, 177; Stone, *Legal System and Lawyers' Reasonings*, above n 10, 249.

25 This is borne out by a close comparison of the classifications presented in Stone, *Legal System and Lawyers' Reasonings*, above n 10; Stone, *Precedent and Law*, above n 10.

26 Stone, *The Province and Function of Law*, above n 10, 176–8; Stone, *Legal System and Lawyers' Reasonings*, above n 10, 248–52; Stone, *Precedent and Law*, above n 10, 63.

27 'One thing with many names', as Tony Blackshield explains it, the 'one thing' being the single type of fact situation, and the 'many names' being the competing categories. See Blackshield, above n 2, 223 fn 21.

pointed out, different legal consequences flow from each characterisation.²⁸ Again, the law of fixtures and the law applicable to events occurring within a public river might compete, Stone said, ‘to decide the status of the deceased as he stood on the springboard, a few feet above the river’.²⁹ Different consequences flow from the two relevant legal rules, but the fact situation can properly fall into either. The judge has to choose between them, but neither formula provides definitive guidance on how to make that choice.

Just about as common, but somewhat less easy to identify, is Stone’s *single legal category with competing versions of reference*. Here one encounters what is generally taken to be a single legal rule, regularly referred to by one name or label, the content of which has been expressed, however, by different judges in subtly and yet significantly different ways. Only one legal rule is supposedly at stake, but on the different versions the rule applies in different ways, with different outcomes in the instant case.³⁰ Confronted with such a situation, a judge will be faced with the need to choose which version of reference is to be followed, and thus which set of legal consequences will ensue.³¹ As Stone described it, the category occurs where a ‘single verbal entity’ (which we may designate ‘C’) applies to ‘only one fact-situation’ (which we may designate ‘F’), but the different versions of reference (‘V1’ and ‘V2’) prescribe different legal outcomes or results (‘R1’ and ‘R2’).³² As Stone explained, competing versions of reference are a normal part of the common law, especially given the regular practice of judges to deliver separate opinions even when concurring in the result of a particular case.³³ However, although the authors of such opinions may have assumed that their different versions yielded the same results for the same set of facts, Stone pointed out that courts later confronted by a different set of facts (‘F1’) find that the different versions yield different results.³⁴ The examples Stone identified where this occurred in the common law included: the rule concerning the exclusion of similar fact evidence, the principle of frustration of contract and the principle of consideration in contract – each of which, he argued, had been encapsulated in conflicting formulations by different judicial

28 Stone, *Legal System and Lawyers’ Reasonings*, above n 10, 249; Stone, *Precedent and Law*, above n 10, 63.

29 Stone, *Legal System and Lawyers’ Reasonings*, above n 10, 249.

30 As Blackshield puts it, ‘many things with one name’. See Blackshield, above n 2, 223 fn 21.

31 Stone, *Precedent and Law*, above n 10, 63–5.

32 Stone, *Legal System and Lawyers’ Reasonings*, above n 10, 252.

33 Ibid 254–7.

34 Stone, *Precedent and Law*, above n 10, 64. This latter reference to a *different* set of facts in the instant case is potentially inconsistent with Stone’s characterisation of competing versions of reference as applying to the *one* set of facts. To make the references consistent, we have to assume that when Stone explained that the category of competing versions of reference applies to only one fact scenario (‘F’), he had in mind the facts in the original case (or cases) in which the competing versions of reference were first articulated and did not mean the facts in the instant case (where the judge has to make a choice between the two versions) – since the facts of the instant case (‘F1’) are ipso facto different from those of the original case (or cases) (‘F’). Further, we must assume that Stone meant to suggest that the different versions (‘V1’ and ‘V2’) do not on their terms apply to quite the same set of facts, for how otherwise could there be ‘circumstances falling within one version and not within [the] other’? See Stone, *Legal System and Lawyers’ Reasonings*, above n 10, 252.

authorities.³⁵ The conflicting formulations are all referred to by the same name, but each formulation has the potential to involve different legal consequences, depending upon the nature of the facts presented to the court.

Stone's *category of concealed circular reference* concerns circular reasoning. It occurs when a legal category prescribes as an essential part of its own principle what is actually a restatement or reformulation of the very question in issue, with the result that the principle which should give an answer to the question in issue merely restates the same question in a different way.³⁶ As Stone explained, if the question is: 'Is this an X?', the rule offered to resolve that question is: 'It is an X if it is a Y'. But if it is asked: 'Is this a Y?', the answer is: 'It is a Y if it is an X'.³⁷ One of the clearest examples Stone provided of this category concerned the recovery of compensation in quasi-contract cases. According to the traditional formula, recovery was allowed for the reason that the court implied the existence of a contract. However, as Holmes CJ once queried, '[y]ou can always imply a condition in a contract. But why do you imply it?'³⁸ As Stone pointed out, in such cases the substantial reason for the award was that the court thought that there *ought* to be a recovery. It was therefore meaningless for the court to ask whether there ought to be an implied contract, because the answer to the question of whether a contract ought to be implied was that it should *if there ought to be a recovery*. Thus the court was thrown back to the original question posed by the litigation: ought there to be a recovery?³⁹ Indeed, according to Stone, the 'lawyer's resort to circular categories is but a manifestation of the tendency of all of us to cover over with words our discomfort with "too hard" questions.'⁴⁰

To Stone's *category of indeterminate reference* belong what he called 'legal standards' (or 'principles', as opposed to 'legal rules'), which call for judicial evaluation on the basis of an indeterminate concept (as opposed to judicial deduction on the basis of a relatively determinate major premise).⁴¹ Such standards or principles include or involve, for example, ideas of 'reasonableness', 'sufficiency', 'adequacy', 'appropriateness', 'due care', 'just cause' and so on. It cannot be said that any conclusion follows logically from these standards. The court is openly required to evaluate the concrete situation rather than apply a mechanical formula. Stone thus observed of such categories:

35 Stone, *Legal System and Lawyers' Reasonings*, above n 10, 252–4; Stone, *Precedent and Law*, above n 10, 63–5.

36 As Stone describes it, it is to reason 'idem per idem': Stone, *The Province and Function of Law*, above n 10, 181–5; Stone, *Legal System and Lawyers' Reasonings*, above n 10, 258–63; Stone, *Precedent and Law*, above n 10, 65–7.

37 Stone, *Legal System and Lawyers' Reasonings*, above n 10, 258, fn 145.

38 *Ibid* 260.

39 *Ibid* 260–2.

40 Stone, *Precedent and Law*, above n 10, 66.

41 Stone, *The Province and Function of Law*, above n 10, 185–6; Stone, *Legal System and Lawyers' Reasonings*, above n 10, 263–7; Stone, *Precedent and Law*, above n 10, 67–8.

When Courts are required to apply such standards ... 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 ... [Such standards] are predicated on fact-value complexes, not on mere facts.⁴²

Notably, Stone considered the idea of the ratio decidendi of a case to be a prime example of a category of indeterminate reference.⁴³

Stone's *category of meaningless reference* is significantly more complex than the name might suggest.⁴⁴ A proposition falls into this category when it simply 'has no possible meaning which can base the decision'.⁴⁵ Typically, says Stone, it involves cases of reliance upon a 'distinction without a difference', as when – to give perhaps the clearest illustration – the onus of proof in a case is determined by whether the formulation of the relevant rule within a judgment happens to have been expressed as a limited class or a qualification to an unlimited class.⁴⁶ According to Stone, technically competent judges are less likely to fall into this trap, and thus instances of meaningless references are rather rare. The other categories of illusory reference, by contrast, are more common. But because they, too, are inherently illusory, they also have no strictly logical relationship to the conclusion arrived at by the court.

