PRAGMATISM AND VALID LAW[1]

I

At the beginning of this century William James, John Dewey and F. C. S. Schiller proclaimed a new philosophic method which they called pragmatism. It was a method which either substituted for "truth" as a value-standard of ideas, the value of practical usefulness, or purported to reinterpret "truth" as *meaning* practical usefulness. It embodied elements from many empirical philosophies of the past, and its exponents emphasised this: James sub-titled his *Pragmatism* "a New Name for Some Old Ways of Thinking", claiming descent from Socrates, Aristotle, Locke, Berkeley and Hume,[2] and Schiller proclaimed himself a disciple of the Sophist philosopher Protagoras (born about 500 B.C.). However this may be, the influence of the doctrine in modern times, supplemented by the lessons of modern physics, has been widespread.

In law, as elsewhere, we have felt its effects. The importance of the pragmatic method in the movement known as American legal realism can hardly be exaggerated. The juristic importance of pragmatism as an abstract philosophical theory has been less obvious: doubtless the thought of Dewey and James provided part of the intellectual atmosphere in which legal realism was able to flourish, but for the most part the American realists, led by the pragmatic ideology to an intensive study of the effects of law, have paid little attention to the theoretical foundations of the legal system—and indeed, in so far as they have considered the matter, have found it pragmatically meaningless to speak of theoretical foundations in law at all. A notable exception is to be found in the writings of Roscoe Pound and those who have more closely aligned themselves with him; Pound's realist inquiries into the social effects of law have been founded on an important theoretical view of the law as a pragmatically defined social instrument with which to achieve pragmatically defined goals.[3]

The American legal realists have now been coupled in our minds, by certain common emphases and the consequent adoption of a common teaching label, with the Scandinavian legal realists. But generally speaking, it would be a mistake to suggest that the work of the Scandinavians is infused with pragmatism to any substantial extent. The close attention to the effects of the legal system which they share with their American colleagues proceeds in the case of the Scandinavians from an insight into certain defects and errors of traditional but over-literal metaphysics — an insight which now appears to manifest itself in attacks, extreme sometimes to the point of irrationalism, on anything with a remotely metaphysical flavour. These attacks are founded on no pragmatic weighing of consequences; too often, they seem to be mere automatic invocations of the catch-cry of "Nonsense".

But, like their American counterparts, the members of the Scandinavian

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[1] A review article of *On Law and Justice,* by Alf Ross. London, 1958. Stevens and Sons, Ltd. xi-383. £2/19/0 in Australia.

[2] William James, *Pragmatism* (1907) 50.

[3] See Julius Stone, *The Province and Function of Law* (1946), cc. 15, 17, 20.

school are really no "school" to be mentally filed away under a facile generalization. The works of Alf Ross, one of the most distinguished of their number now writing, have been frequently shot through with strains of pragmatism. In the past, for instance, he has taken a pragmatist attitude to metaphysical ideas. While joining in the condemnation of all such ideas as meaningless and intellectually empty, he repeatedly emphasised their "emblematic" or "symbolic" value.[4] Elsewhere, for similar reasons, he called for a return to the abiding values of humanism and Christianity.[5]

In the work now under review, he seems to have virtually abandoned this position of moderation. It is a change which the present writer may be permitted to regret.[6] He now decries all metaphysics as "untenable, arbitrary, and fanciful";[7] he reduces the idea of justice to the bare demand for the application of a rule—irrespective of what rule;[8] he sees the whole of natural law thought as proceeding from man's fears and insecurities, driving us to seek an escape, not only from the cosmic powers of existence, but from responsibility for our own actions, in some mythical absolute.[9] His self-appointed task is to root out this infantile attitude to life, not by reasoned refutation,[10] but by creating a scientific theory of law whose very self-sufficiency will render metaphysics obsolete.[11]

Ross does not here purport to create such a complete and self-contained theory, but only to deal piecemeal with certain jurisprudential problems. But to a large extent, his solutions to the problems which he discusses do hang together in a juristic system: they are complementary and mutually interdependent.

The key to this interlocking series of ideas is an attempt to define "valid law" in a strictly pragmatist fashion. For the present writer the attempt fails, for reasons which will appear; but it is extremely interesting and it prompts a renewed discussion of some much-debated but still unsolved jurisprudential problems.

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[4] Alf Ross, *Towards a Realistic Jurisprudence* (1946) *passim*, e.g. at 238.

[5] Alf Ross, *Why Democracy?* (1952) 246-247.

[6] For a vigorous defence of the natural law position see the review by Arnold Brecht in (1960) 5 *Natural Law Forum* 160. See also H. L. A. Hart, "Scandinavian Realism" (1959) *Cambridge L.J.* 233 at 235.

