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Book Review. Ross, A., Towards a Realistic Jurisprudence

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RECENT CASES

Persistence may perhaps be accounted for by the tendency of constantly rising land values to offset building depreciation. Cf. 2 Scott, Trusts § 239.4 (1939). However, the possibility of such unpredictable market fluctuations, usually unrealizable until the asset is sold, should have no place in determining proper standards of trust administration. Cf. Kester, Advanced Accounting 303 (4th ed. 1946). Unless assets are systematically reserved from current receipts, the consequent lack of ready capital will result in a gradual impairment of the value of the trust res and in a continued decrease in productivity. Such a result, clearly at variance with sound business principles, would seem hardly consistent with the average testator’s concern for proper management of the property in the interests of all beneficiaries. The present court, in its emphasis on the preservation of the “initial utilitarian value” of the trust estate, 88 N.Y.S.2d at 854, appears wholeheartedly to have adopted this view for the purpose of determining the proper method of administering the trust. Such a requirement on the trustee seems sound in the absence of special circumstances. See 2 Scott, Trusts § 239.4.

However, the adverse interests of the income and principal beneficiaries of a trust indicate that the business analogy cannot be carried too far; in business, depreciation accounting is seldom called upon to settle such conflicting rights as these. The present court recognizes this problem in postponing the final allocation of the reserve, seemingly leaving this determination to other than business criteria. While this may temporarily deprive the income beneficiary of the full enjoyment of his share, it should eliminate any objection to depreciation accounting based on the inaccuracies inherent in any such exercise of judgment. Allocations should be frequent, and no excessive allowance, especially for functional factors in depreciation accounting such as obsolescence, should be permitted to accumulate to the detriment of the income beneficiary. Cf. Del. Laws 1939, c. 150, § 1 (trustees given discretionary power to depreciate). This opportunity for periodically re-examining the depreciation rate and the size of the reserve should assure both income and principal beneficiaries a continuously productive and intact investment.

BOOK REVIEWS


Professor Ross, Anders V. Lundstedt, and Karl Olivecrona are the leading disciples of the Swedish philosopher Axel Hägerström, and represent a Scandinavian school which has particular interest for us.

1 Professor of Law, University of Copenhagen.
2 Some of Lundstedt’s and Olivecrona’s writings are also available in English translation. See Lundstedt, Superstition or Rationality in Action for Peace (1925); Olivecrona, Law as Fact (1939), reviewed in 53 Harv. L. Rev. 507 (1940).
because of its close relationship to American Legal Realism. The relationship is not causal, although Ross is familiar with Holmes, Gray, and Frank. It is found in a common empirical perspective. Thus, the term "realistic" in the title of Professor Ross's book does not connote the realism of the ancient Greeks; it means factual, and the author's inquiry is a prolegomenon to an empirical science of law, restricted to the most fundamental question — the nature of positive law. The book reveals a familiarity with modern European legal and general philosophy and a level of discourse that are lacking in the American counterpart, but it also perpetuates a vagueness and abstractionism that seriously impair its effectiveness.

The subtitle of the book, "A Criticism of the Dualism in Law," aptly characterizes its principal thesis. By "the dualism," the author means "the dualism of reality and validity in law . . . law is conceived at the same time as an observable phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and a priori, as real and ideal, as something that exists and something that is valid, as a phenomenon and as a proposition" (p. ii).

In focusing his analysis on "validity" and "reality," Professor Ross manifests an appreciation of the central problems of jurisprudence. Most of the history of jurisprudence could be written around the meanings of "validity" in the different schools of legal philosophy, beginning with Plato. And, with the rise of modern empiricism and social science, the factuality of law has become a principal inquiry. One of the components of validity has variously been represented by Prince, State, People, or Sovereign. Interpreted as the maximum center of power, such authority is sheer fact, a physical phenomenon. Although a necessary criterion in the determination of positive law, such authority is not a sufficient explanation of the binding quality of law. Accordingly, in Plato and Aristotle are the beginnings of insistence on reason as an essential attribute of law; in the Stoics and in medieval jurisprudence there is insistence on conformity of power norms to "natural law," and the ambiguity of this classic phrase and the complexity of moral problems do not warrant dismissal of valuation as irrelevant to the nature of positive law. The author pays scant attention to the legal philosophies of ancient Greece, especially those of the Stoics and their successors; his standpoint is that of modern German philosophy and European jurisprudence beginning with Grotius. Hence, his assertion that all of traditional jurisprudence is dualistic and that it "falls by its antinomies" (p. 12) is open to serious dispute.