Finally, the *category of concealed multiple reference* is, as Stone admitted, 'the most difficult to pin down, and indeed to exemplify'.⁴⁷ According to Stone's earlier accounts, a concealed multiple reference arises where a particular legal rule or proposition – a single 'verbal entity' – has been confusingly used to describe more than one distinct type of fact situation, each fact situation involving or entailing contradictory legal consequences.⁴⁸ As Stone later explained more clearly, what is in view here is a single label or verbal entity which covers two or more different rules, each with its predicated facts and legal consequences attached to those facts.⁴⁹ As a consequence, it seems, the one verbal formula is regarded as a single legal doctrine, and the use of the bare verbal formula does not of itself indicate which fact situation is in view. What determines the court's decision is which fact situation and accompanying

42 Stone, *Legal System and Lawyers' Reasonings*, above n 10, 263–4.

43 Stone, *The Province and Function of Law*, above n 10, 186–9; Stone, *Legal System and Lawyers' Reasonings*, above n 10, 267–74. Stone later explained that the formulation of a particular ratio from a case necessarily involved the operation of categories of competing reference, competing versions of reference, or indeterminate categories, and that the idea that there is only one ratio of a case is a meaningless claim: Stone, *Precedent and Law*, above n 10, 123–8.

44 Stone, *The Province and Function of Law*, above n 10, 171–4; Stone, above n 4, 241–6; Stone, *Precedent and Law*, above n 10, 68–70.

45 See Stone, *Legal System and Lawyers' Reasonings*, above n 10, 241.

46 Ibid 241–5. Another nice example given by Stone is a case in which vicarious liability was made to turn on two different ways of posing the question at issue: first, whether 'smoking while pouring petrol is a negligent way of pouring petrol', or second, whether 'pouring petrol while smoking is a negligent way of smoking'. Stone says that there is no substantial difference between 'smoking while pouring petrol' and 'pouring petrol while smoking', it is only a difference in the order in which the words are used: Stone, *Precedent and Law*, above n 10, 68.

47 Stone, *Precedent and Law*, above n 10, 70.

48 Stone, *The Province and Function of Law*, above n 10, 174–5; Stone, *Legal System and Lawyers' Reasonings*, above n 10, 246.

49 Stone, *Precedent and Law*, above n 10, 70.

consequence is intended by the court, a decision over which the court has a leeway of choice. As such, the category is difficult to distinguish from the category of competing versions of reference, but possibly comes clearer when particular illustrations are considered. Stone's examples included the notion of 'passing of property in goods' (the consequences of which turns on the precise circumstances in question) and the doctrine of *res gesta* (which, as a term, can incorporate any number of different fact situations, each of which entail differing consequences).⁵⁰ He concluded:

In many situations opposite conclusions will be made available as a matter of logic by the application of this apparently single legal category ... precisely by choosing one or another of its concealed alternatives. The choice between alternative major premises, as has been sufficiently stressed, cannot be a logical process. Willy-nilly, it confronts the court with a problem of evaluation until the category is split into its alternatives.⁵¹

Julius Stone developed the intellectual constructs of categories of illusory reference with a view to justifying the idea of judicial creativity, by pointing out that creativity and initiative is inevitable and, more importantly, intrinsic to common law reasoning.⁵² He considered it 'unjust, unwarranted and unilluminating' to conclude that a court is somehow guilty of deception or disingenuousness if it purports to be compelled to its decision and yet is not compelled.⁵³ Indeed, a 'duty of choice' confronts the judge: he or she must turn, expressly or implicitly, to notions of justice or social need.⁵⁴ Thus, as Stone elsewhere pointed out:

the High Court in constitutional questions must make choices open to them in the deliberate light of whatever relevant considerations can be made available to the Court. These considerations must certainly include the actual demands and conditions in contemporary society and current convictions as to justice, values and policies current in it.⁵⁵

B The Normative

'[T]he limited potentialities of stringent reasoning', Stone observed, 'urge the lawyer's concern forward to questions of policy and justice'.⁵⁶ If judicial decision-making is more than a mechanical application of rules to particular fact scenarios, the real determinant of outcomes must lie elsewhere. Stone's overarching objective in *Human Law and Human Justice* was to offer an analytical, historical and critical account of human ideals of justice understood in the framework of the specific social and economic contexts in which they have developed. The accent on the adjective *human* and the concern to place our ideals

50 Stone, *Legal System and Lawyers' Reasonings*, above n 10, 247–8. See also Julius Stone, 'Res Gesta Reagitata' (1939) 55 *Law Quarterly Review* 66.

51 Stone, *Legal System and Lawyers' Reasonings*, above n 10, 248.

52 *Ibid* 281.

53 *Ibid* 14.

54 *Ibid* 325–6. These matters, respectively, are the burdens of Stone, above n 1 and above n 4.

55 Julius Stone, 'Reflections on the Seminar', in David Hambly and John Goldring (eds), *Australian lawyers and social change* (1976) 378.

56 Stone, above n 4, 349.

of justice and good order into their *social contexts* were characteristic of Stone's treatment of the topic. In working his way through early Greek and Hebrew conceptions of justice, followed in turn by medieval natural law, enlightenment individualism, hedonist utilitarianism, 'modern' pragmatism and contemporary relativism, Stone's objective was to present a comprehensive account of our all too human conceptions of justice: an account which suggested at first a profound longing for metaphysical certainty and stability, and yet a thorough-going recognition that human yearnings for justice are all too relative to the particularities of time and place. Despite Stone's obvious affection for Roscoe Pound, not even Pound's jurisprudence escaped from this characterisation as but one perspective among others. Rather, Stone concluded the account merely with a series of 'quasi-absolute' precepts, which he also called 'enclaves of justice' – historically-given and therefore only to be 'tenuously' held, and yet reflective of our human aspirations and 'worthy' of defence and, indeed, of extended application to new situations, times and places.⁵⁷

Stone's account of the legal philosophy of Roscoe Pound is emblematic of his approach to normative jurisprudence generally.⁵⁸ Pound, following Rudolf von Ihering and William James, had understood law to be concerned, fundamentally, with social interests. According to James, that which is the object of a demand is ipso facto a good, so that the guiding principle of ethical philosophy must be to satisfy as many demands as possible.⁵⁹ According to Stone, Pound adopted this principle as his standard of justice, which he described as 'an adjustment of relations and ordering of conduct as will make the goods of existence ... go round as far as possible with the least friction and waste'.⁶⁰ In other words, because the de facto claims made by human beings tend to conflict, it is the task of law to adjudicate between these interests, and it is the task of a theory of justice to indicate how this ought to be done.⁶¹

As Stone understood Pound's jurisprudence, this task involved three steps, which he described in the following way: (1) the observation of the various de facto claims made by human beings; (2A) the formulation of the various jural postulates presupposed by these claims (these postulates being described variously as rationalisations, abstractions, or classifications of these claims, which operate as hypotheses about what human beings want the law to do for them); *or alternatively* (2B) the construction of a scheme of interests, setting out the various interests in an orderly fashion to enable judgments to be made about how their realisation may be maximised; and (3) formulation of definite legal

57 Ibid 344–55. On the enclaves of justice, see also Anthony R Blackshield, 'The Enclaves of Justice: The Meaning of a Jurisprudential Metaphor' (1967) 19 *Maine Law Review* 131.

