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LAW-AS-ACTION AND INTEGRATIVE JURISPRUDENCE†

By JULIUS STONE*

FEW exercises are more salutary for the learned than explaining their activities to laymen. What, for example, is jurisprudence? as a radio audience once asked me (I am sure in fullest good faith) in a program allowing sixty seconds for reply. I replied desperately that people who act to interpret or apply the *law* were lawyers; that those who write or speak *about lawyers' activities* were jurists; and that those who write or speak *about what jurists write or say about law* were *jurisprudents*.

The reply made the time-slot, which is, of course, the prime test of good radio. Yet it left out the important *genre* of which Jerome Hall's *Foundations of Jurisprudence* is a fine example. For I should really have gone on to say that *those who write or speak about what jurisprudents write or say about what jurists write or say about lawyers' activities in interpreting or applying law* are also jurisprudents, though of a special kind. They are *meta-jurisprudents*; and their concern is to explain, justify or criticize the directions and limits of concern which ordinary jurisprudents set for themselves.

I

As in our private lives, so in the movement of thought generally, the trauma of change which threatens an end to accustomed patterns, and even to life itself, can be a creative force. The unexamined codes by which we tend to live may then suddenly present themselves for urgent attention, and make the interests and anxieties of yesteryear seem

† A review article of *Foundations of Jurisprudence*. By Jerome Hall. New York: Bobbs-Merrill & Co. 1973. Pp. viii, 184. \$9.50.

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rather trivial. The remarkable resurgence of both writing and teaching in the field of jurisprudence under a variety of names since World War II is in this light a reflection of the formidable flood of change, physical, biological and technological, matched by psychological, moral and cultural transformations now proceeding among almost all peoples of the globe, though at varying paces. Notable among these is a newly disclosed fragility of what appeared in nineteenth century optimism to be entrenched standards of morals and justice. Whether this fragility be a product of modern techniques of mass psychological manipulation, or the success of these techniques is but a witness to this fragility, such developments have provoked a wide-ranging reexamination of fundamental questions about legal ordering. Anticipations of doomsday in terms of nuclear weaponry, and more recently in terms of exhaustion of planetary resources or planetary pollution, have only aggravated this crisis and heightened our awareness of it. The reexploration of fundamental questions becomes even more in point.

Meta-jurisprudential concern, also, is naturally intensified when fundamental concerns thus come under review. Hall sees the present welter of jurisprudential concerns as expressions of partial and varied "perspectives" on our troubled societies.

The ultimate concepts of a legal philosophy are expressed or reflected in a postulate or set of postulates comprising a *perspective* that was accepted as self-evident and all-important. The postulates of reality and reason in classical natural law theory, the *Volkgeist* of the Historical School, the pleasure-pain principle of utilitarianism, Duguit's social solidarity and Pound's social interests were the foundations upon which certain philosophies of law were built.¹

While each such perspective, whether of former or present times, may be valuable within its limits, it becomes vulnerable when the jurist concerned presents it as "an adequate philosophy of law"—as all that need be said, as the "real" or the "true" or the "pure" philosophy or science of law.

The truth, in short, that the house of jurisprudence has many mansions, becomes obscured when the occupants of one mansion attempt to appropriate the whole house. Such a claim may sometimes even seem justified, in terms of how the particular jurist describes the *subject-matter* of law and legal activities. One of Professor Hall's major contributions here is to show that this appearance is deceptive. For the plausibility of the claim that his own perspective

1. J. HALL, FOUNDATIONS OF JURISPRUDENCE 5 (1973) [hereinafter cited as HALL].

on "law" is the whole view of it, usually arises from the claimant's own description of the subject-matter of law in terms *which express his own concerns with it*.

[I]n all legal philosophies there is a congruence between the selected subject-matter ("law") and the relevant knowledge or discipline, just as obtains, for example, between matter and physics. As theories of matter change (as physics changes) so, too, does matter, and that applies to jurisprudence and its subject.²

The very amplitude of the house of jurisprudence means of course that what goes on under its roofs has great potential meanings for many urgent and practical questions of the day. This is so even for stable and peaceful times; all the more for our time of turbulent dynamic movement and confrontation. The commitment with which a particular jurisprudent approaches his subject may correspondingly be to finding answers to particular practical questions, rather than to extension of knowledge as such.

