

REVIEWS

SOVEREIGNTY. AN INQUIRY INTO THE POLITICAL GOOD. By Bertrand de Jouvenel. Translated by J. F. Huntington. Chicago: The University of Chicago Press, 1957. Pp. xiv, 320. \$4.50.

ANY study of sovereignty must face the paradox of political and legal obligation. This paradox can be very simply put: laws are made by, yet they measure, men. Their man-made character is obvious. It is equally evident that in any judicial decision, particularly in a criminal case in which the defendant is sentenced to death, the laws of political and legal science measure men. How is it possible for man thus to be measured by something which he himself makes? Does it not almost verge on the self-contradictory for man to make something which obligates him, as in the foregoing example, to eliminate himself from existence?

The paradox appears in a more technical form when stated in terms of the methods of natural science. As is evident from the example of the criminal case, the laws of political and legal science are normative in the sense that they prescribe an "ought" to which the criminal is obligated to conform; they do not conform to the "is" of his *de facto* behavior. The situation is like that of an astronomer who, having a theory that planets move about the sun in rectangular orbits, upon finding the facts to be that planets move in elliptical orbits, nevertheless preserved the laws of his initial theory by affirming that facts out of accord with rectangular orbital motion ought not to be, and then, as if even this were not enough, proceeded to remove the orbital motions. Certainly one would take a rather dim view of the scientific claims of such an astronomer and his laws of planetary motion. Yet, the behavior and laws of such an astronomer are precisely like those of the political and legal scientist and the judge. How, then, can politics and law be called sciences? But if the laws of these social subjects are not scientific, having no objective reference by which one can significantly say they are empirically confirmed and hence generally valid, even for the criminal, why is there any obligation upon the criminal or anybody else to accept their authority and to be measured by them? Why can they not be ignored and dismissed after the manner of any arbitrarily stipulated or fanciful hypothesis in the natural sciences which is out of accord with the facts?

The importance of De Jouvenel's recent study is that it directs itself to these paradoxical questions, even though the author has not put his problem in such a form. To this undertaking he brings an exceptional background. As president of an economic research institute in Paris, he is not unmindful of the inductive data of the social sciences and the methods of empirical science. A Frenchman who, like any student educated in France, has read the mathe-

matical physicist and philosopher Descartes, he knows further that science is not merely the observation and collection of facts but also the description, analysis and interpretation of these facts in terms of a theory so precisely stated that what it affirms is both clear and distinct. Any theory purporting to be scientific may seem, to uncritical and unprecise minds, to fit the facts and hence to be a scientific theory if it is stated in indistinct terms; for vagueness permits the theory to be stretched or interpreted to fit any facts. Only by requiring clarity and distinctness in the statement of a scientific theory can any appeal to facts possibly show the theory to be confirmed or false. De Jouvenel is well aware that such a clearly stated theory is just as important as the gathering of inductive data if politics and law are to merit being called sciences. Furthermore, except for American legal realism, he has a technical knowledge of the major traditional and contemporary ethical and legal theories and the philosophers from which each derives. Finally, he appreciates the semantic and logical issues that are inescapable in judging the merits of any ethical, legal or political theory, even though his study does not exhibit the mastery of philosophical analysis or symbolic logic necessary to a decisive resolution of these issues.

Clearly, a study with such range of approach and competence demands serious attention. Its main thesis is that the foregoing paradoxes are real only for certain ethical, legal and political theories. The theories for which the paradoxes are not resolvable, however, are those concerning political sovereignty which modern political and legal science has come to accept. Hence, the paradoxes can be resolved only by correcting the theoretical assumptions of traditional modern political and legal science.