58 In what follows, I present Stone's reading of Pound. Whether Stone accurately portrayed Pound's philosophy of law as it evolved over time is another matter. I am grateful to Jay Tidmarsh for this point. See Jay Tidmarsh, 'Pound's Century, and Ours' (2006) 81 *Notre Dame Law Review* 513.

59 William James, *The Will to Believe* (1897) 205, cited in Stone, above n 4, 265; Stone, above n 1, 167–8.

60 Roscoe Pound, *Social Control Through Law* (1942) 65, cited in Stone, above n 4, 264. Or, as Pound put it in Roscoe Pound, *Jurisprudence Vol III* (1959) 334 (cited in Stone, above n 4, 275): 'secure all interests so far as possible with the least sacrifice of the totality of interests as a whole'.

61 Stone, above n 4, 265–6.

solutions for the adjustment of these claims, based alternatively upon the jural postulates or scheme of interests articulated in step (2).⁶²

Despite Stone's affection for Pound's theory – the extent of his reliance will become very clear below – he recognised serious problems with it.⁶³ The abstraction of jural postulates and the construction of a scheme of interests would, as Pound recognised, have to entail certain discrimination among the overwhelming mass of specific claims actually made in any particular society. In the face of such an overwhelming task, Stone observed that Pound's theory presented the undertaking as an essentially quantitative balancing of the interests involved, without any qualitative judgments based on values – even though this certainly could not be the case. As Stone pointed out, Pound's theory could only fulfil its promise 'if somewhat greater precision' could be given to the putatively quantitative judgments on which it was supposed to be based.⁶⁴ Most significantly, while Stone's concern was to emphasise, with Pound, the value in having the competing interests clearly and fully articulated, he nonetheless considered that any attempt to analyse and quantify would inevitably have to 'stop short of guiding the final evaluative judgment'.⁶⁵ And here, among other problems, there would always lurk the possibility that law-makers might substitute their own views as to what the demands made by members of the society ought to be, and the extent to which those demands ought to be realised by law.⁶⁶

For these and other reasons, Stone did not commit himself to Pound's, or indeed to any other normative jurisprudence surveyed in *Human Law and Human Justice*.⁶⁷ Stone was acutely aware of the inevitability of evaluative judgment, but he was not prepared to commit to anything more than a set of what he called 'quasi-absolutes of justice', precepts that at any rate 'have the standing of absolutes for us'.⁶⁸ First among these, notably, Stone included the proposition that '[s]ocial arrangements must leave everyone free to form and assert his own interests, treating every adult sane person as morally autonomous',⁶⁹ a directive which Stone expanded in the following terms:

society shall be so organised that men's felt wants can be freely expressed; and that the law shall protect that expression, and provide it with the channels through which it can compete effectively for (though not necessarily attain) the support of politically organised society.⁷⁰

Stone understood the various enclaves of justice to which we are committed today to have been secured as the result of 'hard-won struggles' at crucial points

62 Ibid 266–70. See also 280–2 for Stone's account of the jural postulates actually proposed by Pound.

63 For a discussion of these issues along more dimensions than covered here, see Blackshield, *Legal Change: Essays in Honour of Julius Stone*, above n 5.

64 Stone, above n 4, 270–1.

65 Ibid 275; See also 333–4.

66 Ibid 282.

67 Ibid 287, 297, 300.

68 Stone, above n 4, 340 (emphasis added); Stone, above n 1, 797.

69 Stone, above n 4, 341

70 Stone, *The Province and Function of Law*, above n 10, 785; Stone, above n 4, 332. Stone referred to this as the 'one indubitable minimum requirement of justice as sought through law': Stone, above n 4, 332.

in the development of our current civilisation.⁷¹ And the precept concerning the free assertion on interests occupied a strategic position here, as it was intended to enable the articulation of claims lying outside these enclaves, as well as arguments over the meaning and application of – and indeed the relationship between – each precept.⁷² Stone believed that our enclaves of justice are to be adhered to ‘tenuously and tentatively’, and yet he warned of the ‘danger’ that they might be overrun, and he called for advocates in each generation to defend and extend them.⁷³

Writing in this way, Stone appeared to depart from the cultural relativism which characterised so much of his argument in *Human Law and Human Justice*, speaking not simply of the fact that such enclaves exist, but of the ‘worthiness of such principles for acceptance’ and our ‘faith in the capacity of human communities to struggle towards the more worthy principles, and bear the responsibility of holding to them when they are won’.⁷⁴ As he concluded:

It is not given to any generation of men to complete the tasks of human improvement and redemption; but no generation is free, either, to desist from them. ... A society in which the questionings of justice cease to be a constant prod and perplexity would not be human in any sense that matters.⁷⁵

The near-religious quality of this narrative and exhortation is very evident; Stone wrote here not only of *justice*, but of *worthiness*, of *faith* and of *redemption*.⁷⁶ It is passages such as these that help to explain how, despite his relativism, Stone could have had such an influence upon his disciples.

C The Sociological

Stone’s emphasis on enclaves of justice to be defended and extended by each generation within each human community drew attention, he felt, to the need for a renewed analysis of the specifically *social* dimensions of law and justice.⁷⁷ Like Pound, Stone understood law to be concerned, at base, with the *de facto* interests or demands made by people within particular societies, and sociological jurisprudence to be a study of law in its practical functioning, with a view to making and administering law as a means of adjusting those demands so as to minimise conflict between them and maximise their realisation.⁷⁸ As such, Stone understood law to be ‘an instrument of social control’.⁷⁹

Stone’s account of Pound’s approach to addressing these questions has been noted above. Stone himself appears to have understood the process as involving:

71 Stone, above n 4, 340, 345.

72 Cf Stone, above n 1, 225–6, discussed below.

73 Stone, above n 4, 353.

74 Stone, above n 4, 353.

75 Ibid 355.

76 Ibid 353–5. He also wrote of ‘great acts of prophetic leadership’, and later contrasted these with certain ‘fragilities and backslidings’: at 347, 352.

77 Cf Stone, above n 1, 793.

78 Stone, *The Province and Function of Law*, above n 10, 487–606; Stone, above n 1, 164–98. For an emphatic statement that conflict and compromise of interests lies behind all parts of the law, see Stone, above n 1, 192.

79 Stone, above n 1, 1–3, 649–51, 743.

(1) the ascertainment of the de facto interests being asserted in a society; (2) the determination of the extent to which these can be given legal support; (3) the identification of the various legal precepts, concepts and machinery available to secure these interests; and (4) the determination of any practical limitations upon the capacity of law effectively to secure these interests.⁸⁰ In relation to the first step, Stone deliberately meant de facto claims actually made within a society, and not the declaration of ‘needs’ or ‘rights’. To begin with these would imply some kind of evaluation,⁸¹ whereas the starting point for Stone (again following James and Pound) was that all interests were equally entitled to be taken into consideration.⁸² The task of a theory of justice, Stone believed, was to evaluate these claims and assess the degree to which they *ought* to be secured in view of competing interests, whereas the task of sociological jurisprudence was to identify the interests being pressed and to ascertain the degree to which they are *in fact* secured within the legal system.⁸³

Stone was also conscious of the many difficulties that must accompany the second task of sociological jurisprudence. Thus Stone was acutely aware, not only of the problem facing any sociology that would make claims to ‘value-free’ objectivity in description,⁸⁴ but of the unmanageable immensity of the task of cataloguing the interests and demands actually asserted within a particular society. It was perhaps for this reason that in *Social Dimensions of Law and Justice*, rather than compile a catalogue of de facto interests, Stone chose to analyse the nature and structure of law in modern democracies with a view to revealing the extent to which the law recognises and gives effect to particular interests.⁸⁵ Following Pound, Stone claimed that each interest can be expressed meaningfully in both ‘individual’ and ‘social’ terms, that is, in its significance to both particular individuals and the entire society; the categories of individual and social were themselves not to be considered as somehow in tension or conflict.⁸⁶ Indeed, again citing Pound, Stone considered that when assessing two conflicting interests, it was important to describe each interest ‘on the same level’, thus avoiding any suggestion that what might be at stake is a particular individual interest confronting a particular social interest, with the implication that the individual might have to give way to the social, or vice versa.⁸⁷ This meant, for example, that a conflict between free speech and public safety or public morals should not be seen as a conflict between society on one hand and a private individual on the other. According to Stone, modern Western societies are themselves deeply concerned with the preservation of the claims of individuals to

80 Ibid 168. Here, as elsewhere, it becomes difficult to perceive to what extent Stone is describing Pound’s ideas and to what extent he is expounding his own.