Whether the limited perspective on law be one of the formal positivisms, like Austin's or Kelsen's, so prominent since the nineteenth century; or of the sociologisms or other empiricisms of our own century; or of the various natural law stances which span the centuries and millennia before, this book serves a stern admonition on it. This is that "no particularistic jurisprudence can suffice when measured against the importance of what it rejects or neglects" that is relevant to the present age and its intellectual concerns.³ Even when jurisprudential forays are directed to particular practical questions, the book still offers them the reminder that all stances finally rest on "metaphysical bases." "[T]o the extent that [these] are fallacious, the fallacies permeate the entire structure of the ideas built on these foundations."⁴

II

Professor Hall's second and third chapters are both devoted to the confrontations between natural law and legal positivism, though the latter chapter is separately titled "Validity of Law and the Neutrality of Jurisprudence." He is correct of course to see as central to this millennial debate the fact that in most if not all ages and societies people raise issues about the justness of prevailing law. And as soon as law comes to be thought of as man-made, the question of justness may seem to precede and transcend all the other questions concerning law.

2. *Id.* at 7.
3. *Id.* at 19.
4. *Id.*

Even those of us not disposed to gird our loins for this perennial battle will find value in these chapters on natural law and legal positivism. They give a succinct account of the tactics and strategies of the age-old protagonists. Though I suspect that the compression, and knowledge it presupposes, may make it hard going for law students, the documentation provides even them with good guidance to the main literature.⁵

It is unnecessary to linger on positions as to which my own published writings have long marched with Jerome Hall's. He stops short of Norberto Bobbio's verdict that the story of natural law is an "elegy of folly," but admits that one reason for the unhappy confusions of this subject is "the ambiguity" of "natural law" and "positivism."⁶ In agreeing, I would change "ambiguity" to a very considerable plural, especially on the natural law side. Even if it is an exaggeration to say that, based on the respective possible meanings of "natural" and "law," there are over eighty possible meanings of their union, it is clearly an understatement to say merely that it is "ambiguous." And since there are at least half a dozen main meanings of "legal positivism," the number of possible conflicts between "natural law" and "legal positivism" are far more numerous than any two chapters, or indeed any two books, could fully canvass. The resulting "Puzzles," which the author here exemplifies, cannot therefore do more than begin the final "unravelling" to which he aspires.⁷

I would agree also with the somewhat related conclusion that even in the classical versions of natural law the contraposition of law as reason and law as will is no simple one.⁸ And the theological issue as to the absoluteness of God's will even as against His reason (in which humans may be thought to participate) is not the same issue as that involved in the justification of law as a promulgation of superior *human* will.⁹ But clearly the final thesis with which Professor Hall is concerned is that "law" is substantially comprised of "morally valid laws."¹⁰ And this thesis I would have preferred him to state rather differently.

5. Other guidance, somewhat differently oriented, may be found in J. STONE, *HUMAN LAW AND HUMAN JUSTICE* 9-81, 193-227 (1965) [hereinafter cited as *HUMAN JUSTICE*].

6. HALL, *supra* note 1, at 22.

7. *Id.* at 23-24.

8. *Id.* at 26.

9. *Id.* at 27.

10. *See, e.g., id.* at 28, 47, 49, 52, 63-66, 72-75.