Let no one suppose that De Jouvenel's conclusions are of merely academic interest. The initial thesis of his entire study is that modern theoretical errors in the social sciences are taking even the liberal democratic peoples of the free world to tyranny. His reading of medieval and modern history, supported with references to the texts, is that the modern world has substituted, both in theory and increasingly in fact, a tyranny of the political legislative sovereign over the individual for a supposed tyranny of the medieval political monarch which, in theory and to a real extent in fact, never existed. This has occurred through a jurisprudential definition of the word "just," after the manner of the positivistic Hobbes and Austin, as the will of the political sovereign which the scientific jurist merely declares, and the consequent affirmation that an unjust political sovereign cannot exist.

So far as the United States is concerned, this analysis means that there is no contemporary theory of politics and law more incompatible with the basic results of De Jouvenel's study than legal positivism. This theory, introduced into the United States by Thayer of the Harvard Law School and expounded recently by Judge Learned Hand in his Holmes lectures on the bill of rights at the same school,¹ is represented by that group of Justices of the Supreme Court who have been referred to in the press as centering around Mr. Justice

1. HAND, *THE BILL OF RIGHTS* (1958).

Frankfurter.² De Jouvenel's analysis cuts, therefore, to the heart of the contemporary philosophical issue between the Frankfurter school and the position represented by Chief Justice Warren and Justices Black and Douglas. This philosophical issue concerns the proper interpretation of the bill of rights in civil liberty cases.

The philosophy of the Chief Justice's group is that in the case of civil liberties, the bill of rights is to be interpreted as law. From this it follows that if the political sovereign—the democratically elected legislature—passes a statute affecting individual civil liberties whose substance is incompatible with the bill of rights, a federal judge who has sworn to uphold the Constitution must declare the statute unconstitutional. Clearly this is a philosophy in which the political sovereign, as well as any one of his subjects, is measured by the law. The philosophy of the other group, as unequivocally stated by Hobbes, Austin and Learned Hand, is that law is the will or command of the political sovereign and hence to talk about an unjust political sovereign is self-contradictory. It follows, as Hobbes, Austin and Hand make equally clear, that the political sovereign can place no legal restrictions whatever upon himself and, as Hand states with respect to civil liberties as well as new social legislation, that the bill of rights must be interpreted not as law but merely as "admonitions to forbearance,"³ mere moral advice to the legislative majority. Consequently, should the political sovereign ignore the moral advice by passing a statute affecting civil liberties incompatible with the bill of rights, federal courts must declare this statute to be law.

Concretely, the difference between these two philosophies is this: if in a burst of religious fervor, not to mention demagoguery, the democratic political sovereign or one of his vaguely authorized committee investigators made it a crime, or interpreted his legislative authorization as making it a crime, for a person to have the religious belief of, let us say, a Quaker, the philosophy of Warren, Black and Douglas requires them to interpret this statute as unconstitutional; whereas the philosophy of Hobbes, Austin, Hand—and Frankfurter when he can morally stomach his Harvard Law School legal positivism—requires the judge to declare the legislature's statute and its committeeman's behavior law. It is precisely the latter philosophy of political and legal institutions to which De Jouvenel refers when he says that it puts the sovereign completely above the law and thereby carries the modern world to tyranny.

De Jouvenel demonstrates also that acceptance of this modern positivistic philosophy of government and law has led modern legal historians to a completely false account of the medieval monarch's status before the law. This erroneous historical account portrays the medieval ruler, like the modern legal positivist's political sovereign, as completely above the law. De Jouvenel shows that the historical documents simply do not support this thesis. To be sure, the

2. See Krock, *Justice Brennan as a New 'Swing Man,'* N.Y. Times, April 3, 1958, p. 30, col. 5. See also Lewis, *Conflict in the Court,* N.Y. Times, April 3, 1958, p. 17, col. 2.

3. HAND, *THE SPIRIT OF LIBERTY* 204 (1953).

medieval monarch had more legislative rights than his subjects, but those legal rights his subjects did possess the ruler could not touch if he were to be legally just.