81 Ibid 165–6, 170, 178–80.

82 Ibid 169.

83 Ibid 170.

84 Ibid 178–80, 547–8.

85 Ibid 169.

86 Ibid 171–5, 181–2, 199. However, Stone rejected Pound’s third aspect, which Pound had called ‘public’, as incoherent.

87 Ibid 181.

freedom of speech, since free speech is fundamental to social and political progress, free government and participatory democracy.⁸⁸

Stone, again following Pound, was also willing to classify the different interests in their individual and social aspects into more specific categories, such as between individual interests of a personal and an economic kind. He wished, however, to regard the categorisation as nothing more than a convenience, which should not be allowed to obscure the fact that all interests are inextricably entangled with one another, and no one basis of classification ought to be regarded as more illuminating than another.⁸⁹

Stone's insistence that merely classifying an interest as alternatively individual or social, or as a particular kind of individual or social interest, must not be allowed to carry with it any evaluative implication was an outworking of the principle that every interest was equally entitled to consideration, and that no particular interest should be seen as more fundamental, prior to or higher than others.⁹⁰ Nonetheless, Stone considered that within democratic countries claims to freedom of expression 'should ... approach nearer absoluteness than perhaps any other single claim', principally because they are a vital prerequisite to the formulation of human demands, as well as fundamental to the proper development of democratic political institutions.⁹¹ As has been seen, Stone considered that the 'one irreducible minimum requirement of justice' is that the law protect the free expression of human wants and desires so that all individuals are able to compete effectively for political support.⁹² So vital was freedom of speech for Stone that he was willing to countenance the idea that it might be protected with unamendable constitutional provisions, and even be the object of judicial invention.⁹³

Stone did not often use the expression 'balancing' to refer to the attempt to maximise interests, and he seems to have done so deliberately to avoid any inference that some kind of harmony or equilibrium can be achieved, rather than a 'relative balance of stability' within an inherently 'dynamic and rather precariously balanced society'.⁹⁴ Nor did Stone provide any definitive conclusions at all on the balance to be struck between free speech and other interests.⁹⁵ On one hand, he was acutely aware of the indeterminacy of various formulas and tests proposed by judges to help guide the weighing process: reciting verbal formulas is not a substitute for the actual process of weighing up

88 Ibid 181–2, cf 223, 776, 786.

89 Ibid 175–8. One must wonder, at this juncture, whether Stone was altogether too optimistic that by such acknowledgement and renunciation, the scholar engaged in sociological jurisprudence could avoid the problem that even the most austere of sociological descriptions will inevitably carry with them a conceptual a priori which is imposed on the raw data.

90 See, eg, *ibid* 200.

91 Ibid 225–6, 323–4.

92 Ibid 794.

93 See, eg, *ibid* 622, fn 89.

94 Ibid 166, citing Talcott Parsons, 'The Law and Social Control' in W M Evan (ed), *Law and Sociology* (1962) 70. And yet, here as elsewhere, when Stone is addressing concrete situations of great significance for him, he is willing to speak of a proper equilibrium or balance. See Stone, above n 1, 323.

95 Stone, above n 1, 228.

the interests, he said.⁹⁶ On the other hand, however, Stone tentatively endorsed a categorical approach to certain problems in free-speech law. Speech acts related to the commercial exploitation of pornography or hate speech might, he suggested, simply fall outside the category of ‘speech’ that is protected by the *Constitution*.⁹⁷ However, for speech acts falling properly within the protection of the *Constitution*, as has been seen, Stone thought that a ‘constant weighing of values through an adjustment of the particular interests in conflict’ would be inevitable, and that more rational subcategories of free speech would emerge only if the adjustment of conflicting interests was ‘consciously made’, rather than concealed by ‘illusory general tests and slogans’.⁹⁸

To somewhat different effect, however, Stone was elsewhere critical of the idea that judicial discretion in applying general standards will necessarily, over time, work itself into more precise subordinate standards, categories or even rules. As Stone pointed out, reasoned elaboration of the meaning and application of broad standards may actually ‘widen the area of available choice even beyond what the original standard seemed to offer’.⁹⁹ And yet, Stone was strongly supportive of the idea that judges ought to provide reasoned elaborations and justifications of their choices: even though these might in fact widen future discretion, they would also make judges responsible for their decisions, and the need to justify would promote justifiability.¹⁰⁰

This rather confusing treatment of the ‘balance’ to be struck between freedom of speech and other important social interests recapitulated a more basic tension in Stone’s treatment of sociological jurisprudence generally. Stone understood sociological jurisprudence to be driven by a ‘compelling need’ for law and judicial decisions to satisfy *de facto* human wants.¹⁰¹ For Stone, this task required, among other things, a critical analysis of various historical and sociological schools of inquiry into the nature and functioning of law, culminating in an account of law ‘in modern democratic society’ as ‘an adjustment of conflicting interests’.¹⁰² Thereafter followed an exhaustive account of the many and varied interests to be considered and balanced. However, as noted earlier, no specific program was set forth, and there was no clear normative recommendation that interests ought to be balanced, let alone anything specific about how this might be done. We are given an analysis and classification of the relevant data, but no definitive evaluative criteria. To have done so would have been to depart from the sociological method. But without criteria the final evaluative judgment between the competing interests is left entirely open. Sociological jurisprudence promises to expose the underlying reasons for

96 See, eg. *ibid* 228–9, on the ‘dangerous ambiguity’ of Justice Holmes’s famous ‘clear and present danger’ test.

97 *Ibid* 229.

98 *Ibid* 230. For Stone’s brief and uncritical discussion of *New York Times Co v Sullivan*, 84 S Ct 710 (1964) see Stone, above n 1, 222, 319.

99 Stone, above n 1, 675, 678–80.

100 *Ibid* 679.

101 *Ibid* 671.

102 Stone, *The Province and Function of Law*, above n 10, 487–506; Stone, above n 1, 164–98.

decision, but it hesitates at the very threshold of the ‘judgment of justice’.¹⁰³ The ultimate reasons for decision must therefore remain hidden, inviting the return, once again, of the categories of illusory reference.

III STONE’S INFLUENCE

Julius Stone’s influence has reached not only into the legal academy,¹⁰⁴ but also into the legal profession, particularly through the generations of students that he taught, first at Sydney Law School and later at the University of New South Wales Faculty of Law.¹⁰⁵ Stone’s impact on Australian judges has particularly grown and developed over the years.¹⁰⁶ To the extent that explicit references to his scholarship in High Court judgments is instructive,¹⁰⁷ it may be worth noting that in earlier cases such references were usually associated with Stone’s analyses of specific cases or particular legal doctrines,¹⁰⁸ whereas more recent references have usually concerned Stone’s wider jurisprudential themes, most prominently the various categories of illusory reference and the leeways of choice which they

103 Julius Stone, ‘From Principles to Principles’ (1981) 97 *Law Quarterly Review* 224, 245–8, discussed in Eugene Kamenka and Alice Erh-Soon Tay, ‘The Sociology of Justice’ in Blackshield, *Legal Change: Essays in Honour of Julius Stone*, above n 5, 119–20.