[7] At 368.

[8] At 272-275.

[9] At 227-228.

[10] In c. 11, Ross does specifically indicate his main criticisms of natural law, but one cannot help feeling he is not on strong ground here. First, he stresses the arbitrariness of both the fundamental postulates as to the nature of existence and of man on which the various systems of natural law are erected, and the particular moral-legal ideas that are purportedly derived from these postulates. "Like a harlot, natural law is at the disposal of everyone." (261). But it might be said that all philosophical approaches to the basic juristic problems, including Ross's own, are founded in the last analysis upon arbitrary postulates amongst which there can be no rational choice. Second, he repeats that the strength of metaphysics derives from the psychological desire to appease our fears and escape our responsibilities by casting all our burdens on to immutable principles outside ourselves. To accept this simplified statement as an accurate psychological analysis is perilous; to philosophize about psychological conclusions (even if we accept them as psychology) is worse. And even if we accept Ross's view completely, what can it possibly tell us about the *existence or non-existence* of the absolutes to which our fears then direct us? Third, Ross comments on the political play which has been made with natural law theories. But he himself admits that "its political orientation cannot be adduced as an argument for or against the theoretical tenability of the doctrine of natural law". (263-264). Lastly, he draws attention to the confusion which resulted from the detailed elaboration of natural law in the Age of Reason into a complete duplication of the positive legal system, and to the resulting errors in jurisprudential thought, e.g., the belief in "a right" as a metaphysical entity. Whether these evils were as great as Ross supposes is a difficult question, and whether the blame for their growth can be laid at the door of rationalist natural law is another. It is an even more pointed question whether, however it may have been in a previous generation, the view that "a right" is a metaphysical entity is sufficiently influential today to warrant Ross's great fuss and bother about it. And even if all these questions be answered in the affirmative, the exposure of the pernicious consequences of one school of natural law has nothing to do with the validity or otherwise of the natural law approach.

[11] At 69, 258.

II

The pragmatism which shapes Ross's definition of "valid law" reminds us of that which was unfolded in the lectures of William James. For James, theories were "instruments, not answers to enigmas, in which we can rest";[12] ideas will "become true just in so far as they help us to get into satisfactory relations with other parts of our experience".[13] For Protagoras, according to Plato, one opinion can be *better* than another, though it cannot be *truer*.[14] Ross, for his part, has stated his requirements for an acceptable definition in *Why Democracy?*[15]

> First, the definition must to a certain extent be related to the present linguistic usage. To define a word in a way that has no connection with what generally, in a linguistic community, presents itself to people's minds when they use the word is an absurdity that cannot expect support. Second, the idea, which indeed is intended as an instrument of human thought, whereby it may penetrate into the coherence of things and grasp their regularity, must be formed in such a fashion that it comprehends within itself essentially related phenomena and distinguishes them from essentially alien phenomena . . . Scientific progress rests to a great extent on skill in finding out precisely the conceptual differences that prove fertile for scientific research . . . It is a mistake to believe that there is a single clear definition of an idea which is the only true one, or that a definition can be proved. A definition is not proved as true, but is *justified as expedient* on the assumption of the two considerations mentioned, which may also be called the demands for *adequacy* and for *relevance*, respectively.

Both these criteria had been emphasised by James as arising out of his basic test of the *usefulness* of definitions.[16] They are also closely in line with the functions assigned to the hypothesis in modern physics, which has shown that few, if any, hypotheses, can be verified in the sense that observation or experiment *proves them to be true:* the most we can usually say is that a hypothesis is "very probably" true. Truth as a value-standard in relation to hypotheses then loses its importance, and the highest value for a hypothesis becomes its utility. A hypothesis is projected not as something to be proved, but as what appears to be the most satisfactory explanation of the observed facts, and it is retained, not until it is proved to be "true" or "false", but until a more satisfactory explanation becomes available, or until new facts are observed which the hypothesis does not explain satisfactorily. It has become commonplace to point out that the *quantum* theory in modern physics is a hypothesis of this sort.

