Ross: On Law and Justice

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Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylj/vol69/iss6/7
REVIEWS


The book under review is the English 1 edition of the most important work of a Danish writer some of whose other work is already familiar to those whose reading is confined to what appears in English.2 Ross describes himself as a realist,3 but, as he points out,4 his use of the term does not correspond with its use in American jurisprudence. Ross shares with American realists the view that law is a social phenomenon, but does not share their scepticism about legal rules and concepts and the part they play in the administration of justice. For Ross, a major task of jurisprudence is the examination of the language used in the doctrinal study of law, and he approaches this task from a conservative rather than a destructive standpoint: “The task of jurisprudence is restricted to revise and refine traditional concepts.”6 Thus Ross devotes a great deal of space to finding a satisfactory single meaning for the proposition that a given rule is valid law in a particular country 0 and equal space to defending the usefulness of traditional legal conceptions.7 For purposes of comparison of his work with that of other writers, Ross seems most conveniently classifiable as a positivist. Certainly, Ross is not a positivist in the sense that he regards law as a closed system of rules within which judges engage in purely derivational exercises, for he emphasizes the judge's creative task particularly in his chapters dealing with the sources of law 8 and the judicial method.9 Nor is he a positivist in the sense that he limits his horizon to the analysis of legal doctrine, for the last eight of Ross's seventeen chapters comprise an examination of “legal politics” or “applied sociology of law.” These criteria of positivism are, however, used largely by caricaturists of positivism and would result in the denial of this title to practically every writer.

1. The Danish edition, Om Ret Og Retfaerdighed, was published in Copenhagen in 1953. For a discussion in English of the Danish edition see Arnholm, Some Basic Problems of Jurisprudence, in 1 SCANDINAVIAN STUDIES IN LAW 9 (Schmidt ed. 1957).
3. He represents his view as a synthesis of behavioristic and psychological realism. Pp. 70-74.
4. P. 68.
whose work is commonly so described. The true features common to positivist writers seem to be, firstly, that they insist upon the divorce of law from metaphysics and, secondly, that they seek to find a nonmetaphysical reference for legal propositions which will not entail a drastic revision of the traditional formulation and classification of such propositions. Ross’s writing exhibits both these characteristics in full measure.

For discussion in a brief review, it seems appropriate to select that section of Ross’s work which is concerned with finding a satisfactory empirical meaning for propositions made by students of legal doctrine to the effect that a given rule is valid law in a particular country. The chapters on the sociology of law, though interesting and skillfully presented, consist largely of material which is already familiar either because it has been dealt with along similar lines by modern sociologists or because Ross himself has traversed the ground in earlier translated work. Similarly his treatment of legal conceptions will be familiar to students who have combined some reading of Hohfeld with Ross’s article, “T-T-T.” On the other hand, his treatment of valid law appears to the reviewer to represent something of a new departure in Ross’s thinking and to be highly likely to produce controversy. For here Ross makes so many concessions to the American realists that the maintenance of his positivist position appears to be endangered. It may be expected in these circumstances that realists will have considerable incentive to press their advantage against him, while positivists will have equal incentive to differentiate their positions from his.

Ross begins with the problem: what is meant by the assertion that section 62 of the Negotiable Instruments Act, for example, is valid law in a particular jurisdiction? He pursues this question from covert to covert so entertainingly that one must feel some guilt at giving away in a review the plot of this section of the book. Nevertheless, some exposition is essential for a critical appraisal. Ross distinguishes between linguistic utterances which have a representative meaning and those which have only an expressive meaning. “Directives” do not assert a state of affairs; they are merely expressive of the intention of influencing another.” Legal rules are directives. But propositions in legal text books are not directives; they are assertions with a representative meaning and are of the form “D (a directive) is valid law (in some country).” By saying that a directive is valid law a writer means that it is one of an “abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding” by the judge and other legal authorities applying the law. At this point Ross’s view of law appears to be of the kind held, for