104 Stone’s influence in legal theory can in part be gauged by the fact that both H L A Hart and Hans Kelsen thought it necessary to address Stone’s criticisms of their theories. See H L A Hart, ‘Philosophy of Law and Jurisprudence in Britain (1945–1952)’ (1953) 2 *American Journal of Comparative Law* 355; Hans Kelsen, ‘Professor Stone and the Pure Theory of Law’ (1965) 17 *Stanford Law Review* 1128. On Stone and Hart, see Michael Kirby, ‘HLA Hart, Julius Stone and the Struggle for the Soul of Law’ (2005) 27 *Sydney Law Review* 323. On Stone and Kelsen, see Stanley Paulsen, ‘The Pure Theory of Law versus Sociological Jurisprudence: Kelsen versus Stone’ (Paper presented at the Julius Stone Centenary Conference, Sydney Law School, 5 July 2007). Stone’s work as a challenge to the legal method championed by Sir Owen Dixon is discussed in Martin Krygier, ‘Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law’ (1986) 9 *University of New South Wales Law Journal* 26.

105 Stone’s impact on his students is particularly reflected in two collections of essays, first in Blackshield, *Legal Change: Essays in Honour of Julius Stone*, above n 5, and second in Anthony R Blackshield, ‘Legacy of Julius Stone’ (1997) 20 *University of New South Wales Law Journal* 215. The wider influence of Stone’s life and work can be gauged by the attention which this received from the then Australian Prime Minister, Bob Hawke, in the Inaugural Julius and Recca Stone Memorial Lecture. See Robert James Lee Hawke, ‘Julius Stone - Humanist, Jurist and Internationalist’ (1986) 9 *University of New South Wales Law Journal* 1.

106 See, generally, Blackshield, above n 2; Kirby, above n 12.

107 I here respectfully agree with the analysis in Kirby, above n 12.

108 See generally, *Martin v Osborne* (1936) 55 CLR 367, 394, 398, 401 (Evatt J); *Curwood v The King* (1944) 69 CLR 561, 568 (Latham CJ); *Hall v Baybrook* (1956) 95 CLR 620, 657 (Kitto J); *Dawson v The Queen* (1961) 106 CLR 1, 10 (Dixon CJ); *Ramsay v Watson* (1963) 108 CLR 642, 648 (Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ); *Buck v Bavone* (1976) 135 CLR 110, 134 (Murphy J); *Jackson v Harrison* (1978) 138 CLR 438, 462 (Murphy J); *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 49 (Murphy J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 218 (Stephen J); *Jaensch v Coffey* (1984) 155 CLR 549, 580 (Deane J).

make possible.¹⁰⁹ This latter development tended to coincide with the period during which Sir Anthony Mason presided as Chief Justice over the Court.¹¹⁰ The rate at which Stone has been cited by the High Court underwent a marked acceleration during this period, and has extended to most, but not all, of the members of the Court since then. It is no coincidence that the Mason Court is known for many landmark judgments, not least of which were the free speech cases of the early 1990s, in which Stone's jurisprudence played a distinct and important role.

That the democratic features of the *Australian Constitution* might somehow imply the existence of a judicially-enforceable freedom of political communication was first suggested in a series of judgments of Murphy J in the late 1970s and early 1980s,¹¹¹ and subsequently affirmed and applied by a majority of the Court under Mason CJ in the early 1990s.¹¹² Notably, just as citations to Stone accelerated under Mason CJ, Murphy J himself cited Julius Stone in his judgments more often than any of his predecessors.¹¹³ And, indeed, there is a certain affinity between Stone's jurisprudence and the idea that there is an implied freedom of political communication. The affinity can be explained in three different ways.

First, just as Stone railed against legal *formalism*, so the High Court's freedom of political communication jurisprudence involved a rejection of a certain kind of *textualism* in constitutional interpretation. While the two are not simply

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- 109 See generally, *Waterford v Commonwealth* (1987) 163 CLR 54, 63,99 (Mason and Wilson JJ); *Gala v Preston* (1991) 172 CLR 243, 284–5 (Toohey J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 144 (Brennan J); *McGinty v Western Australia* (1996) 186 CLR 140, 269–70 (Gummow J); *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 397 (Kirby J); *Jones v Bartlett* (2000) 205 CLR 166, 224 (Gummow and Hayne JJ); *Commissioner of Taxation v Payne* (2001) 202 CLR 93, 110 (Gaudron and Gummow JJ); *Carson v John Fairfax and Sons Limited and Slee and another* (1993) 178 CLR 44, 105 (McHugh J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 245 (Gummow and Hayne JJ); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 445 (Gleeson CJ, Gummow and Hayne JJ); *CSR Limited v Eddy* (2005) 226 CLR 1, 39 (McHugh J); *Travel Compensation Fund v Robert Tambree (t/as R Tambree and Associates)* (2005) 224 CLR 627, 650 (Kirby J). See also the submissions in Transcripts of Proceedings, *Vasiljkovic v Commonwealth of Australia & Ors* (High Court of Australia, Mr Hughes, 13 April 2006).
- 110 See Michael Kirby, 'A F Mason – From Trigwell to Teoh' (Speech delivered at the Sir Anthony Mason Lecture, Melbourne University Law Student's Society, 6 September 1996), who cites the jurisprudence of Julius Stone as one of ten factors which help to explain the evolution of Sir Anthony's approach to judicial decision-making.
- 111 See generally, *R v Director-General of Social Welfare for Victoria; Ex parte Henry* (1975) 133 CLR 369, 386–9; *Buck v Bavone* (1976) 135 CLR 110, 134; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, 88; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670; *Seaman's Union of Australia v Utah Development Company* (1979) 144 CLR 120, 157; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 312; *Sillery v The Queen* (1981) 180 CLR 363, 357–63; *Gallagher v Durack* (1983) 152 CLR 238, 246; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581–2.
- 112 See generally, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
- 113 However, this claim needs to be made tentatively for at least two reasons. Firstly, explicit references are not a comprehensive indicator of influence and, secondly, citations to secondary literature generally underwent a rapid acceleration during the 1990s.

synonymous, there is a strong association between textualism in constitutional interpretation and formalism in legal reasoning. As Scalia J has argued:

Of all the criticisms leveled against textualism, the most mindless is that it is formalist. The answer to that is, of course it's formalistic! The rule of law is about form.¹¹⁴ Long live formalism! It is what makes us a government of laws and not of men.

Textualism came into Australian constitutional law as a means of eliminating subjective and idiosyncratic judicial decision-making.¹¹⁵ As the quotation from Scalia J suggests, legal formalism is often supported for similar reasons. In his critique of legal formalism, Stone sought to demonstrate that, in spite of protestations to the contrary, legal formalism does not eliminate judicial choice. In devising a constitutional freedom of political communication, a majority on the High Court embraced the interpretive freedom which Stone had insisted they enjoyed as members of a court of final appeal, and based their decision not simply on the text, but upon what they believed the structures and underlying principles of the *Constitution* presupposed and implied.