At this stage, to revive the challenge to Austinian or Kelsenite views of what "law" is, in terms of some finally "true" meaning of "law," tends to perpetuate the imperialist claims of partial perspectives to exclusive sovereignty over all aspects of jurisprudential enquiry. Would it not be better merely to clarify the domain for which each claim is significant and discount the overclaim? Such an *action finium regundorum* would leave some hope of stable adjustment of boundaries, freeing attention for more fruitful tasks. Continuing indecisive wars of conquest in the areas of knowledge are even less promising in this regard than wars for final control over physical territory.¹¹

Let me put the point another way. It is no doubt interesting in some ways to classify all "legal philosophies" by reference to the kind or degree of "positivism" they manifest. Can we really say that this exercise is either essential or even helpful at all, to the progress of jurisprudence?¹² The author offers a range of legal philosophers from Plato, Aristotle and Aquinas to the Scandinavian realists—along a spectrum running from the classical natural law at one end through "post-Kantian social theory of law as action," Kantian and neo-Kantian free will "idealism," to "utilitarian legal positivism," and "sociological or psychological legal positivism" (the Scandinavian realists) at the other, with some modalities in between. This spectrum is clearly related to the author's recurrent thesis that we need "to widen the connotation and narrow the denotation of 'positive law' by including moral value in its definition."¹³

I remain in some doubt whether it can promote the integration of the diverse jurisprudential perspectives for any one of them to view the others in terms of mere degrees of approach to or shortfall from its own main positions. If we see jurisprudence as an arena in which forces are marshalled to resume battle, these themes of Professor Hall represent one of the more sophisticated orders and strategies of battle with positivism that our generation has seen. My questions are whether the battle is worth the dedication of the intellectual resources involved; whether victory can possibly bring the intellectual consent of the adversary. I tend to feel rather that the net gain would be greater if we could all reach a more steady recognition of the limits of our own discourse along with that of others, and a no less steady resolve to

11. On these struggles, see J. STONE, *THE PROVINCE AND FUNCTION OF LAW* ch. 1 (1946) [hereinafter cited as *PROVINCE AND FUNCTION*]; HALL, *supra* note 1, at 36-43.

12. HALL, *supra* note 1, at 47-49.

13. *Id.* at 49-53.

search for mutual enrichment of insights from the diversity of our perspectives.

III

I ignore, in assessing net gains, the sense of satisfaction and improved morale in the valiant defenders of *iusnaturalism*, after its vicissitudes of the last two centuries. For in an age so far committed to everybody's liberty "to do one's own thing," there is little chance of a victory in battle by either side being more than Pyrrhic. The self-evident primacy of value over disvalue and of justice over injustice, on which Professor Hall insists, is perhaps truer in our age of rebellion than at some other times. But I doubt whether its influence on human affairs can be increased by the further prolongation of *iusnaturalist-positivist* struggles.

The point may be considered in relation to the issue between Lon Fuller and H.L.A. Hart as to whether there is indeed a point (as Gustav Radbruch finally thought)¹⁴ at which outrageously unjust law is no longer to be regarded as "valid law." Or, as H.L.A. Hart thought, whether even such "law" remains valid as law, though it may be our overriding duty to correct it and even to disobey it and struggle for its overthrow. If this question has social importance it would be as to the comparative social efficacy of adhering to one standpoint or the other for preventing human backsliding. It seems to be assumed by those who would deny the name "law" to outrageously unjust rules, that this denial will tend to make it easier to correct or disobey or overthrow such rules, by stripping them of the positive emotive support carried by the symbol "law."

As against this, Hart urged that the effect of such a denial is to invite us all, when something called "law" is presented to us, to believe not only that it is "law" but also that it is "just." It thus confuses or even conceals altogether our duty to disobey an intolerably unjust law. It can perhaps then be said in reply to H.L.A. Hart that this confusion and concealment *need* not occur. For the emotive effect of the symbol "injustice" could, in theory at any rate, still do its work in checking obedience, before the power of the symbol "law" to stimulate obedience could even come into operation. The censorial power of the "justice" symbol would then, at the outset, block the attribution of the symbol "law" to the unworthy precept, and thus abort

14. See the citations and discussion at length in *HUMAN JUSTICE*, *supra* note 5, at 250-56.

any obedience-inducing effect. This further reply to Hart is itself, however, less than convincing. Can we really assume that every time a rule is presented to us as "law" we will be asking ourselves whether it is so unjust as not really to be such? Insofar as the particular community has accepted the Fuller-Radbruch kind of view, will not members take it for granted that the legal order as a whole (and therefore the particular precept of "law" in question) is not intolerably unjust? The censorial power of "justice," as a symbol checking the obedience-producing capacity of the symbol "law," may indeed then be neutralized *a limine*, and converted into a reinforcement by rationalization of the obedience-response.