At this point, the reader may well grant the theoretical accuracy of De Jouvenel's evaluation but question its significance as a matter of medieval practice. The author answers by pointing to the patent fact of the "fortunate powerlessness of kings."⁴ He means that a king is merely a single person, quite unlike the modern legislature whose majority is able to brush individual rights of dissenters aside and to draw increasing physical power to itself. Thus, where the modern individual is helpless before the absolute theoretical power and majority physical power of the political sovereign, the medieval political sovereign, being only one person, had to enter into a contractual agreement with his subjects under which, in return for their physical support of him, he guaranteed protection of those legal rights in the contract which were theirs. In this sense, De Jouvenel's book is one of the strongest recent arguments for a constitutional monarch that I have read.

It does not follow, however, that this is De Jouvenel's political theory. In fact, he does not advocate a constitutional monarchy even though it is preferable to a democratic tyranny. But he does make clear that in moving from the medieval monarch to the modern, legally positivistic, democratic and political community, we have gained greater democracy with respect to the legislative character of the political sovereign at the very grave cost of putting the absolutely sovereign legislature completely above the law and transforming it into an unqualified tyrant so far as the civil liberties and other personal rights of minority groups, dissenters, or the individual are concerned.

This tyranny does not affect merely those who disagree with the substantive content of majority-approved statutes of the legislative political sovereign. When the legislative majority in a burst of enthusiasm, again not to mention demagoguery, makes illegal certain personal, religious or political beliefs, or even scientifically verified conclusions about foreign countries, the individual legislator's freedom of choice in any future voting risks intimidation. When this occurs, the vote of the majority becomes spurious, democratic in name only. This is precisely why the majority votes in tyrannical governments today, which show 98½ per cent of the electorate in support of the government in any election or legislative action, are correctly taken as spurious. Tyranny is no less tyrannical when fathered by a "democratic" legislature. There is no escape, therefore, from De Jouvenel's conclusion that to put the political sovereign above the law, even if that political sovereign be identified with the majority in a democratically elected legislature, is to have tyranny.

Although he does not refer to the John Locke of *Essays on the Law of Nature*, *A Letter Concerning Toleration* and the political classic, *Of Civil Government*, or to Jefferson and the founding fathers of the United States' political and legal institutions, we can now see why all these men insisted,

4. P. 204.

against Hobbes, that a political sovereign, even a democratically constituted political sovereign, cannot legally do certain things without contradicting the very reason for its existence.⁵ The sovereign, for example, cannot foreclose an individual's legal right to his own religious belief or his elemental freedom to express his honest beliefs and convictions in his voting. We can also understand why Jefferson and Marshall, having seen the tyranny of democratic political sovereigns in Europe, witnessed demagoguery in the Virginia legislature and, in Marshall's case, seen the mob stone General Washington, feared a tyranny of the legislative branch of the government as much as a tyranny of the executive or judiciary.⁶ Clear, too, is the reason why Jefferson and the founding fathers insisted upon a "mixed" government of checks and balances in which political sovereignty, not to be trusted in a single department, was distributed among the legislative, executive and judicial branches, so that the limited sovereignty of one branch could serve as a check upon any tendency of another branch to usurp absolute power. Such considerations undoubtedly motivated Jefferson, upon receiving the first draft of the Constitution of the United States, to write President Washington and his friend Madison, insisting that a bill of rights must be added. For without a bill of rights interpreted as law, of which the judiciary is custodian, the natural tendency of a legislative majority to usurp absolute power remains unchecked. In moments of unreflective fear or enthusiasm, the legislature can gradually strip the individual of his personal beliefs and liberties by proscribing certain ideas. The essence, consequently, of the mixed theory of democratic government is that a bill of rights interpreted merely as moral advice, important as it is, is not enough.

Viewed in these terms, the philosophy of Warren, Douglas and Black with respect to civil liberties can be described as follows: their legal philosophy extends to the modern democratic political sovereign the same measurement by law to which the medieval political sovereign was subject. Their legal philosophy of civil liberties is the same as that of the American founding fathers.

The reasons for De Jouvenel's rejection of medieval religious, political and legal institutions, notwithstanding their measurement of the political sovereign by law, are equally important. His reasons provide part at least of the resolution of the paradoxes of political and legal obligation.