In Ross's view, law itself is nothing more nor less than such a hypothesis. He defines "valid law" as "the 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 followed because they are experienced and felt to be socially binding".[17] He reaches this definition by means of an analogy between a system of law and the rules of chess.[18] This is now a familiar mode

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[12] *Op.cit. supra* n. 2 at 53.
[13] *Id.* 58.
[14] Plato, *Theaetetus*, 167 b.
[15] *Why Democracy?* 77-78.
[16] *Pragmatism*, Lectures 2 and 6, *passim.*
[17] At 18. The hypothetical element on which the whole rests may then be seen as the element of truth in Kelsen's "postulated" *Grundnorm*, which Ross criticizes at 70. Kelsen's "pure" analysis admittedly suffers by comparison with Ross's "realist" analysis of basic constitutional norms at 80-84.
[18] At 14-18; see also his *Towards a Realistic Jurisprudence* (1946) 89.

of reasoning,[19] but Ross draws distinctive conclusions from it. If we wish to learn what are the rules of chess, he says, we cannot do so with any certainty simply by watching the procedure of particular players and noting what features regularly recur, for we could not distinguish mere custom, or even regularities conditioned by the theory of the game, from the rules of chess proper. Nor can we rely on statements of the rules in standard textbooks, since such statements may not be adhered to in practice and in fact it is quite common for particular players to have their own variations of the rules. Further, such textbooks will contain many "rules" which are really only advice as to skilful playing.

All that we can do, then, is to ascertain, first, what rules are in fact effective in the game and outwardly visible as such; and second, by what rules the players *feel themselves* to be bound. The "rules of chess" to which validity as such can be ascribed are the totality of the rules which satisfy both these criteria.

The vital element of a *feeling of being bound* can itself be dissected into two elements: the players' actual psychic feeling,[20] and the abstract idea content (of a directive nature) to which that feeling pertains. It would be contrary to Ross's thought to ascribe "reality" or "truth" to these abstract ideas simply by a transference of the "reality" or "truth" of the players' feelings about those ideas.[21] What the ideas do constitute is not truth, but a hypothesis by which alone the "moves of chess" can be explained. The manual transference, from a black square to a white square which stands in a certain relation to the original black square, of a piece of wood carved in the shape of a horse's head is simply a biological-physical action in relation to the objects mentioned which, in itself, is meaningless. It becomes a "move of chess" only by being interpreted in relation to the norms of chess. Similarly, the phenomena of law have meaning as such only by being interpreted in relation to the norms of law.

Conversely, norms (whether of law or of chess) are in themselves mere abstract ideas and nothing more. Their normative character and their validity spring solely from the fact that they can, in their totality,[22] be effectively applied as a scheme of interpretation for the actual phenomena to which they relate. In chess, these phenomena are the moves made by the players with the various pieces; in law, they are the human actions regulated by the legal norms.

The question then is, what are the human actions which constitute legal phenomena and form the subject-matter of legal norms? To whom are the legal norms directed? In one aspect, a norm is directed to the ordinary members of the community and prescribes that in certain circumstances they shall behave in a certain way; in another aspect, it is directed to the courts and prescribes how they are to exercise their authority over a person from whom the prescribed behaviour has not been forthcoming. The question then is which of these dual aspects of a legal norm has primacy. Ross answers that this must clearly be the directive to the courts as the agencies controlling and directing the

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[19] Compare, e.g., Wittgenstein's use of the analogy between chess and language *(Philosophical Investigations* (1953) *passim)* and, in jurisprudence, H. L. A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 *L.Q.R.* 37, employing analogies from cricket (at 42, 53-54) and cards (at 47). But *cf.* Hart's criticism of Ross's use of the chess analogy in *op.cit. supra* n. 6.

[20] See Stone, *op.cit. supra* n. 3, c. 25, and the various theories there discussed.

[21] Although Ross recognizes that the "facts" with which his empirical inquiries are concerned can include ideas, he does not give them an unlimited degree of empirical force. See his *Towards a Realistic Jurisprudence* (1946) 36, where he rejects Binder's idea that "Thought . . . has reality not only as a psychic act, but also as what is thought and what is willed as the content of the act". Ross comments: "This, however, is wrong. It is real, indeed, that I am thinking now (at such and such an hour) that there exists a golden mountain. But *what was thought as such*—viz. that there exists a golden mountain—*is by no means real.* The reality of the thinking process can by no means be transferred to its content, to what is thought."

[22] At 32.

State's sanctioning force;[23] for if a statutory provision contains no directive for the courts, "it can be regarded only as a moral-ideological pronouncement without legal relevance"; while if it does contain such a directive, any directive to the individual is superfluous, or rather "is implicit in the fact that he knows what reactions on the part of the courts he can then expect in given conditions".[24] The provisions of the criminal law "say nothing about citizens being forbidden to commit homicide, but merely indicate to the judge what his judgment shall be in such a case"; and in principle any statute could be drafted the same way. "This shows that the real content of a norm of conduct is a directive to the judge, while the instruction to the private individual is a derived and figurative legal norm deduced from it."[25]

Legal norms, then, can only be verified by reference to the acts of the judges.[26] The statement "The norm X is valid law" becomes a statement that if an action should be brought on which the particular norm has bearing, and if in the meantime there has been no alteration in the state of the law, the norm will be applied by the courts.[27] It will be noted that this last sentence is in the form of a prediction, a statement about what will be done in the future if certain conditions are fulfilled.

