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Review of “Foundations of Jurisprudence,” By Jerome Hall

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BOOK REVIEWS

FOUNDATIONS OF JURISPRUDENCE. By Jerome Hall.¹ Indianapolis: The Bobbs-Merrill Company, 1973. Pp. viii, 184. \$9.50.

Jerome Hall's eighth book brings to mind the graduate student who reported that he had written a long dissertation because he didn't have the time to write a short one. This brief volume contains exceedingly rich fare, reflecting as it does the author's long career as a leader in the field of jurisprudence. Professor Hall has indeed taken the time to write a short book; he speaks to important themes in a serious and professional way. While one may ultimately disagree with Hall's position, there is no question but that it has been articulated by a significant scholar.

Foundations of Jurisprudence is not a book for timid souls who seek a cursory introduction to jurisprudence. Hall plunges deeply into the intricacies of his subject matter. The book will probably be of greatest interest to specialists in the field who are familiar with the authors whose works Hall discusses and with the background of the issues he analyzes. Nevertheless, it is certainly appropriate for the general reader who is willing to pay careful attention to the author's line of argument.

In a sense, reading *Foundations of Jurisprudence* is not unlike picking up an extension telephone and listening in on the middle of a conversation which has been going on for some time. One senses that language is being used in a special way. The participants in the conversation share certain assumptions and points of reference, and the listener must attempt to place their remarks in the appropriate context. In part, this may result from the nature of the beast: jurisprudence, according to Hall, is the continuation of a conversation begun centuries ago by Plato in his dialogues.² Much of the book consists of Hall's reactions to the leading participants in this process—Kant, Kelsen, Austin, Hart, and Fuller, to name only a few. The author's substantial

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2. J. HALL, FOUNDATIONS OF JURISPRUDENCE 5-11, 24-25 (1973).

reliance on footnoted references to his discussions in earlier works is an additional problem in this regard.

What can one hope to gain by jumping in at the midst of this ongoing conversation? One benefit is an appreciation of the kinds of questions which constitute the field of jurisprudence. The following incomplete list indicates the range of Professor Hall's concerns:

1. What is law? What is the difference between "law" and "a law?"
2. What is the relationship between "law" and "values?"
3. What is the nature of the debate between proponents of "natural law" and "legal positivism?"
4. What is the relationship between "law" and "sanctions?" Are sanctions necessary to a theory of law?
5. What is the relationship of the state's "laws" to other norms?
6. What is the relationship of "formal law" (law on the books) to "law in action?"

Hall's detailed discussion of these questions reveals their complexity. At a minimum, the reader of *Foundations of Jurisprudence* will come away with an awareness of the terrain of jurisprudence and, perhaps more significantly, with heightened sensitivity to the subtleties and nuances of the enterprise.

The feature of Hall's jurisprudence which is likely to strike most readers—particularly those trained in American law schools—especially forcefully is his fundamental rejection of the positivist tradition.³ Hall believes that a legal system must embody ethical standards. The term "law" as a symbol has honorific connotations, and Hall believes that it should be utilized only in that sense: "[A] point is reached where it must be recognized that an enactment falls outside the accepted criteria and is, therefore, not bad law but *not law*."⁴ That is, enactments are not necessarily law, quite regardless of whether they are complied with. It is the *content* of a statute which earns for it the meritorious label, "law."

Unfortunately, Hall does not put forth an adequate justification of this position, at least not one which I find convincing. In part, his argument rests on his detailed criticisms of legal positivism.⁵ His stance is essentially that if he can demonstrate fallacies in the positions of the various schools of positivism, he will have demonstrated the validity

3. See *id.* at 21-53.

4. *Id.* at 67 (emphasis original).

5. See *id.* at 21-53.

of his alternative approach. I don't think this move works. Even if all of Hall's specific criticisms of positivism are granted—and it is far from obvious that this should be the case—he has simply established the necessity for some alternative approach, not his particular alternative with its natural law overtones. In addition, Hall frequently appears to fall back on an argument in the form, "Fifty million Frenchmen can't be wrong." Since significant philosophers, as well as the public over the ages, have employed the term "law" in an honorific sense, surely we cannot dismiss this usage. At the least, usage over the ages entitles a position to serious examination and consideration, but this hardly compels us to accept the position.

A basic weakness of Hall's honorific usage is that he never defines the particular content which an enactment must have in order to qualify as "law." What are the standards which define "law?" Where can they be found? In short, Hall is close enough to a natural law doctrine that he must meet the standard responses to it; I think he fails to do this.

