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by Jerome Hall. The Bobbs-Merrill Company, Inc.,
Indianapolis, 1949. Pp. 146. \$2.00.

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Book Reviews

LIVING LAW OF DEMOCRATIC SOCIETY, by Jerome Hall. The Bobbs-Merrill Company, Inc., Indianapolis, 1949. Pp. 146. \$2.00.

Professor Hall's thesis is that the definition of *positive* law should be limited to (1) norms for the exercise of State power, (2) ethically valid and democratically ascertained, (3) but only so far and in such manner as these norms are institutionalized so as to be cultural fact; with all three components (formal, ethical, and actual) being regarded as of the essence of the definition. The little book consists of three parts, "Law and Legal Methods," "Law as Valuation," and "Law as Cultural Fact," augmented versions of lectures given in 1947 at Pacific University. Its few pages are most carefully written.

The first part of Professor Hall's definition is admittedly expressive of that traditionally referred to as "commands or rules of conduct imposed and enforced by the sovereign." "Enforced commands or rules" become "power norms" (hypothetical—imperative judgments) and "sovereign" gives way to "State." The author's preference for his phraseology is principally fourfold. It defines positive law in the terminology currently most in use in the non-legal social sciences. It includes customary law, whereas definitions in terms of "imposition of rules" or "commands" exclude it. Again, it permits the clear differentiation between positive law (State power norms) and other State norms for the enactment, interpretation, and administration of law. Finally, the word "State" is more inclusive of the various forms of the subject political institution than is the word "sovereign" with its monarchial connotation. The merits of this part of the definition, as Professor Hall admits, are terminological rather than substantive, for it adds nothing to the previous knowledge of law. But language advantage can be of tremendous importance in the facilitation of legal science (the systematic exposition of the knowledge of law, which Professor Hall carefully distinguishes from law itself) and its integration with other social sciences.

The third component of the definition is based on the idea that positive law *in its plenitude or totality* cannot exist except as a fusion of mind and fact. The contention is that the generalization which is the norm (mental element) cannot have objec-

tive) meaning except in terms of the conduct of persons in the presence of the norm (factual element), that law includes the behavior in response to the normative stimulus, and that the two cannot be separated if the full impact of the law is to be realized. The contention is not merely that the meaning of a law is difficult or even impossible to communicate fully and accurately; nor is it a denial of the practical necessity, outside of legal science, of separating the norm (formal law) from its interpretation and application (factual, actual, or living law); but it is that norm and fact are both elements of the law *as it exists* and that *legal science* (not necessarily legal practice) cannot consider the one or the other as law in its totality. Professor Hall believes this view of positive law effectively refutes "positivism" on one extreme and "realism" on the other as theories of the complete essence of law, and at the same time shows the emphasis of each to be an aspect of the totality of law. As a descriptive definition of the total effect of positive law at any one time it is no doubt correct. This is its principal merit, for it permits the easy inclusion of the phenomena of change in interpretation and application, of desuetude and obsolescence, which otherwise must be explained in terms which clash with the idea of law defined formally.

It is with the bipartite second component of the definition that the reviewer has great difficulty. Professor Hall observes that, at least since the Stoics, ethical validity has formed a part of the essence of positive law in all systems of jurisprudence except those denying the possibility of ethical science. Then arguing that moral judgments and therefore ethical science are possible, he concludes that this insight must be correct and accepts ethical validity as essential to positive law. This must not be misunderstood. Professor Hall does not deny that formal and even actual State power norms may be opposed to ethical principle, but does deny that such norms should be dignified by the term "law."

For Professor Hall, who rejects metaphysics and (at least for the purposes of his monograph) faith as sources of first principles, "justice" consists of the "better answers" to moral problems, which answers become "objectively valid" if "rationally defensible," that is, most persuasive after investigation, discussion, and reflection. This of course does not provide a foundation for ethical science, for the end toward which man should direct his activities is not given. Nor does his observation, that law

itself represents previous evaluations of conduct and in turn influences subsequent evaluations, provide a guide, for an ultimate criterion is still lacking. But Professor Hall seems to have faith in method, though the purpose of the method be left unexplained. Arguing that the current political ideal has formed, again at least since the time of the Stoics, a part of the essence of positive law (in the sense that such ideal should conform to "justice," "virtue" or "natural law"), and expressing the belief that the democratic ideal, self-rule, is the highest political form achievable by man, he concludes that self-rule must form a part of the essence of law. Certainly the democratic form of government would seem to be that most consistent with man's nature. It also may be that self-rule is less likely to lead to excesses like Nazism or Communism, which Professor Hall dreads as much as any person. To that extent a plea for self-rule is more than understandable. But if I understand Professor Hall correctly, he does not actually separate the ethical quality of law from its democratic or non-democratic formulation. In his analysis, democratically formulated law has intrinsic value because it is the product of the form of government best suited to ascertain the "best answers" to human problems; that is, because there is no better way of ascertaining the ethically valid, law established by truly democratic processes must be "rationally the most defensible," and therefore "objectively valid."

In the last analysis, Professor Hall's third component must be regarded as another of those attempts, always necessarily futile, to construct an ethical science without first principles. It would be better if it were not necessary to be adversely critical of the effort of so serious a scholar as Professor Hall. But there is no way of judging the value of any activity as *human activity* (that it, not merely in terms of immediate purpose), which is necessarily the essence of ethics, unless the purpose of man can be ascertained. This is the province of metaphysics and faith. Those who can accept neither must be content to remain aimless impulses to action without right to speak of values.

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TAX PLANNING FOR ESTATES, by William J. Bowie. Nashville: The Vanderbilt University Press, 1949. Pp. 93, \$2.00.

My own liking for this little book is shown by the fact that I placed it on the list of books for the students in the Estate

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