III

This short paraphrase of Ross's views has done less than justice both to the ideas themselves and to the brilliant argumentation with which he advances them. But though brilliant, his own exposition of the ideas in question is brief, and the writer may be pardoned for turning, after so short an exposition, to a criticism of Ross's central propositions.

There are three specific matters which seem to call for comment. First, there is the definition of "valid law" itself; second, the notion that legal norms are addressed primarily to the judges; and third, the characterization of validity-statements as "predictions". It will be convenient to deal with these in reverse order.

To turn the statement "The norm X is valid law" into a prediction of what the judges will do is a consummation to which Ross is inevitably driven. For, first, he has already noted[28] that the system of norms which can be applied to actual phenomena as a scheme of interpretation will also make it possible, within certain limits,[29] to predict what those phenomena will be. Second, the law is a dynamic system changing and developing from day to day. Any cross-section of such a system, purporting to state what is "valid law" at the present,

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[23] See also Karl Olivecrona, *Law as Fact* (1939) at 134-135.

[24] At 33.

[25] *Ibid.*

[26] This presupposes "judges" whose status as such depends on other norms of the legal system: norms of competence as distinct from norms of conduct. This is why it is necessary, when seeking to demonstrate the validity of any one norm, to refer the matter to the legal system as a whole. "The test of the validity is that the system in its entirety, used as a scheme of interpretation, makes us to comprehend, not only the manner in which the judges act, but also that they are acting in the capacity as 'judges'." (at 36). See also C. J. Arnholm, "Some Basic Problems of Jurisprudence" in *Scandinavian Studies in Law 1957*. Vol. 1, 9 at 32; but cf. the review by W. L. Morison, (1960) 69 *Yale L.J.* 1090, at 1093.

[27] At 41.

[28] E.g. at 16.

[29] The limits are dictated by the nature of the phenomena and the purposes to which they are directed by the acting subjects. In chess, players are motivated not only by the rules of chess but by their aim in playing and the theoretical propositions of chess as to the consequences of the moves. In law, judges are motivated not only by the legal norms, but also "by social purposes and the theoretical insight into the social connections relevant to the furtherance of these purposes" (20; see also 138-140).

will necessarily be characterized by questions which lie open as to the future.[30] Third, Ross substantially accepts the American realist view that every statement of the law is simply a prophesy as to the probable future behaviour of courts or officials.[31] He expresses himself here in a way which makes it clear that he does not wish to commit himself to the full implications of this view; elsewhere,[32] he has stated explicitly the points at which he disagrees. Shortly, he agreed that many factors besides "law" affect judicial decision, but argued that this very fact means that to predict judicial decisions is not to predict "law", but only to use, *inter alia*, law as a basis for prediction.

It is submitted that this now places Ross in a difficult position. He maintains that "valid law" is the scheme of norms in the light of which judicial decisions can be interpreted, and an individual norm is "valid law" if it can be predicted that this norm will be applied in a judicial decision.[33] But he would also say that judicial decisions are influenced by extra-legal factors,[34] and it would follow that such factors must also be taken into account both in "interpreting" and in "predicting" such decisions. It would seem probable that at least some of these extra-legal factors would also satisfy the other criterion in his definition of valid law; i.e., that they would be felt to be socially binding. Ross would apparently say[35] that such extra-legal factors can be excluded from his definition of "valid law" by reference to the further criterion that "valid law" includes only those socially binding directives which are enforced by judicial and administrative action;[36] but this does not help him here because such a criterion cannot exclude factors whose troublesomeness arises from the very fact that they *do affect* the decisions of courts and officials. It may be that this dilemma is not insoluble, and that Ross would feel that these objections can be answered. But the only other answer which the present writer has been able to find in his book is an explanation that he is concerned with national, supraindividual norms as distinct from particular, personal ideas peculiar to the judge;[37] and this seems clearly insufficient.

In any event, this is only one of a series of difficulties into which Ross's emphasis on predictions seems to lead him. Some of these difficulties will become apparent if, in the light of his restatement, we briefly rehearse the whole question of "prediction" as an accurate characterization of validity-statements about rules of law.

In one sense, it is not possible to say of any rule—"That is law". The two main sources in Anglo-American States[38] of what we call legal rules are statute and precedent. But though we undoubtedly say that a statute constitutes law, the statement proceeds on several assumptions which are not necessarily correct.