Yet when we descend from these abstract (and in my view jejune) debates, it seems clear that neither the Fuller-Radbruch view, nor the Hart view, can give us any serious assurance that outrageously unjust law can or will be resisted. It is very difficult to see how any situation could arise in which either view could marshal empirical evidence in its own support. For, almost *ex hypothesi*, under whatever government, those who make, promulgate and enforce law do so by virtue of the fact that they wield, for the time being, the predominant power in the community. The tendency of the subjects to obey "law" is probably far more attributable to the actual power of the promulgators, and to "the normative power of the factual," than to the emotive power of the symbol "law." The hard truth is that the liberation of men from tyrannically unjust law is not really a function of enquiries into the "true" or "actual" meaning of the word "law" and whether "justice" is an essential element in that meaning.¹⁵

Liberation from intolerable injustice, in law and elsewhere, is finally a rebellion against facts rather than definitions. And these facts are usually facts of vested political and physical power. What such rebellion must overcome is not the emotive appeal of the symbol "law," but *the power of those who enact, promulgate or seek to enforce it*. Compared to this, and to the energy and sacrifice necessary to overcome it, any differential advantage as between *iusnaturalist* and *positivist* views as to the essential elements of a definition of law, seems too slight to merit further protraction of this age-old debate.

IV

It is, in my view, only when the legal positivist not only denies that "lawness" imports "justness," but denies that the question of just-

15. Cf. *id.* at 255.

ness is a real or important question, that this becomes an issue worthy of jurisprudential battles. With thinkers, like the Scandinavian realists, for whom talk of "justice" is but "thumping the table," meaningless "myth," "fiction," "illusion" or "phantom," there thus is indeed an issue to be joined.¹⁶ But not even all who are called "realists" should be counted among such adversaries. Demands such as that of the late Karl Llewellyn for temporary divorce of the Is and the Ought for the purpose of study of legal phenomena, may have been debatable in terms of fruitfulness as a technique of research, or even in terms of their feasibility. But this affords no reason for denying the legitimacy of such an approach within the broad and generous vision of Hall's integrative jurisprudence as "the dynamics of Law-as-Action."¹⁷ Even Hans Kelsen took justice seriously, as a subject of discussion, as clearly as he excluded it from his "pure theory" of law.

Jerome Hall's formidable onslaught on efforts to appropriate the term "validity" to *formal* or *empirical* validity seems subject to a corresponding comment. This point too seems worth the tiresomeness of endless debate only when the proponent claims that the elucidations of formal or empirical validity are exhaustive of what is significant about "law-as-action." Where, on the contrary, the proponent leaves questions of justice open, the appropriate answer is to address *them* rather than *him*. It may be true, as the author goes far to establish, that the purportedly value-free "validity" of a Kelsen, an Austin or a Ross, conceals "the (illicit) intrusion of ethical ideas" or "the reduction of positive law to power norms."¹⁸ Yet, I would insist here also that it is only when claims to be "value-free" move to the point of a "negative valuation of all valuation" that the issue seems worth the powder and shot.¹⁹ When a thinker stops short of such extremes, our onslaught on him may afford catharsis to ourselves and encourage like-minded colleagues; but this, it seems to me, is to small effect, and with the sacrifice of worthier targets.

The main dispute about the "validity" of positive law is, after all, but an extension of the dispute as to the meaning of "law." The author is concerned to assert the importance of "the moral validity of sound laws" instead of allowing the term "validity" to be appropriated merely to some logical relation between precepts.²⁰ Chapter III

16. See HALL, *supra* note 1, at 55-62.

17. See *id.* at 78-100. See generally *id.* at 155-77.

18. *Id.* at 70.