The error of medieval legal thinking was its supposition, following Plato and the medieval Christian church, and also St. Thomas, that: (a) there is only one cognitive theory of the content of the legal norms which measure both the political sovereign and his subjects; and (b) all men using cognitive scientific and philosophic methods must come to the same conclusion about what this theory is. This supposition brought about a tyranny of a different, but nonethe-

5. In this connection see *Adler v. Board of Educ.*, 342 U.S. 485, 508-11 (1952) (dissenting opinion by Douglas, J.).

6. Beveridge, *John Marshall—His Personality and Development*, in *THE MARSHALL READER* 34 (1955).

less patently evil, kind. If any man using cognitive scientific and philosophical methods can know with certainty the single scientifically-verified philosophical theory which defines the content of the norms which in turn define a just political sovereign, then anyone who dissents from this absolutely certain orthodox doctrine is cognitively unscientific and hence, in this sense, immoral. Of this belief was born the medieval inquisition, as today the tyranny of Communists with their absolute certainty of the one and only true doctrine. The error both of the present Communists and of the medieval theory of the just sovereign is that the finite human mind, using cognitive scientific and philosophical methods, simply does not have the capacity to arrive with complete certitude at the unique theory of the normative goal of all ethical, political and legal endeavor.

De Jouvenel sees, therefore, that modern ethical, legal and political theory and practice, for all its reinforcement of tyranny, has something to teach the Western mind. Because of the finiteness of human knowledge, even the most rigorous and empirically inclusive scientific and philosophical theories account for only some of the facts of nature and human experience; hence, there are multiple reasonable theories of the facts of nature and the intrinsic goal values of political, moral and legal action. A theory of good government and just law for measuring the political sovereign and his subjects which is in accord with scientific and philosophical cognitive methods must therefore have the content of an open pluralistic, not a closed monistic and monolithic, society. Here, he agrees with Professor Karl Popper and the thesis of the latter's *The Open Society and Its Enemies*. The second lesson of modern ethical, legal and political theory is the necessity for the subjective "for-me-ness" of any ethical and legal norm. Unless an ethical and legal rule is my norm, its ethical and legal obligation has no meaning with respect to me. There is no meaning, also, to my obligation to accept it as a measurement of me. This is the truth of contemporary existential philosophy and the major contribution to Western religious, political and legal theory of the Protestant Reformation. From the required "for-me-ness" of any legal norm which obligates me to be measured by it, follows the necessity that a law measuring one and all have its basis in the consent of one and all. In short, the obligatory character of law logically implies an implicit contract.

It is an error, therefore, as De Jouvenel notes, to interpret the natural-law theory which roots law in an initial contract freely made by its subjects, as an empirical proposition about an actual historical event. Instead, the contractual theory of the origin of government and law is the logical prerequisite of any obligation of its subjects to be measured by any political and legal system.

Without a contract, explicit or implicit, the political sovereign is a tyrant outside the law, and without the logically implicit consent of all to the contract, the contract's norms bind neither sovereign nor subject. This assent, to be sure, may be given only implicitly through one's acceptance of the social norms endorsed by the society in which one is immersed and by one's insistence upon the protection of the law should another violate one's own legal rights. Thus,

the murderer sent to the electric chair may not at the moment consent to what is being done to him, but that same murderer would undoubtedly appeal to the law of his country in cases where the law favors his actions, or were anyone else to do to his own wife or children what he did to his victim.

Much more is involved than the implicit, or what the anthropologists call the covert, norms of one's own culture. To make this clear, however, would require an analysis of the technical meaning of Sir Henry Maine's distinction between the law of "contract" and the law of "status"⁷ and exceed the limitations of De Jouvenel's study.