10. 70 Harv. L. Rev. 812 (1957).
14. P. 18 n.2.
example, by Sir John Salmond, that law consists of the rules which the courts recognize and act upon.\textsuperscript{15} Ross proceeds, however, to give a new twist to his theory by postulating that the real content of a proposition is the sum of its verifiable implications.\textsuperscript{16} Since Ross verifies the existence of the judge's feelings of being bound by examining his actions in court, his notion of valid law now comes to be explained thus: "Our interpretation, based on the preceding analysis, is that the real content of doctrinal proposition refers to the actions of the courts under certain conditions."\textsuperscript{17} Ross now begins to assume the guise of an American realist since one would infer from this statement that the "real content" of a doctrinal proposition refers to a pattern of decisions and not to notions held by judges which are supposed to influence their decisions. But the guise reveals itself as a disguise as soon as we learn what are the actions of the courts to which Ross refers.

These actions turn out to be what the judges will say in their opinions, or reasons, as distinct from the judgment which states the final outcome of the case. Ross expresses this by saying that the real content of the proposition that \( A \) is valid law is that under certain conditions it will "form an integral part of the reasoning underlying the judgment"\textsuperscript{18} and that it will therefore "figure in the opinion."\textsuperscript{19} As to the causal connection between "opinion" and "judgment" Ross in one place confidently asserts that the appearance of a proposition in the reasoning "underlying" the judgment implies that this proposition has "been one of the decisive factors determining the conclusion at which the court has arrived."\textsuperscript{20} But then he approaches afresh the question: "what relationship exists between the opinion and the judgment, which, naturally, is what we really want to predict."\textsuperscript{21} Ross then refers to the realist view that the opinion is merely a rationalization of a judgment which is arrived at on other grounds than the ostensible ones and declines to come to a conclusion on the question whether the realists are right, arguing that this issue is outside the field of an examination of legal doctrine.\textsuperscript{22}

Ross therefore takes account of the American realist attack on the view that legal rules stated in opinions represent patterns of actual court decisions. But he declines to abandon the view that "valid law" has reference to such rules. He prefers instead not to pursue the contention that "valid law" has any necessary relationship to court decisions. Moreover, in deference to realist "fact-scepticism," Ross declines even to say that the valid rule will always figure in the opinion whenever the facts calling for its application actually arise. For he concedes that the determination of the facts may be markedly subjective.\textsuperscript{23} Therefore his final formulation is as follows:

\begin{itemize}
\item \textsuperscript{15} Salmond, Jurisprudence 39 (7th ed. 1924).
\item \textsuperscript{16} P. 39.
\item \textsuperscript{17} P. 40.
\item \textsuperscript{18} P. 42.
\item \textsuperscript{19} P. 43.
\item \textsuperscript{20} P. 42.
\item \textsuperscript{21} P. 43.
\item \textsuperscript{22} Pp. 43-44.
\item \textsuperscript{23} P. 43.
\end{itemize}
The real content of the assertion

\[ A = \text{section 62 of the Uniform Negotiable Instruments Act is valid law at the present time of a certain state} \]

is a prediction to the effect that if an action in which the conditioning facts given in the section are considered to exist is brought before the courts of this state, and in the meantime there have been no alterations in the circumstances which form the basis of A, the directive to the judge contained in the section will form an integral part of the reasoning underlying the judgment.\(^{24}\)

Ross’s final explanation raises a number of difficulties for the reader. In the first place, any definition which identifies law in terms of judicial activity must cope with the problem of identifying “judges.” Ross could scarcely be unaware of the fact that his former teacher Kelsen attacks such definitions on the ground that no other satisfactory description can be given of a judge than that he is the person whom the legal system renders competent to apply the law.\(^{25}\) Kelsen’s conclusion from this is that a factual study of law presupposes “normative jurisprudence” in the sense of a study of the “rules” conceived as existing in a non-empirical “ought” world.\(^{26}\)