19. See *id.*

20. *Id.* at 76.

points out that in fact our reasons and procedures for justifying legal decisions take account of values, ends and purposes; that this is congruent with social reality in the sense that values and attitudes anchored in them are characteristic of a "successful" society. The recognition of these truths, Professor Hall thinks, suits contemporary intellectual concerns with law, prominent among which is the drive for reform and improvement, better than do the narrower positivist perspectives. My dissent on this, within my general agreement, is that *I do not think we need to discredit those narrower concerns, in order to express our wider ones.* The only exception I would make (as already indicated) is for that very limited body of thought, where narrowness is also accompanied by a "negative valuation of all valuation."

For those still attracted to the waning light cast by the star of linguistic philosophy on legal problems, Professor Hall's excursion in Chapter IV on "linguistic jurisprudence" may have some interest. The present writer is not disposed to quarrel with his rather clear conclusions that this fashion of the decade preceding our own predoomsday age, a decade which now seems a whole age away, tends to stress words rather than "relevant realities" and that its value-neutrality may not be what it seems.²¹ It is, however, with the Chapter on "Sanctions and the Law" that the author resumes his own Odyssey across the world of meta-jurisprudence. And he poses for himself the difficult task of setting into some order of reason not only the diverse senses of the sanction notion, in which opposing positions like those of Aquinas and Kant on the one hand, and of Austin and Kelsen on the other, agree that "sanction" is an essential of law; but also seemingly related doctrinal successors (Lon Fuller on the one hand, and H.L.A. Hart on the other) who have lately thought sanction not to be essential.

This treatment of the sanction element in law is perhaps the most masterly and well-balanced segment of this closely reasoned book. It has an empathic and welcoming openness towards the ideas of others, even while building a frame of critical judgment well transcending the subjects chosen for discussion. It offers many precious insights, for instance, into the relation between powers and rights and duties, and the bearing of this on what may be called "facilitative"

21. For a longer statement, see HUMAN JUSTICE, *supra* note 5, at 303-13 (1965), and for an even longer (probably *too long*) one, Stone & Tarrello, *Justice, Language and Communication*, 14 VAND. L. REV. 331-80 (1960).

parts of a legal system.²² The chapter culminates in a courageous offer of six criteria by which together the author would characterize legal as against other norms.²³ And if we should still hanker after the simpler criteria which have been the stock-in-trade of lawyers and jurists for centuries, Professor Hall also tells us why we had better free ourselves of such hankerings.²⁴

V

The conclusions of Professor Hall's meta-jurisprudence are well drawn together in his final chapter entitled "Towards an Integrative Jurisprudence."²⁵ He takes his starting point from political scientist A. F. Bentley's *The Process of Government* of 1908. This is that law is activity of men, embodied in groups which tend to demand conformity by others as well as themselves, which has available the aid of certain specialist groups and organs of government to support its demands.²⁶ While the choice of Bentley as a main precursor of the American Neo-Realists is interesting, one wonders why this was preferred to Eugen Ehrlich's theses of similar import in his *Beiträge zur Theorie der Rechtsquellen* (1903), *Soziologie und Jurisprudenz* (1906) and especially his *Grundlegung der Soziologie des Rechts* in 1913. (Ehrlich was certainly a more potent influence on Roscoe Pound whose article *Law in Books and Law-in-Action*²⁷ is obviously a staging post for Hall's own central theme.) He traces his theme through Joseph Bingham, Jerome Frank, K. N. Llewellyn, and in parallel through certain parts of Max Weber's work.²⁸ Hall's own vision builds on, but it more embracing than, all of these. It is that the subject-matter of jurisprudential study is not "law" in the mere sense of rules, doctrines and principles of positive law. Nor is it "action" in the mere sense of "activities," or "behavior" or "processes" independent of human choices. It is "law-as-action" in which both "law" and "action," and the two conjoined, have a more precise though still quite wide meaning.

22. HALL, *supra* note 1, at 121-29.

23. *Id.* at 135-41.

24. *Id.* at 135-36. See my own refusal to offer any simple criteria, but only to designate a number of clusters of attributes in J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 177-84 (1964).