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[30] At 21-22.

[31] At 42-44, 73, and 101-102.

[32] *Towards a Realistic Jurisprudence* 145-147.

[33] In so far as this involves a double usage of "valid law", the difficulties thereby created do not seem to be crucial.

[34] See especially 138-140.

[35] See 33-34.

[36] *Prima facie*, one of the great virtues of a pragmatist definition of law seems to be that it does away with the troublesome element of a sanction. But by the implication that "valid law" is to be further limited by excluding rules which would otherwise be included in the definition unless they are enforced by State authority, Ross seems to reintroduce the idea of a sanction by the back door: cf. Arnholm's criticism, *op.cit. supra* n. 26 at 32-33. To this Ross would doubtless reply that his is a "realistically" modified notion of sanction (52-64); and this merits careful consideration.

[37] At 36.

[38] Theories emphasising what courts do are of course peculiarly well suited to the Anglo-American environment, where the traditional doctrine of *stare decisis* places such importance on judicial decision as a conventional source of the law. But in Ross's Danish environment the practical results of the attitude to precedent appear to differ little from those in England; if anything, the very absence of a simple binding rule on the matter renders Danish lawyers more sensitive to the implications of authoritative precedent: see e.g. W. E. von Eyben, "The Attitude towards Judicial Precedent in Danish and Norwegian Courts", 3 *Scandinavian Studies in Law 1959*, 53.

In particular, a court may pronounce the statute invalid, either for want of some formal requirement or on the ground, common in a federal system, that it is *ultra vires* the legislating authority. Or again, the court may adopt such an interpretation as to read out of the statute altogether the very rule which we thought it represented; or at least, may interpret the rule with or without such qualifications as to make it virtually a different rule.

The same is true of precedents.[39] A decided case may appear to contain a clear rule of law; but the vagaries of the *ratio decidendi* are well known and in later cases the precedent may be expanded, distinguished, criticized, not followed, or simply overruled. If it is a decision of an inferior court, it may be varied or overruled by an appellate court in a later case or even in the same litigation. All this means that even a rule that has just been pronounced by a judge in his decision of a case cannot really be said to be law. All we can really say is that "Mr. Justice X has just treated this rule as law". The statement, even if it is made instantaneously with the decision, has no greater force than a similar statement about an ancient precedent. And both statements have no more force than the statutory or judicial rules about which they are made; i.e., they are simply data for probability-statements about what will be the law.[40]

Even this short analysis presents two formidable difficulties. First, where a supposed statutory or judicial rule is judicially held not to constitute law, what are we to say of its status during the interregnum between its promulgation and the pronouncement of invalidity? The logical analysis of this position has been the subject of much academic and judicial[41] perturbation. Is it the position that the supposed rule never was law; or did it become law for a time, only to lose the legal quality with the later pronouncement? Is it possible to say that either of these solutions—or any other solution—is on principle correct or necessary? Ross would presumably say no, and draw on pragmatist sources to say that the whole discussion is therefore useless and should be abandoned. But if either of the above suggested solutions is correct, it raises difficulties for the prediction theory which cannot be thus lightly dismissed.

Second, if legal rules as properly understood serve only as bases for predictions, then law does not consist of rules at all, but only of the sum of the specific legal decisions. This was one of the points made by Jerome Frank.[42] But the above analysis shows that if we carry this line of thought to its logical conclusion, as we must if we adopt it at all, the legal decisions themselves—except in the very moment of their utterance and in relation to the case which is just decided, and in which therefore we have no particular interest—are not law, but only bases for further predictions as to further decisions. In short, leaving aside that one exception, "law" can never exist at all.[43] It is something perpetually predicted, but no sooner realised than it is submerged in new predictions.

However much conviction it at first appears to carry, this is a difficult picture to accept. But the crucial point lies in the exception which has just been made: when a *judge* says "The norm X is valid law", he does *not* make a prediction about either his own behaviour or that of other judges; he gives

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[39] Ross's analysis of precedent is at 84-90. So far as common law problems are concerned, the analysis would have benefited from fuller reference to Julius Stone, *op.cit. supra* n. 3, c. 7. See now also *id.*, "The *Ratio* of the *Ratio Decidendi*" (1959) 22 *Mod. L.R.* 597-620.

[40] At 45, 77, 101-102, Ross indicates that he would use the "sources of law" both as affording the material on which the prediction is to be founded and as indicating the degree of probability that can be attached to the prediction. Morison finds further difficulties in this dual function: see *op.cit. supra* n. 26 at 1095.