Rejecting as he does Kelsen’s distinction between the factual (is) and the normative (ought)\(^ {27}\) Ross cannot accept Kelsen’s conclusion, but oddly enough he does accept the premise.\(^ {28}\) The result appears to be circularity in Ross’s definition of valid law, despite Ross’s philosophical contention that the definition is not circular but merely exhibits a kind of mutual relativity between its parts.\(^ {29}\) The reviewer believes that there is only one way of meeting Kelsen’s challenge, namely, to accept the responsibility of identifying judges, or any other institution to which a writer relates law, in a strictly factual way within the social process. John Austin at least accepted this responsibility, whatever one may think about the manner in which he discharged it.\(^ {30}\) Ross does not.

Nor is this the only occasion when Ross purports to overcome a difficulty by resort to disputable philosophy. Ross manages, as we have seen, to amalgamate the position of those who argue that law is a body of rules by which judges feel bound with the position of those who argue that law is the prediction of judicial activity. This is achieved, it will be recalled, by arguing that the real content of a proposition is the sum of the evidence by which it is verified.\(^ {31}\) This statement seems indistinguishable from the central tenet of

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24. P. 42. (Emphasis added.)
27. P. 45.
29. P. 36.
31. See note 16 supra and accompanying text.
primitive logical positivism, now abandoned by many linguistic philosophers. Its present application seems especially unhappy. Ross himself is anxious to distinguish between legal rules by which a judge feels bound, to which Ross wishes exclusively to attach the term law, and legal theory, by which Ross means maxims by which a judge does not feel bound but which merely point out to him strategies by which he may achieve desired results. But how does the fact that something appears in an opinion even provide evidence of the category to which it belongs? Surely an opinion typically consists of a multitude of considerations which the judge regards as important and the relationship between rules and theory in opinions is highly fluid. Ross's identification of law here is too broad to satisfy his professed objectives.

A third complication may be added. Ross tells us, and indeed demonstrates in a convincingly realistic way, that “the interpretation of the rules of law offer [sic] vital points of uncertainty.” Hence what view a judge takes of the meaning of a statute is governed not merely by his feeling of being bound by it as a directive, “it is rooted in the whole personality of the judge, his formal and material legal consciousness as well as his rational opinions and views.” With this proposition one would not care to quarrel. But what Ross does not investigate are the implications of such a proposition for his definition of law. If saying that a statutory provision is law means that under certain conditions it will form part of the reasoning in an opinion, are we saying that a mere form of words will form a part of the reasoning? Obviously not; it is only some meaning of the words that can figure in reasoning. And if so, what meaning? If Ross were to attempt to meet this difficulty in the same way as he meets the difficulty he encounters in regard to the uncertainty regarding judges' determinations of facts he would emerge with a proposition somewhat as follows:

The real content of the assertion

\[ A = \text{section 62 of the Uniform Negotiable Instruments Act is valid law at the present time of a certain state} \]

is a prediction to the effect that if an action in which what are considered to be the conditioning facts given in the section are considered to exist is brought before the courts of this state, and in the meantime there have been no alterations in the circumstances which form the basis of A, the directive to the judge which is considered to be contained in the section will form an integral part of the reasoning underlying the judgment.

Even if one restates Ross's main proposition in this guarded way, at least one complication remains. The predictions he regards jurists as making about A are conditioned, it will be noticed, on there being no change in the circum-