25. HALL, *supra* note 1, at 142-77.

26. *Id.* at 144.

27. 44 AM. L. REV. 12 (1910).

28. See HALL, *supra* note 1, at 146-49 and works cited therein. The author is of course aware of Ehrlich's related positions. See *e.g.*, *id.* at 159.

Law-as-action embraces for him legal rules, doctrines, and principles (legal precepts, in short) and also lawyers' theorizings about them, and the internalization of all these by men, for example by official decisionmakers. It also embraces the application of all these in the contexts of decisionmakers' knowledge, the circumstances of prior cases and the instant facts. It embraces, too, the influences of physical, biological and cultural forces which constitute the wider context of decisions.²⁹ These influences include "moral principles, personal philosophies, emotional attachments, understandings of scientific data at the particular time." In this framework, then, the components of "law-as-action" may be defined.

1. "Law" is employed in the sense of legal precepts and their theoretical constructs and elaborations, as internalized and used by persons acting in or on the "law-as-action."

2. The contexts include the physical, biological, social and cultural contexts, in which precepts arise, lawyers theorize and persons so act.

3. "Action" thus relevant is "reasoned" though "not wholly rational," and its internal mental elements are as important as its operation in the world. Hence, the actor's awareness, purposiveness, and motivation operative in the choices open to him are among such components.

4. The persons involved in "law-as-action" as the subject of Hall's "integrative jurisprudence" include not only law-related action of officials, but also patterns of conformity or violation towards which the official part of "law-as-action" is directed.³⁰ This draws in, necessarily, lay action and behavior as part of "law-as-action." Lay action and behavior figure not merely as the targets of directives issuing directly or indirectly through law, but also as part of the influences bearing on official action, whether as practice building towards custom, as pressures for particular changes or interpretations of law, or as unmanageable defiance of law in title of justice and conscience as in civil disobedience, or in terms of self-interested deviation or corruption.³¹

5. Amid these components, Professor Hall thinks the practice of lawyers, despite their designation as "officials of the Court," amounts

29. *Id.* at 153-54.

30. *Id.* at 155-58.

31. *See id.* at 159. The author offers in this regard interesting if somewhat artificial distinctions between "conformity," "obedience" and "compliance." *Id.* at 159-60.

merely to specialized assistance to laymen, officials, courts and legislators. Though not a separate *main* component of "law-as-action," it may wield great influence on how the "law-as-action" moves and is shaped.

The "law-as-action" thus conceived as the subject-matter of "integrative jurisprudence" has, in Professor Hall's view, a dynamic quality—that is, an inbuilt capacity for growth and change—lacking in most traditional jurisprudential models. He means more here than Kelsen apparently meant by asserting that "a legal system" is "dynamic" when its basic norm provides for delegations of norm-making power. That "dynamism" means merely that the legal order can be indefinitely concretized by delegates within the limits of formal consistency of inferior norms with higher ones.³² Even though the Kelsenite model may be *tolerant of the emergence of* creative imagination and invention in the course of exercise by competent persons of powers delegated from the basic norm, these qualities *are not built into the model itself*. It is otherwise, the author urges, with his own nearer-to-life model of "law-as-action."³³ His "law-as-action" permits us, he thinks, to see law in its structure and substantial growth in time, and not merely (as does Kelsen's model) its formal structure and substantial contents *at any one time*. It makes a due place for "past law," for the "present law" of the instant decision, and for "probable law," "potential law" and "emerging present law" as these may be foreshadowed for future decision in the rich complexity of "law-as-action."³⁴

VI

Even if it were not a part of his overall meta-jurisprudential theme, we would be indebted for Professor Hall's short but penetrating view in his final chapter of the much used but too little analysed notion of "overall effectiveness" as an essential attribute of law.³⁵ It leads to some rather clear conclusions (once they are pointed out!). One is that

"the effectiveness of law" is a simplistic symbol of what is actually a whole sweep of theories of action and theories of history. In some of those theories, law is only the product of social and eco-

32. *Id.* at 164.

33. *Id.* at 151-52, 164-67.