A second affinity between Stone's jurisprudence and the High Court's decision in the free speech cases lies in Stone's belief that law is a mechanism by which the various conflicting and constantly evolving interests and demands made in a society are to be coordinated and resolved. For Stone, this meant that the law needed to be constantly reformed in order to keep pace with social change. In the context of constitutional interpretation, it could mean in turn that the Court has a responsibility to read the *Constitution* in the light of contemporary social conditions. While the prevailing wisdom among the framers of the Constitution when drafting it more than a century ago was against a Bill of Rights and in favour of parliamentary sovereignty,¹¹⁶ the High Court in the free speech cases seem to have been influenced by the idea that the tide of (informed) opinion had shifted, and that it was the responsibility of the Court to interpret the *Constitution* in tune with (perceived) contemporary hopes and expectations.¹¹⁷ The idea that today's executive governments are able to dominate their parliaments, and that parliaments are unable to function as effective guarantors of individual rights seems to have influenced a number of the Justices. While Australian voters have repeatedly rejected proposals to amend the *Constitution* by inserting guarantees of various kinds of rights and freedoms, the leeways of choice which the task of constitutional interpretation presents left room for the High Court to find somehow implied within the text, structure and underlying principles of the *Constitution* an implied freedom of political communication.¹¹⁸

Third, and most specifically, Stone placed a great deal of stress upon freedom of speech. If law is to be a mechanism by which legitimate social interests are

114 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) 25. See also Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175.

115 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 142, 148–54 (Knox CJ, Isaacs, Rich and Starke JJ).

116 John Andrew La Nauze, *The Making of the Australian Constitution* (1972) 227, 229.

117 See, eg, John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158.

118 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

secured, there must be some means by which they can be articulated. Interests need to coalesce into expectations, and expectations need to be formulated into demands before they can be taken into consideration in the development of the law. Freedom of speech plays a critical role here by providing the context in which interests can become fully articulated demands to be pressed upon the decision-making institutions of the modern democratic social order.¹¹⁹ Free speech, for Stone, is an ‘irreducible minimum requirement of justice’,¹²⁰ so important that it should be accorded the status of a near absolute first principle of contemporary society.

These three affinities do not suggest a simple and direct relationship between the High Court’s free speech decisions and the jurisprudence of Julius Stone. Clearly, other theoretical influences were at work.¹²¹ However, the judges who formulated the implied freedom were clearly conscious of their law-making role, a consciousness which seems have been due, at least in part, to Julius Stone’s work.

IV STONE’S REVENGE

Notwithstanding this, the High Court’s free speech jurisprudence is shot through with categories of illusory reference. As will be seen, these have included numerous competing references, a large number of enigmatic references which can be classified either as concealed multiple references or as competing versions of reference, a concealed circular reference of very great importance, a concealed multiple reference obscuring a somewhat embarrassing *non sequitur*, and a significant number of accompanying indeterminate references.

There are a number of versions of the reasoning, some more reliant upon various abstract conceptions said to underlie or be presupposed by the *Constitution*, others more concerned to adhere relatively closely to the text of the *Constitution*. In what follows, I will briefly summarise the reasoning, drawing particular attention to the abstract conceptions and their role in the argument, while at the same time acknowledging the existence of more textually-oriented versions.¹²²

In short, the reasoning was as follows. Firstly, at least some members of the Court explicitly conceptualised the *Australian Constitution* as one deriving its normative value (if not also its legal force) from the role played by the Australian voters in the initial ratification by referendum and progressive amendment of the *Constitution*. If the *Constitution* was contained within and derived its legal force from a statute of the British Parliament, it was said that, particularly following

119 Stone, above n 1, 225–6, 323–4.

120 Ibid 794.

121 See, eg, Mason, above n 12; McHugh, above n 12; Kirby, above n 12; Toohey, above n 117.

122 In the following paragraph, I summarise the reasoning of the majority judgments in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *NationwideNews Pty Ltd v Wills* (1992) 177 CLR 1. For a fuller account, with references, see Nicholas Aroney, *Freedom of Speech in the Constitution* (1998).

the cessation of the competence of that Parliament to legislate for Australia,¹²³ the *Constitution* was now to be understood as founded upon the sovereignty of the Australian people. Secondly, the Court claimed to find implicit within the text and structure of the *Constitution* an underlying principle of representative democracy, a principle said to be reflected in specific sections providing for the popular election of members of Parliament and other provisions which suggested that the executive power of the Commonwealth should be exercised on the advice of a Prime Minister and Cabinet responsible to the Parliament. Thirdly, a majority of the Court reasoned that a properly operating system of representative democracy will involve freedom to discuss and debate political matters generally or, at the least, matters relevant to voters when making the electoral decisions contemplated by the *Constitution*. Fourthly, as a consequence, the Court considered that there was to be found within the *Constitution* an implied freedom of political communication which operates as a constitutional limitation of the power of the Parliament and, as a constitutional guarantee, is enforced by the courts. Fifthly, however, the Court said that freedom of speech cannot, by its nature, be treated as an absolute right, but may be subject to various kinds of laws which pursue legitimate social goals in a manner that is appropriate and proportionate to those objectives. In other words, the interest in freedom of speech must be balanced against potentially competing interests, and it is for the courts, as final interpreters of the *Constitution*, to determine whether legislation interfering with freedom of political communication is aimed at something legitimate, and pursues that objective in a proportionate and appropriate manner.

As presented, the reasoning has a certain persuasive, even seductive, quality about it.¹²⁴ Criticisms from both within and outside the Court of the use of abstract conceptions such as popular sovereignty and representative democracy however, subsequently led the Court to revise the formulation in a more textually-oriented manner, but the general line of reasoning remained the same.¹²⁵ In the revised formulation, the idea of popular sovereignty receded from view, and the conception of representative government relied upon was said to be no more than the particular system of government specifically required by the text and structure of the *Constitution*. Nonetheless, to speak of a constitutionally guaranteed freedom of political communication as a necessary implication of that system of government is necessarily to invoke a conception of political representation in which free speech is seen as an essential or necessary element, even though the text and structure of the *Constitution* make no mention of it. Additionally, regarding the test to be applied when assessing laws which burden political communication, some members of the Court have sought to eliminate

123 *Australia Acts 1986* (UK and Cth).

124 See Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249.

125 The decisive case here was *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, a decision which developed a number of themes articulated in the dissenting judgments of Brennan, McHugh and Dawson JJ in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and in the majority judgments of Brennan CJ, Dawson, McHugh and Gummow JJ in *McGinty v Western Australia* (1996) 186 CLR 140.

the need to balance the constitutional interest in freedom of political communication with the competing social interest or interests that the law purports to secure.¹²⁶ To the extent that these approaches eliminate reliance upon abstract ideas and balancing tests, they represent alternative choices made by members of the Court, and serve to illustrate how the various principles, formulas and tests so far developed constitute in themselves categories of competing versions of reference, of concealed multiple reference and of indeterminate reference.

A Competing References

To begin with, to conceptualise the *Constitution* as based upon a principle of popular sovereignty is to adopt a particular account of its historical origins and legitimating foundations which competes with alternative accounts founded upon a conception of the sovereignty of the Imperial Parliament on one hand, and a conception of the sovereignty of the Australian parliaments on the other. To develop the way in which these competing conceptions as to the locus of sovereignty may be defined and how they interrelate would take me well beyond the scope of this article. It must suffice to observe, firstly, that abundant support for any one of these alternative conceptualisations can be identified in both the constitutional materials and the case law and, secondly, that each conceptualisation is capable of being developed in such a way as to produce very different conclusions about the meaning of the *Constitution* regarding questions of representative democracy and freedom of political communication.