32. P. 12.
33. Ch. 4.
34. P. 43.
35. P. 140.
36. See text at note 23 supra.
stances which form the basis of \( A \). But unless one is able to identify the "circumstances which form the basis of \( A \)," one is not able to determine whether a prediction in the form that Ross envisages is verified or falsified by what subsequently appears in court opinions. Until this identification was made, one could not tell, for instance, whether the absence from an opinion of the rule was due to the fact that the prediction had proved wrong or that the "circumstances which form the basis of \( A \)" had altered. Until this identification was made, the prediction would be "meaningless" in Ross's sense of this word. Yet all that Ross appears to say on this matter specifically is that juristic predictions contain the condition that "there has been no alteration in the state of the law (that is to say, in the circumstances which condition our assertion that the rule is valid law)." What these circumstances are, however, may be inferred from Ross's statement elsewhere that the material of experience on which the prediction is built is the "sources of law." Curiously, he regards the discussion of what are the sources of law as important in connection with the question: with what degree of probability can juristic predictions be made? Yet in the light of the passages we have just quoted, it would appear that there is an implied reference to these sources in Ross's predictions themselves, and that Ross is required to identify them for the purpose of explaining just what is the prediction which is being made, quite apart from the question of the probability of its fulfillment. In these circumstances the reviewer questions whether Ross can afford to define sources of law as he does, as "the aggregate of factors which exercise influence on the judge's formulation of the rule on which he bases his decision; with the qualification that this influence can vary—from those 'sources' which furnish the judge with a ready rule of law which he merely has to accept, to those 'sources' which offer him nothing more than ideas and inspiration from which he himself has to formulate the rule he needs." Surely, if the legal predictions we make are conditioned on the "aggregate of factors which exercise influence" on judges' formulations of legal rules remaining constant, our predictions will never be verifiable at all. For such factors vary from moment to moment.

It is not impossible, nevertheless, that when a lawyer makes the relatively innocuous kind of legal proposition on which Ross concentrates for definitional purposes, he is saying something as guarded as Ross's formulation would indicate. But no text writer who wanted to do anything more than recount statutory provisions could limit himself to propositions of this sort. Ross's survey suggests to the reviewer that if we are concerned to find out what law-

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37. See text at note 24 supra.
38. See pp. 39-40.
39. P. 41.
40. P. 45.
41. Ibid.
42. P. 77.
43. For Ross's own views of the extent to which legal textbooks go beyond statements of what is valid law, see p. 46.
yers actually mean by propositions that something is valid law, then we must be prepared to embrace the conclusion that they mean a large number of different things at different times, or even several different things at once. If, on the other hand, we are concerned, as Ross himself is, to find a single meaning of such propositions which will prove useful as a universal basis of a doctrinal study of law, his own essay, though highly stimulating in exposing and grappling with difficulties, yields disappointing results. For the realist, as we have suggested, the book will be highly encouraging in its indications of the difficulties which a positivist faces in handling realism. Positivists are likely to be concerned with whether Ross has unnecessarily exposed himself to realist attacks, and in this connection H. L. A. Hart’s recent review article is of particular interest. Both schools will be indebted to Ross.

W. L. MORISON†


The regulation of pornography frequently resembles the firing of buckshot in the general direction of a target, mindless of the havoc caused around. The zeal of some individuals to suppress “smut” tends to engulf “unclean literature,” loosely defined, with personal outrage the chief criterion. Yet, one man’s dirt is another’s sandlot. Personal outrage is a poor criterion for legislation affecting the public at large. The test of the “contemporary mores of the community” would perhaps be more acceptable if that phrase did not have such divergent connotations depending on whether the community is seen from the viewpoint of the late Professor Kinsey or that of a latter-day vigilante. As it is, one suspects that the phrase stands all too frequently for personal bias elevated to a status of communal bias by modest jurists. From behind the bastions of the first amendment, lawyers view obscenity (a first cousin to pornography) as without the walls of protection. Yet the definition of obscenity—smutty, dirty, lascivious, salacious, prurient (“pfui” is its best definition yet)—is mostly an emotional affair. The “pfui” books are not protected by freedom of speech since they do not have “even the slightest redeeming social importance.” This determination is made by judges who thus profess to know what is “slight” and what is “socially important.” Hence we have an unidentified evil, defined by an unclear value-judgment of whoever constitutes the “community” in the eyes of the judge.

Pornography and the Law is interesting because it attempts to deal with the very question of the social usefulness of “smut.” The authors submit that far

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