34. *Id.* at 167-68. As to Hermann Kantorowicz's related categories in 1908, see PROVINCE AND FUNCTION, *supra* note 11, at 745-46.

35. HALL, *supra* note 1, at 168-73.

conomic forces; in others, law is a patent, active instrument of social and economic change. One's view of the effectiveness of law reflects his position *vis-à-vis* those wider theories.³⁶

Still another relates back to his major preoccupation with the iusnaturalist-positivist entanglement:

[W]hen we ask about the effectiveness of law, are we enquiring about the effectiveness of rules that are recognized as law in legal positivism (which one?), or are we limiting the inquiry to such of those rules as are recognised as law in natural law philosophy (again, which one?).³⁷

And when modern social-psychological notions of "internalization" of rules come into play the tangle thickens even more. While we generally think of morally based precepts when we think of internalization, norms which are clearly not "moral" in any significant sense can (as the Nazi phenomenon showed) also be "internalized."³⁸

The implication from this, that the criterion of effectiveness as it concerns "law-as-action" involves ethical as well as factual matching, reflects back on the author's rejection of the positivist view of the meaning of "valid" law. This latter notion is addressed to the status of rules within a legal order, and as such refers to the logical relations of meanings contained in legal propositions. As soon as it is recognized that jurisprudence concerns not merely legal precepts, but "law-as-action" in the much wider sense above indicated, many other factors and issues, framed within matrices far wider and more varied than logic, demand elucidation and expression. Within the logical matrix, in particular, it may be admitted that attempts to deduce ought-conclusions from is-premises have failed, and that within it factual existence and values represent separate realms. But within the wider matrices relevant to "law-as-action" insistence on such sharp separation is misleading and obstructive to understanding. For "law-as-action" by its scope and nature entails the making of choices, and men necessarily tend to make choices *by reference to values*. In turn, these values tend to flourish and spread, or to wither and die away, as men argue to justify them and as men act or fail to act for the vindication of them.

VII

The capacity to sustain to a coherent climax so complex a meta-jurisprudential thesis as Jerome Hall has now presented is a rare one in

36. *Id.* at 171.

37. *Id.* at 172.

38. *Id.*

any generation. He has presented it with the wide sweep of learning and acute analytical power which the learned world has come to expect from him since his classic work on *Theft, Law and Society* in 1935. I would want to salute his achievement even if it had radically departed from major positions of my own. On most major points, however, I find myself in substantial agreement; though my selection of particular issues and positions for examination would (as already observed) probably have been rather different.

What major disagreement I have is by way of a kind of methodological caveat on this whole meta-jurisprudential enterprise. To set out the caveat in full I would have to add yet a fourth tier to my slightly quizzical three-tiered explanation of what jurisprudence is.³⁹ This would amount to writing a monograph on *meta-meta-jurisprudence*! Let me instead close with the merest prospectus of such an undertaking.

What Professor Hall's book has shown is that most jurists choose for their devotion a perspective on law which reflects what interests them most in it. Each then tends to neglect other perspectives and some even deny the factual or intellectual legitimacy of other perspectives. And even if they do not manifest such imperialism, their partial perspective acts to blind them to aspects of law which, had they been attentive to them, would have given pause to some perceptions even within their limited perspectives. To overcome such difficulties Professor Hall would have all jurists attend to all perspectives of law, which means that they must see the subject-matter of law in all the fullness of its actuality in society. This law-in-its-fullness is what he means by "law-as-action," and the study and teaching of this fullness is, for the author, the final "integrative jurisprudence."

It is at this point that I would want to set Peleon on Ossa—or rather meta- on meta-! I would want to say that, however it be in final epistemology, we cannot really expect this range of concern and vision from everyone who chooses to interest himself in jurisprudence. And even if we could, we would have to expect a good deal of the resulting work to be lacking in the basic expertises which would be involved in approaching all the numerous aspects of the fullness of "law-as-action." So that, without directly challenging Professor Hall's basic thesis, I would wish to question whether a safer and more promising (even if untidier) road to "integration" of jurisprudence may not be our continuing to make do with partial perspectives competently

39. See discussion in the opening paragraphs of this article.

pursued on the basis of particular interests, but then brought together, as far as we can, by more efficient and more openminded mutual correction and supplementation.