[41] See most recently *per* Williams, J. in *Armstrong* v. *The State of Victoria (No. 2)* (1957) 99 C.L.R.28 at 73.

[42] Jerome Frank. *Law and the Modern Mind* (1930) 46, 132.

[43] At 102 Ross substantially recognizes this.

a reason for what he now does. How does this vital distinction affect Ross's theory?

So far as relates to the notion of "valid law" as a whole as an interpretation scheme, this judicial use of "valid law" is perfectly consistent. As to the characterization as "predictions" of validity-statements about individual rules, the judicial statement is certainly an exception, but in the light of what has just been said, it may at first appear in the nature of an exception which saves the whole. It may be thought to leave Ross's picture incomplete, but not incorrect.

Professor Hart, however, takes a different view.[44] He regards the exceptional case of judicial usage as disproving the whole of Ross's thesis that validity-statements are predictions of what the courts will do. Professor Lloyd takes the same view, putting the concrete case of a dissenting member of the House of Lords, who cannot possibly be said to "predict" by his statement of the law, because he already knows that the majority decision will go the other way and thereby determine both the instant case and future cases in a manner contrary to what he in his dissent states to be "valid law".[45] C. J. Arnholm also takes this view, examining the case of the dissenting judge in an appellate court at considerable length.[46] Indeed, Arnholm goes further: after pointing out that where Ross gives "valid law" one meaning, the judges give it another, he adds[47]

> Nor am I sure whether this is always what the ordinary citizen wants to know when he asks his lawyer 'what the law is' in a certain situation . . . And who knows whether 'valid law' is not a fourth concept to the members of the Bar, a fifth to those who enforce law in administrative capacities, etc.? Possibly, too, sociologists must operate with concepts of law different from those the jurists employ.[48]

Nor does this exhaust the difficulties into which Ross's use of the prediction notion leads him. Among the extra-legal factors which may influence a judge in his decision, Ross especially emphasises that predictions themselves may influence the result: the fact that a text-writer has predicted a certain decision, adducing arguments, may lead the judge to a similar conclusion even though without the influence of the text-writer's opinion and arguments his decision would have been quite different.[49] Arnholm takes up this paradoxical situation and notes that the paradox is really twofold: the more a writer tries to avoid exerting an influence on the courts, the more likely it is that his opinions will be taken into consideration, even in a case where they are unwarranted.[50]

This raises difficulties for another part of Ross's work by which he appears to set great store: the four chapters on what he calls "legal politics" as distinct from "legal science"; i.e., discussion *de lege ferenda* and not *de lege lata*. Ross believes that in this sphere the lawyer has an important part to play: on the

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[44] Hart, *op.cit. supra* n. 6, at 237.

[45] Dennis Lloyd, *Introduction to Jurisprudence* (1959) 241.

[46] Arnholm, *op.cit. supra* n. 26, at 33-37; see also *id.* 29-30.

[47] *Id.* 23-24; cf. Morison, *op.cit. supra* n. 26 at 1095-1096.

[48] In short, we are all involved with the law; but what it "is" for each person is determined by the function which it performs for that person, which is in turn determined by the function of his which brings him into contact with it. There can then be no definition of "valid law" which holds good universally.

[49] Less frequently, the fact that a text-writer has made a certain prediction may result in the judge's deciding the other way; e.g., the text-writer's exposition may unwittingly reveal defects in the argument which the judge would himself have otherwise adopted; or it may expose evils which are then removed by amending legislation before the point comes up for decision; or, in exceptional cases, the judge may even be guilty of perversity, contrasuggestibility, or simply prejudice against the particular text-book. Ross's discussion is at 47. Compare R. K. Merton's distinction there cited between "self-fulfilling" and "self-destroying" predictions; compare also the continuing debate as to the influence of the Gallup polls on the U.S. elections. A similar phenomenon is discussed by William James, *The Meaning of Truth* (1909) 94-95.

[50] Arnholm, *op.cit. supra* n. 26 at 22.

one hand, in his capacity as legal scientist, he can investigate and correlate the various factors which must be weighed in determining what the desirable object of legislation in any given situation is;[51] he can criticize, correct and guide along rational channels the argumentation by which the intending legislator proceeds from the factors so correlated to a decision on what the legislative object is to be;[52] and, once that decision has been made, he can provide technological information[53] on how the chosen end can best be realised.[54] On the other hand, the lawyer himself may properly offer suggestions and recommendations as to which of the alternative legislative objectives in any situation should be chosen; but in this activity he should not act *as a legal scientist*.[55]