B Competing Versions of Reference, Concealed Multiple References

Let us grant, however, at least some role for representative democracy in the reasoning process. We are immediately confronted with a number of competing versions of the democratic idea. And, as far as inferences drawn from the idea are concerned, it all turns on which particular conception we adopt.¹²⁷ Democracy can be understood as either a system of majority rule or a system of rule by consensus; and it has been conceived in alternatively representative or participatory terms; it can be understood in all manner of ways, some very minimal, others much fuller.¹²⁸ Each approach tends to have its own implications for whether we think that there ought to be constitutional guarantees of some kind for various individual or human rights, for what we conceive the relationship between legislature and court ought to be, and for how we assess the justifiability of certain restrictions on such rights, such as the right to free speech. To speak simply of representative democracy is thus to invoke, at best a single

126 The key case here is *Coleman v Power* (2004) 220 CLR 1. See Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505.

127 Notably, the ideas of representative democracy and representative government were both classified as categories of indeterminate reference in *McGinty v Western Australia* (1996) 186 CLR 140, 269 (Gummow J), and this was given as a reason for using such ideas with extreme care.

128 Cf Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (1984); John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998).

category with competing versions of reference, and at worst, a single category containing concealed multiple references. And here I say *at best* and *at worst* most deliberately. Representative democracy has the capacity to function as a category of concealed multiple reference insofar as its scope and implications will only clearly arise when we are confronted by the facts of particular cases which have not as yet been foreseen or considered. To the extent that we are able to articulate competing *versions* of reference, we are aware – at least to some degree – of the competing alternatives at stake. But where the alternatives remain *concealed* we are invoking ideas whose range and consequences are as yet undetermined and in principle unknowable.

C Another Category of Competing Reference

But let us now grant, as a second assumption, some role for political communication in the practical working of our system of representative democracy. The Court says that political communication must be *free*, but freedom can mean and imply so many different things. That this is the case is perhaps most easily demonstrated by adopting, for the purpose of illustration, Wesley Hohfeld's categories of rights.¹²⁹ Here we can immediately see that the freedom may mean, first, a bare *privilege or liberty* in the sense of the mere absence of any duty not to engage in particular communicative activities, second, a *claim-right* in the sense of an entitlement to the performance of certain duties that might facilitate one's engagement in such communicative activities or, third, an *immunity* in the sense of the absence of any legal power to alter one's legal status and rights regarding certain communicative activities. Each of these types of *freedom* can exist; each may be thought to be somehow and in some respect implied by a certain conception of representative democracy, but which type or types is implied, and in what respects, again involves a choice between alternatives. In concluding that the *Constitution's* provision for a system of representative democracy putatively requires a freedom of political communication operating as a constitutional right, the Court chose to recognise and establish an *immunity* – not just a *liberty* and not as much as a *claim-right* – and a *constitutional immunity* at that, with the additional implication that the *courts* have the power to declare parliamentary statutes and executive actions to be unconstitutional and void. There are patently choices here, at every step of the reasoning.

D A Concealed Circular Reference

Stone pointed out that while judges may have a choice presented before them in a case, they may or may not be conscious of this choice, and thus they may exercise the choice without acknowledging its existence.¹³⁰ In the free speech cases, while there is at least some evidence to suggest that the justices were conscious of the choices they were making, central to the rhetoric of the

129 See Wesley Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (1919). See also Glanville Williams, 'The Concept of Legal Liberty' (1956) 56 *Colorado Law Review* 1129.

130 Stone, above 1, 676–8.

judgments was the assertion that the implied freedom of political communication was *necessarily implied* by the *Constitution*. Although Brennan J dissented in the result in *Australian Capital Television v Commonwealth*,¹³¹ he certainly joined the majority in finding that there is a freedom of political communication somehow embedded in the *Constitution*. However, he later asserted in *Theophanous v Herald & Weekly Times Ltd* that, while common law might allow certain ‘leeways of choice’, the *Constitution* presented no such opportunities for judicial discretion.¹³² The deliberate invocation of Stone’s terminology warrants some consideration in this context, for it suggests that Brennan J wished his readers to understand that the freedom was indeed necessarily implied, and not simply the result of a choice which the legal materials presented to the Court. If, contrary to Justice Brennan’s insistence, the invocation of the freedom involved judicial choice, to present it as necessarily implied is a classic instance of a category of illusory reference, for it involves, simultaneously, the exercise of a choice and a denial that such a choice is being made. Indeed, it approaches Stone’s category of circular reference, for it focuses attention upon the question of whether a freedom of political communication is *implied* by the *Constitution*, when (according to Stone’s analysis) the deeper assertion underlying the positive answer to this question is that there *ought* to be such a freedom, because the normative conception of representative democracy which is (by judicial fiat) ascribed to the *Constitution* requires that this be so. By insisting, however, on the face of the reasoning that the freedom is indeed a necessary implication, it is suggested that there is no normative judgment involved or, at least, that the answer to the question ‘should there be a constitutionally guaranteed freedom of political communication?’ is answered by the more mundane: ‘there is such a freedom because the *Constitution* necessarily implies that this is so’.

E Indeterminate and Competing References

There are a number of remaining categories of indeterminate and competing versions of reference which can be identified. ‘Communication’ and especially the ‘political’ contain within themselves their own indeterminacies. The nature and scope of what is political can be understood in many different ways, and in individual judgments the description of what is political has varied dramatically. Is the relevantly political limited to the dissemination of information considered relevant to the making of the electoral choices contemplated by the *Constitution*? Or does it extend to ‘public affairs and political discussion’ conceived generally, and thus to ‘all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about’?¹³³ Having generally agreed upon a single verbal formula (‘political communication’) which is inherently indeterminate in Stone’s sense, the Justices have also promulgated a number of different specifications, each of which is meant to reduce the degree of

131 *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106.

132 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 144 (Brennan J).

133 *Ibid* 124 (Mason CJ, Toohey, Gaudron JJ).

indeterminacy, but which nonetheless now function as categories of competing version of reference, and thus in subsequent cases choices remain to be made.

Another dimension to the indeterminacy and competing versions of reference embedded in the case law is the proposition adopted by the court that the freedom is not ‘absolute’, but is subject to certain limitations, such that laws which seek to pursue what are said to be ‘legitimate objectives’ in a ‘reasonably proportionate’ manner will be upheld as constitutional, notwithstanding that they interfere in some way with freedom of political communication. To choose a conception of free speech which is not conceptualised as an absolute is itself to choose among competing versions of the idea. And to refer to laws which pursue legitimate objectives in a reasonably proportionate manner is to invoke additional categories of indeterminate reference. First, at least on the widest view of what this means, this test requires the court to apply a general standard of legitimacy to the objectives of any particular statute that is being examined in a specific case. What could be more indeterminate than an unspecified appeal to the legitimacy of a legislative goal?¹³⁴ Further, the notion of reasonable proportionality is itself indeterminate, for on at least one view it requires the court not only to identify the interest or interests which the law seeks to secure, but to ask whether the law’s interference with political communication is somehow outweighed by the law’s securing of those interests. This means that the court has to assess not only the importance of the law’s objectives and compare them to the value of freedom of political communication, but also to assess the degree to which the law interferes with political communication, and to balance this against the degree to which the law secures the competing interests that are in view.