Certainly, three considerations press the present writer this way. First, it would avoid the dilution of quality which would (as just indicated) otherwise result from demands for a range of expertises so excessive as to be counter-productive. Second, it would limit "the battle of the perspectives" to areas where battle was really necessary to defeat a limited perspective imperialistically posing as a comprehensive one. Imperialistic struggles are wasteful of energy even when they are thus necessary; and always they stir up retaliatory wars, in which both protagonists claim to fight in self-defense against unwarranted aggression. Such battles may be a main reason why, for example, programs such as those of sociological jurisprudence for the integration of the social sciences, seem open to the jibe that they resemble great symphony orchestras which have spent half-a-century or more tuning their instruments, but have not yet begun to play. Third, and not least, the sociology of knowledge does not warrant the hope that intellectuals can, except in very long term, be diverted from their chosen life-concerns by mere redefinitions, however cogent, of fields of knowledge.

So far as teaching is concerned I would want to add two further points. One is that the limitations of a scholar are also the limitations of his teaching. So that even if the novice *could* receive knowledge of the fullness of "law-as-action" all at once, there would be very few teachers at whose feet he could fruitfully pursue his enquiries. The other is that a field of knowledge as wide as that of "law-as-action" must in any case be brought down to the concerns of the law student.

While, therefore, the teacher may still applaud O. W. Holmes Jr.'s point that the aim must be to show "the rational connection between your fact and the frame of the Universe," and that "to be master of any branch of knowledge you must master those which be next to it,"⁴⁰ the teacher of jurisprudence only begins with that applause. Professor Hall and the present writer have been agreed, ever since our days together at Harvard, in rejecting the atomization of the subject in terms of a series of "schools" (or "perspectives" as he now terms them) such as historical jurisprudence, philosophical jurisprudence, sociolog-

40. Holmes, *The Law as a Profession*, 20 AM. L. REV. 741, 742 (1886).

ical jurisprudence, psychological jurisprudence, and the like.⁴¹ The tripartite division of his *Readings on Jurisprudence* (1938) and that of my own writing after 1944⁴² also showed this approximation of thought. My own divisions were: (1) Law, Logic and Reasoning; (2) Law and Justice; and (3) Law and Society. It was and remains my view that the question of classification here is not mainly (if at all) a matter either of logic or philosophy, but an essentially practical one. How can we transmit knowledge about so wide a field in a way permitting coherent exposition, free from excessive duplication or atomization, and in a manner capable, by its relevance to the world they work in, of engaging the attention of lawyers and law students? Thirty years of teaching since I made the above proposal have confirmed me in the view that the above division not only conduces to clarity, and to a closer impact of teaching upon the problems of the present age, but is also in line with whatever can be done towards the unification of the social sciences.

To maintain this division for the purpose of exposition, moreover, seems to me quite consistent with the recognition for which Professor Hall's latest book calls, of the final unitary nature of "law-as-action." What it does is add a caveat about the practical problems of handling the vast and various bodies of knowledge concerning it. I believe that it is happily no longer necessary to obscure the various aspects of jurisprudential concern about "law-as-action," with a contentious literature about the primary or even exclusive *imperium* of any one of them. We must try to take what insights we can from all approaches and perspectives. And we must marshall their data in a way which gives access to these insights. So conceived, jurisprudence may yet still contribute much to reduce the tension between what society demands of lawyers and what legal education can help them to give.

41. Cf. HALL, *supra* note 1, at 25-43; J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 16-20 (1964); PROVINCE AND FUNCTION, *supra* note 11, ch. 1; Stone, *The Province of Jurisprudence Redetermined—I*, 7 MOD. L. REV. 97 (1944); Stone, *The Province of Jurisprudence Redetermined—II*, 7 MOD. L. REV. 177 (1944).

42. See citations note 41 *supra*.