The reasons for this restriction are plain. First, Ross, the avowed enemy of metaphysics, declares that metaphysical reference to the "right" course is meaningless, and that the purported selection of any course of action as the "right" course will in fact be the result of subjective emotional attitudes with which science can have nothing to do.[56] Second, there is the feeling that it would be dishonest to attempt improvement under cover of imparting information.[57] Third, the factors which have to be weighed in a decision affecting social interests are so much more complex than those which arise in any of the natural sciences that the social scientist (including the legal scientist) may well prefer to leave the final decision to the politician. "The expert is and must be professionally single-eyed. The politician should preferably have eyes at the back of his head as well."[58] The complexity of the issues involved is, of course, a two-edged argument, and on the whole Ross inclines to the view that the lawyer should give the lawgiver the benefit of his expert advice. But he insists strongly on the ethical demand[59] that the legal scientist *qua* legal scientist should never attempt to influence the course of decision on matters of policy.

If, however, he is right when he draws attention to the phenomenon of self-fulfilling predictions, and especially if we take into account Arnholm's gloss to the effect that an attempt not to influence the course of decision will only make such influence more probable, then the legal scientist in making statements about what is "valid law" cannot possibly avoid influencing at least one important area of lawgiving decision. Once again, it is the notion of "prediction" that has led Ross into difficulty.

IV

The idea that legal directives are addressed primarily to the courts, and only indirectly and by inference to the individual, runs contrary to traditional beliefs and to the apparent realities. But although Ross speaks of the directive to the judge as the "real" content of a norm, it seems to be clear that Ross does not deny that norms operate as binding directives to individuals; all he is really saying is that a norm can only so operate if failure to obey the directive will result in judicial action against the defaulter. In other words, his proposition comes down to an argument that *ubi remedium, ibi jus*. So stated,

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[51] At 23, 322, 334-336.
[52] At 305-315, 321.
[53] At 320-322, 327-330.
[54] But one would today have thought it obvious that it is an important scholarly task to study and systematize the main kinds of demands, and the main kinds of channels of argumentation, which press on the legislature. See Stone, *op.cit. supra* n. 3, esp. pt.ii ("Law and Justice") and pt.iii ("Law and Society").
[55] At 315-324.
[56] At 297-300.
[57] At 316.
[58] At 324.
[59] In footnotes at 316 Ross himself seeks to comply with the demand by indicating that he makes the demand as the expression of his own subjective attitude. But *quaere* whether this is a sufficient answer to the inconsistencies of his position here.

it loses its compelling novelty and, indeed, becomes a notion almost as old as juristic thought, with its roots in the magical modes of thinking whose lingering traces Ross seeks to eradicate. This, of course, does not suffice to render the emphasis on remedies untenable.

In its more extreme form, however, Ross's proposition does seem to be untenable. It is true that there are directives to the judges as to how they shall deal with certain conduct on the part of individuals; but there are also directives to the individuals prescribing what their conduct shall be. It will sometimes happen that the latter kind of directive will, as Ross points out, be nowhere expressly stated, but only implied from the former; but it will frequently happen also that the former will be implied from the latter. Ross may be permitted to emphasise that the express directive to the courts, from which the directive to the individuals is implied, is the typical format in criminal law; but when he adds that other norms of conduct *could* also be stated in this way, and that *this shows* that the directive to the courts is primary, he is guilty of a *non sequitur*. There is no intrinsic reason why such a mode of statement *should* be adopted; it is equally possible for either of the two directives to be implied, or for both to be expressed. Juristic analysis cannot proceed upon accidents of statutory draftsmanship. As to criminal law, a more cogent argument seems to be that, since the directive to the courts is predicated upon, and can only come into operation after, an individual's failure to comply with the directive to him, the latter is primary and the former only secondary.[60]

The *non sequitur* here referred to is not the only logical defect in this part of Ross's reasoning. Seeking to show that a norm not directed to the courts is of no juristic interest, he says, in a passage quoted above, that if a norm contains no such directive, "it can be regarded only as a moral-ideological pronouncement without legal relevance". But this absence of legal relevance is precisely what was to be proved.

So far we have dealt only with norms of conduct. What are we to say of norms of competence? Ross seeks to bring them within his general proposition by saying that they are only rules of conduct indirectly expressed, because they are "directives to the effect that norms which come into existence in conformity with a declared mode of procedure shall be regarded as norms of conduct".[61] It is true that such a norm operates to prescribe how individuals—and the courts—shall conduct themselves in relation to rules promulgated by the authority in which competence is vested; and to prescribe how the authority shall conduct itself in promulgating such rules. But norms of competence cannot be reduced solely to this content. In a word, such norms create powers as well as duties. To identify norms of competence with norms of conduct, and the individual's liability to the authority's power with his duty to obey its rules, is just the sort of confusion that Hohfeld's "jural correlatives" were intended to dispel. Whatever we may think of the accuracy of Hohfeld's scheme, it should at least place us on our guard against such undiscriminating thinking. And Ross himself, in the fifth chapter of his book, adopts the Hohfeldian scheme with only negligible variations.