And this brings us to the end of sociological jurisprudence itself. The general idea of balancing competing interests is a strategy that owes its originating inspiration to the kinds of critiques of formal legal reasoning propounded by Pound, Stone and the Legal Realists.¹³⁵ While Stone never quite endorsed what he understood to be Pound’s methodology or proposed, with full conviction, a particular method of adjudication, he certainly wrote in a way that suggested that the courts should identify the social interests or demands underlying legal disputes and ought to devise legal solutions which strike an appropriate balance between them. He also wrote as if following this path would enable judges to avoid relying upon categories of illusory reference in their judgments and to articulate, rather, the real reasons for their decisions.¹³⁶ However, just as Stone was well able to identify and classify the various interests and demands being made in the society of his time but was never really able to resolve the paradox that judges must nonetheless evaluate the demands that are made, so the courts in applying the balancing test in freedom of political communication cases have been more or less able to articulate the interests and demands at stake but have not been able to articulate the normative grounds of their final, evaluative

134 Notably, the ‘legitimacy’ requirement has recently been watered down in some of the judgments in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 and *Roach v Electoral Commissioner* (2007) 239 ALR 1. Whether this proves to be of wider significance is not yet clear.

135 T Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943.

136 Stone, above n 1, 230.

judgments. This is particularly evident in the decisions of the lower courts, but it also undermines the decisions of Australian appellate courts.¹³⁷ The judges seem very able to describe the applicable tests, to recount the facts and outcomes in the precedents and to identify the competing interests and objectives at stake in any particular case.¹³⁸ They have even articulated relatively specific (but competing) conceptions of the kind of discourse that they think is appropriate to political communication in Australia.¹³⁹ Having done this, however, the time for evaluation arrives, and it is incumbent upon the judges to decide whether the law in question either is, or is not, on balance, justifiable as a proportionate means to achieving a legitimate objective. However, it is at this point, using the methods that Stone certainly encouraged – if not endorsed – that we find, not the articulation of precisely how the interests are to be evaluated and balanced, but an inscrutable fiat of judgment. The end of sociological jurisprudence was ostensibly that judges would articulate the ‘real’ reasons for decision, but instead we find in the freedom of political communications that the method fails at this last hurdle.

V CONCLUSIONS

A deep problem of incommensurability lies at the heart of the failure of the courts to articulate a fully reasoned account of the final evaluative judgment by which they seek to balance legitimate legislative goals against implied constitutional freedoms. The cause of the problem is not a lack of good faith on the part of the judges; rather, it is a failure of method. According to Stone, Roscoe Pound suggested that a solution could be found in the principle ‘maximise the interests’. However, Stone recognised that more had to be involved than a merely quantitative, mathematical ‘balancing’ or ‘weighing’ of interests. Judicial judgment is a form of ethical or moral judgment which cannot avoid the responsibility to evaluate according to standards of justice. The idea of balancing or weighing in judicial decision-making is but a metaphor after all. The scientific precision with which we are able to compare the weight of different physical substances is possible because the weight or mass of different physical objects is readily measured in terms of a common metric. But according to what metric is a court to weigh or measure for example the interest in freedom of speech against the interest in personal reputation? Some standard of evaluation is required, and Stone was acutely conscious of this. Stone persistently declined, however, to provide such a yardstick, even though this decisively undermined – as he must have understood – the very possibility of a sociological jurisprudence

137 See the cases analysed in Nicholas Aroney, ‘The Freedom of Political Communication since *Lange*: Commentary’ in Adrienne Stone and George Williams (eds), *The High Court in Transition: Essays in Constitutional Law* (2000).

138 Sometimes the elaboration of the applicable tests is very extensive. See, eg, the judgments of Gleeson CJ and Kirby J in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

139 See Adrienne Stone and Simon Evans, ‘Constitutional Developments: Freedom of Speech and Insult in the High Court of Australia’ (2006) 4 *International Journal of Constitutional Law* 677, discussing *Coleman v Power* (2004) 220 CLR 1.

(as distinct from a sociology of law) as he understood it.¹⁴⁰ That being the case, it also had to follow that the categories of illusory reference used to such effect in Stone's critique of traditional legal formalism would reappear in the practical application of balancing tests to the particular facts of specific cases, such as the free speech cases analysed above. In other words, Stone's critique of normative jurisprudence also undercut the sociological, leaving the analytical in command of the terrain. It is little wonder, then, that of all the various dimensions of his jurisprudence, it is the categories of illusory reference that are most often cited in our day.

Stone was undoubtedly aware of the limited nature of his conclusions.¹⁴¹ How then do we account for his influence? The analytical and critical aspects of his work do not give us the full story.¹⁴² Running throughout Stone's jurisprudence was a dialectic between the human quest for a transcendent justice and the all too immanent context from which and in which this striving must occur:

For even when justice as thus fully normative is seen as transcending men's ideas about it in any given time and place, it still represents, like those ideas, an emanation and a striving *from*, but also a creature *of*, particular situations in time and space.¹⁴³

Stone insisted that 'in the Earthly City justice requires law, even though it cannot be wholly replaced by law', and that 'human injustice' must no longer be excused by 'flourishing the blandishments of the Heavenly City'.¹⁴⁴ And yet Stone recognised that most of our ideas about justice and law have come to us through 'great acts of prophetic leadership', and that these have usually been religious in inspiration.¹⁴⁵ Rejecting a complete nihilism as regards justice, Stone concluded his work by referring to the enclaves of justice as 'precious', and affirming that

it would be wrong for those who hold these enclaves to surrender them again to the wilderness, and a dereliction no less grave to shirk their defense, or to flinch from the duty to extend them as we can. For men, once having seen, to close their eyes

140 As noted earlier, for Stone, sociological jurisprudence meant the study of law in its application and functioning in society, conceived as a rational basis for the practical task of administering law and justice in contemporary societies. In particular, this meant the identification of the interests being pressed in a society and ascertaining the degree to which they are in fact secured within the legal system.

141 Stone, above n 1, 4 observed:

The attentive reader will not here expect easy nostrums for the perplexities facing democratic social orders in the second half of the twentieth century. We hope, nevertheless, that he will find compensation in the clearer focus given to these perplexities, and in the balanced stocktaking of the means, intellectual, material and emotional, which our generation may call upon in meeting them. Cf Kamenka and Tay, above n 103, 120.

142 Cf Blackshield, *Legal Change: Essays in Honour of Julius Stone*, above n 5, 123:

One way of looking at the perpetual renvoi, in theories of justice, between claims based on "principles" and claims based on "interests", might be in terms of *successive*, but never *successful*, attempts to escape from the inconclusiveness of one of these modes of discourse – whichever has lately been the prevalent fashion – to what seems by contrast to be the objective in the other.

143 Stone, above n 1, 796. Likewise, the paradox that 'while justice as a normative entity transcends human history in the sense that men's aspirations to move by its light seem irrepressible even through eras of greatest darkness, the approach to understanding justice must still be through history itself'. Stone similarly observed: 'what is common overall certainly includes the yearning of men for clear vision, and for a doubt-free knowledge of what justice requires of them in their lives together.': at 546.

144 Stone, above n 4, 342.

145 Stone, above n 1, 342, 347.

or hearts or minds, so that they no longer see this light, nor longer recognise what it once illumined, would be to betray both their patrimony from the past, and their hope for the future. Rather (we would declare) should men still press forward with courage to realise the vision of Isaiah - that, in the day of human redemption, Justice shall dwell even in the wilderness.¹⁴⁶

In the final analysis, Stone's influence is to be found in the fact that, despite the relativism that characterised so much of his work, he could call us with such fervour to strive in this world for a justice that transcends it.¹⁴⁷

146 Ibid 798.

147 Stone, *Legal System and Lawyers' Reasonings*, above n 10, 347, 352-3; Stone, above n 1, 5.