The most pointed criticism in the book is directed against Kelsen's theory and American Legal Realism — two notable attempts to achieve the same monistic goal at which the author aims. In Professor Ross's view, since law is traditionally a dualism of validity and reality, monism can be achieved by reducing law entirely to validity, i.e., by excluding factuality; and this is the effort of the Pure Theory. It can also be achieved by reducing law to fact, i.e., by excluding validity; and this
represents the direction of American Legal Realism. In the author's opinion, both have failed to achieve the monism sought.

According to Professor Ross's analysis, Kelsen's monism, represented in a formal validity — conformity to the method prescribed in an ultimate hypothetical norm — fails because that norm is not and, by Kelsen's own admission, cannot, be chosen arbitrarily. It must represent a rational relationship to an existing legal system; hence substantive validity is simply postulated. Kelsen failed because he did not bridge the gap between his pure positive norm and fact. A pure norm cannot include fact since the former is wholly in the sphere of "ought"; the latter, in the sphere of "is." Kelsen provides only "an analytic combination of reality and validity," not the required "synthetic union" (p. 44).

The author believes that American Legal Realism failed because definition of law in terms of prediction of judicial conduct eliminates the normativity of law and because judicial conduct cannot be "delimited" without reliance on notions of validity; i.e., in answering the question, why is the conduct of a particular person legally binding, concepts of validity must be taken into consideration. Or, if law is defined in terms of judicial decision, the definition is circular because "judicial decision" implies that we already know what law is. This criticism likewise applies to Gray's theory since that also presupposes law as the determinant of the competence of the tribunal whose decisions comprise rules of law. Thus neither Kelsen nor the Realists achieve a valid monism; the antinomy between fact and validity remains unresolved.

The common error of the Pure Theory and Legal Realism, asserts Professor Ross, is that they do not take adequate account of the validity of law. They merely attempt to "spirit away the notions of validity." They fail because validity, stemming from prehistoric ages, is a permanent phase of law. The solution suggested by the author is to explain validity in terms of fact. How can this be done? The answer is quite simple — for a logical positivist:

Altogether, "validity" is nothing objective or conceivable, but merely a word used as a common term for such expressions by which certain subjective experiences of impulse are rationalised. There do not exist any conceptions of validity whatever, but merely conceptually rationalised experiences of validity, that is to say, certain experiences furnished with peculiar illusions of objectivity. Hence utterances about practical validity, i.e. about value or obligation, lack every meaning or object, though nevertheless, owing to their actual existence, they possess an emblematic value as symbols of certain psycho-physical phenomena.³

Thus, to the author, value judgments are mere rationalizations and symbols of emotion. Emotion is channeled in attitudes of self-interest and in disinterested attitudes. Specifically, validity means "certain peculiar disinterested behaviour attitudes" (p. 77). Hence, "... the science of law is a branch of the doctrine of human behaviour, therefore the legal phenomenon must be found within the field of psycho-physical

³ Pp. 12-13. See also p. 77.
phenomena constituting the domain of psychology and sociology . . .” (p. 78).