By way of illustration, consider Hall's attempt to differentiate between law and other social norms. Since law (as he understands it) must have "ethical validity," it can be differentiated from "conventional rules that have no actual normative significance, for example, that vacations are to be taken in July."⁶ Unfortunately, Professor Hall never defines "normative significance," nor does he indicate the source of these ethical norms. Consider a Sunday closing ordinance; does it have "normative significance?" Presumably, a religious observer of the Sabbath would say yes; a secularist might say no. Why aren't July vacations of "normative significance?" Hall's fundamental intuition that law *must* have ethical content is devoid of meaning because he has not told us what "ethical content" means, or how we would recognize it.

This fundamental problem in analysis also weakens Hall's presentation of what he calls "integrative jurisprudence."⁷ A topic of current interest to social scientists to which Hall addresses himself is the effectiveness of law. Clearly, one must not confuse what the Supreme Court decided, for example, in *Miranda v. Arizona*⁸ with the realities of behavior in local police stations. Hall has much to say that is of interest with regard to the question of effectiveness, and how it should be

6. *Id.* at 137.

7. *See id.* at 142-77.

8. 384 U.S. 436 (1966), discussed in *id.* at 170-71.

conceptualized. But he feels obligated to employ “effectiveness” in a normative sense. If “law” implies ethical standards, so too must “effective” law. Hall asserts that “it is extremely difficult, if not impossible, to treat ‘effectiveness’ in purely descriptive terms because the values that make a social theory significant intrude to qualify the factual statements. . . . If, therefore, in the context of dealing with socio-legal problems, ‘effectiveness’ has normative as well as descriptive connotations, a law is effective if it maximizes values.”⁹

Unfortunately, Professor Hall never defines “values.” He rejects as inappropriate both the use of “effective” in the context of “a sharp knife that is used to cut someone’s throat,” and a discussion of the effectiveness of “statutes that kept blacks out of washrooms.”¹⁰ But Hall doesn’t tell us how we know that this segregation enactment—which clearly supports something which one might reasonably call a “value”—doesn’t qualify for honorific usage.

I would suggest that Hall’s commitment to a normative jurisprudence has led him to ask the wrong questions. His discussion of “effectiveness,” for example, poses the following question: Has this enactment in fact produced results which are in accord with appropriate values? But until we have a clear definition of the appropriate value standard, this question is meaningless. I personally find no difficulty with an alternative question: Given a particular enactment, what social interests have benefited and what social interests have suffered as the result of its enforcement?

Professor Hall explicitly wished to consider much more than “law on the books;” hence, his discussion of “the dynamics of law-as-action.”¹¹ Yet, his analysis is rigid and limited, precisely because he employs conventional formal-legal categories as if they were behaviorally significant. For example, he distinguishes between the state (and its rules) and other associations (and their rules) by fiat: “The State, by contrast, is a unique association; resignation is not possible, it does not occur, and would be rejected out of hand as simply irrelevant.”¹² It may be that there are some senses in which nation-states are significantly different from other social organizations. Clearly, there are many similarities between what we call nation-states and “private” organizations. My basic objection is the way in which Hall deals with

9. J. HALL, FOUNDATIONS OF JURISPRUDENCE 171 (1973).

10. *Id.*

11. *Id.* at 161-68.

12. *Id.* at 139.

this matter. Just as he utilized the notion of "ethical values" without careful definition, so too does he employ the concept of "the state" and, indeed, the concept "legal" without precise definition. Whether the state is a "unique" social institution is an empirical question which can be tested in the real world. Hall postulates its uniqueness, employing "state" as a category, one assumes, because it has been so employed in our legal tradition. But the comfortable ring of familiar terms is not a satisfactory basis for scholarship.

Consider Hall's statement that "rules of law . . . provide the distinctive features of certain actions that otherwise dissolve in an amorphous ocean of behavior; they supply the structures that the mind grasps to give distinctive meaning to legal experience."¹³ Precisely because Hall begins with the premise that law is honorific, that it is worthy of support at least in part because of its content, he must distinguish it from less elevated aspects of human behavior. Query, whether this orientation increases or limits our understanding of phenomena which a particular society happens to call "legal."¹⁴ It may be that something called "rules of law" has the effect of distinguishing forms of behavior in the minds of the members of some societies. But maybe not. What Hall asserts by definition—as he must, given his attachment to the belief that "law" is special—I would pose as an hypothesis to be tested. If it were demonstrated that types of behavior which have traditionally been branded "legal" were in fact not differentiated from "the amorphous ocean" of other human behavior, I would certainly not be offended. And I might learn a great deal.

Which leads us once again to the basic questions: Is there a form of behavior called "legal behavior" which is significantly different from other forms of behavior; and, is there a phenomenon called "the law" which is sufficiently different from other political and social institutions that it and legal behavior must be studied and understood in special ways? An affirmative answer to both of these questions is central to Professor Hall's book. His argument would rest on a much firmer foundation had he explicitly defended these basic assumptions, rather than postulating them as givens.

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13. *Id.* at 161.

14. This would, of course, be heresy in Hall's view.

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