It seems unnecessary to deal with this question at greater length. Once we admit that legal rules are directed both to the courts and to the citizens, it may well be, as Arnholm has suggested,[62] that the question which directive has primacy is essentially meaningless. Most of us will prefer, with Arnholm, to direct our attention to the actual operation of the law in daily life; and with him to conclude that in this everyday sphere the directive to the courts is comparatively remote and the directive to the individual members of the com-

[60] See e.g., G. Del Vecchio, *Justice* (1952) ed. A. H. Campbell, at 104-105.
[61] At 32.
[62] Arnholm, *op.cit. supra* n. 26, at 43.

munity is vastly more important.[63]

Ross's emphasis on the directive to the judges is the more unfortunate because it tends to suggest that the judges are the only "players" in the legal game—or at least the only players with whom jurists need concern themselves.[64] Most individuals will not welcome the status of pawns to which this reduces them. But more important, when Ross comes to consider the "psychic feeling of being bound" as a constituent of validity, he is thus led to address himself to the psychic factors which motivate the judge.[65] His analysis is clear, if not strikingly new; but it diverts attention from what in the present view is the crucial question raised by assertions of validity: namely, what are the psychic factors which prompt the individual subjects of the law to give it their allegiance and obedience.[66]

V

If we cannot accept the characterization of legal norms as directives to the courts, and of statements about norms as "predictions", we cannot accept Ross's definition of "valid law". This alone does not mean that the whole idea of defining "valid law" pragmatically must be abandoned; but Ross's treatment is peculiarly open to a criticism which, in one form or another, Bertrand Russell has made of all pragmatic thought.[67] For Ross, a particular rule is "valid law" because it can be used as the basis for a prediction of what the courts in a particular case will do. This is so because "valid law" as a whole is a scheme of rules by reference to which we can understand and explain what the courts do. If we go further and ask why this latter proposition should be accepted, the answer can only be that the proposition itself is *useful* because it serves at once to unify and conceptualize the phenomena of legal life and to provide a fruitful starting point for juristic analysis. If in turn we ask why this usefulness should be accepted as a satisfactory reason for adopting the proposition, the pragmatist answer can only be that it is useful to accept usefulness as a criterion. The more persistent our questioning, the more the pragmatist becomes rooted in an infinite regress.

What is questioned in this process is not the *truth* of the proposition that usefulness is a useful criterion. If that were all that were in issue, sooner or later the pragmatist could escape into an empirical answer, telling us in effect that he has always found his criterion to be useful in the past. But the real issue is quite different: the pragmatist is asking us to accept usefulness *faute de mieux* because we cannot find truth. Few of us would be so rash as to assert that we know what truth is; but the pragmatist position, literally interpreted, involves the abandonment of the search for truth.

In practice, few pragmatists go so far: part of their criterion of usefulness is, as we have seen, that a "useful" hypothesis must conform to and adequately cover the relevant phenomena in a way which roughly approximates to the "correspondence" between idea and reality to which traditional definitions of truth have referred. It is respectfully submitted that on this point the structure of ideas propounded by Professor Ross finally breaks down. His view of the nature of law as a scheme of interpretation for legal phenomena, his insistence

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[63] *Id.* 44.

[64] That the players in the legal game include all the individual subjects among whom legal relationships can arise is clear from Ross's analysis (at 17) of the series of human actions arising from the purchase of a house, all of which (he says) fall to be interpreted with the aid of the reference scheme "valid law".

[65] Esp. at 138-140.

[66] See Stone, *op.cit. supra* n. 3, cc. 25, 26.

[67] See e.g. Bertrand Russell, "Dewey's New *Logic*" in *The Philosophy of John Dewey* (P.A. Schilpp ed.) (1939) 153; *id.*, *History of Western Philosophy* (1946) 845, 853.

that these phenomena comprise only judicial behaviour, and his interpretation of validity-statements as predictions of what judicial behaviour will be, no doubt all contain an element of truth. Certainly it is both interesting and rewarding to study these various subject-matters in the light of the functions which he thus assigns to them. But in all three instances he seems to have accorded central importance to a feature which is really only peripheral to the concept in question.

*A. R. BLACKSHIELD**

* LL.B. (Sydney). Research Assistant, Department of Jurisprudence and International Law, University of Sydney.