Is Professor Ross's monism more defensible than those of the Pure Theory and Legal Realism? He does not explain, but assumes, the origin of disinterested attitudes; yet, so far as cogent speculation on the matter is concerned, disinterestedness, which must surely be distinguished from mere indifference, is a high accomplishment, hardly compatible with the author's thesis of the exclusive operation of magic, myth, and passion in the earliest human societies. And, if the author's assumption regarding the disinterestedness of an alleged wholly irrational creature lacks persuasiveness, what is left? Emotional attitudes are a kind of fact—the fact of feeling. What allocates and distinguishes one attitude from another is coalescence with distinctive thought, e.g., ideas representing the rational side of rules of law. If intelligence is excluded, the distinctive structure of law disappears and the factual side of law is undifferentiated from nonlegal fact. Nextly, it is evident that Professor Ross presents a theory for which he bespeaks acceptance by scholars. He bolsters it not with rationalizations of his emotion or meaningless words symbolizing his attitudes or the rattle of machinery in a mechanical mind, but with analysis and argument addressed, presumably, to rational beings. However, the incompatibility of the theory with the conduct of the theorist must give one pause. Finally, does the author's reduction of the meaning of validity to meaningless words that serve only as signs of emotional attitudes satisfy any person's normal inquiries regarding the bindingness of law, its appeal to obedience and for support? A metaphysical validity has persisted throughout civilized history precisely because of the need for an adequate explanation of certain human experience. Yet, the author, in effect, asks the reader to disregard the most intimate experience of his daily thought processes and of his struggling with insistent problems that makes sense only when viewed in relation to a moral sphere, a value cosmos. If such experience is to be ignored, it must be on better grounds than the positivists have thus far adduced.

Nonetheless, we must be grateful to Alf Ross for stimulating further inquiry on a problem which is far from constituting a harmless irrelevance indulged in by academicians. It is true that for practitioners, what courts and boards recognize as law is what counts; but an understanding of the perennial debates on positive law provides the kind of argument which has been effective in authoritative determinations and also reveals specific areas where the influence of an able advocate may be potent. In a broader context, debates on the nature of law become meaningful when it is discovered that, far from being the subject of idle speculation, the polemics were warp and woof of burning political issues. Thus, the demand of theory that various power norms be distinguished in terms of law and non-law has practical significance for both lawyers and citizens. One may generalize this significance in relation to the problems of democratic society in the modern world.\footnote{The reviewer's discussion is presented in \textit{Living Law of Democratic Society} which will be published in December, 1949.}
Because they involve the control of human beings by force, these are the major problems of our times. American lawyers ought to be able to discuss them intelligently and even to contribute to their solution.

Jerome Hall.*


This book is the first of three volumes to be published on the history of English criminal law from 1750 to the present time. As its title indicates, it covers the movement for reform from 1750 to 1833. Together with the ensuing volumes, it should make the author's name a permanently outstanding one in English criminal law.

A tremendous amount of research has gone into the making of this and the forthcoming volumes. The author began in 1941 and since 1944 the work has been done under the auspices of the Pilgrim Trust. The volumes are unique in their use of previously untapped sources, namely, State Papers and Parliamentary Debates. The author has consulted "some 1,250 Reports of Commissions and Committees of Inquiry, 3,000 Accounts and Papers, 800 Annual Reports and 1,100 volumes of Parliamentary Debates" (p. v). Thus four types of official materials were used. The material embodied in the Reports of Commissions of Inquiry consists of materials accumulated by Royal Commissions, Departmental Committees, Inter-Departmental Committees, Select Committees, Joint Committees of both Houses of Parliament, and Tribunals of Inquiry. The data embodied in Accounts and Papers covers the same range of subjects and is complementary to those Reports. The Annual Reports are publications of the various State Departments concerned with the administration of criminal justice, such as the reports of the Prison Commissioners, the annual volumes of Criminal Statistics, and the reports issued by the Public Prosecutor's office. The author has also consulted unofficial sources such as the work of British and foreign authors on criminal law and criminology, historical and popular literature, and contemporary newspapers and periodicals. It seems to the reviewer that Dr. Radzinowicz has not spared himself to bring to-

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2 From Dr. Radzinowicz' remarks in Some Sources of Modern English Criminal Legislation, 8 CAMB. L.J. 180, 194 (1943), it seems fair to assume that the second volume will cover the period from 1833–1895 and the third that from 1895 to the present.

3 The significance of these papers is pointed out by the author in Some Sources of Modern English Criminal Legislation, 8 CAMB. L.J. 180 (1943). Stephen in his classic History of the Criminal Law of England (1883) made only three references to them. See vol. I, pp. 196, 480, 481.