His findings nevertheless suggest a technical theory of law. It is best approached by a consideration of Kelsen's improvement over the legal positivism of Hobbes, Austin and Hand and by analysis of the problems left by Kelsen's version of modern legal positivism. Kelsen saw quite correctly that Austin's legal positivism failed to provide the theoretical assumptions necessary to send the criminal to the electric chair even when the criminal's actual behavior did not conform to the political sovereign's commands and the political sovereign had physical power to bring pain or evil upon a dissenter. Educated on the European continent, Kelsen had learned from Kant, as recent Anglo-American ethical and legal theorists have learned from Hume, that a syllogistic conclusion which is a measuring and an imperative sentence cannot be derived from premises which are indicative sentences merely describing what is. In Hume's well known words:

"In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it."⁸

It is Kelsen's great merit to have seen, and this is the point of his essay, "Causality and Imputation,"⁹ that precisely the foregoing fallacy, noted by Kant as well as Hume, occurs in every judicial judgment interpreted according to Anglo-American Austinian legal positivism or American legal realism. The judge's concluding statement which sends the murderer to the electric chair is most obviously an imperative ought or obligatory sentence, yet all that Austinian legal positivism or American legal realism give the judge for his premises are indicative sentences scientifically describing an "is." In the

7. MAINE, *ANCIENT LAW* 181-82 (1930).

8. 2 HUME, *A TREATISE OF HUMAN NATURE* 245-46 (Green & Grose ed. 1874).

9. Kelsen, *Causality and Imputation*, in *WHAT IS JUSTICE* 324 (1957).

Holmesian predictive version of American legal realism, the indicative sentences of the judge's or the legal scientist's premises are merely a predicted "is" inferred from a present "is"; in the view of Austin and Judge Hand, the indicative sentences are merely the statutes handed to the judge by the political sovereign who is above the law and the "is" of the sovereign's physical power to inflict pain on those who disagree with him. Clearly, from such indicative sentences one cannot derive the imperative, obligatory language of a court's judgment.

Kelsen's way of avoiding this fallacy is well known. To remain a legal positivist and preserve the conception of law as the science of the positive law, he saw that one basic ethical premise had to be assumed; for without at least one imperative obligatory sentence in his premises, the judge—if he was a positivist or American legal realist—could never arrive at imperative, obligatory language in his final judgment. This ethical premise, which Kelsen called the *Grundnorm* or "the basic norm," is that "the positive law ought to be obeyed."¹⁰

One important consequence of including this minimal imperative premise distinguishes Kelsen's legal positivism from Austin's. Since no mere physical "is" can give an "ought," the validity of law centers in its ethical *Grundnorm* and not, as for Austin, in the indicative sentence physical power of the political sovereign to enforce his command. Immediately the policeman's club becomes not the source of obligation but merely the instrument by which an ethical "ought" is administered. Forthwith the obligation to be measured by the positive law laid down in the first constitution is not physical but ethical. Clearly, De Jouvenel's legal theory is of this ethical kind.

Has either Kelsen or De Jouvenel established his thesis that government and law are sciences? If De Jouvenel's method of justifying a court's judgment is like Kelsen's—and De Jouvenel is not clear on this point—he, like Kelsen, provides the judge with sufficient premises to warrant his uttering the imperative language of his final judgment. But what of the scientific validity of the two premises which Kelsen has introduced? Certainly, no theory is customarily regarded as scientific unless an empirical method for confirming its premises is provided. Merely to assume such premises and show that they are sufficient logically to justify the judicial decision is not enough. This inadequacy becomes evident when one asks the following questions: (1) why the particular ethical, political and legal philosophy of the norms of the first constitution? (2) how does one verify empirically the ethical *Grundnorm*, "the positive law of the first constitution ought to be obeyed"? (3) does not the very nature of any imperative sentence, such as "Shoulder arms" or "Go to the electric chair," make talk about its empirical truth or falsity nonsensical?

To the first question Kelsen answers in terms of "efficacy." To the third, he would answer in the affirmative, agreeing with the noncognitivists who point out that to talk about verifying empirically the imperative sentences of

10. KELSEN, GENERAL THEORY OF LAW AND STATE 111 (1945).

political or legal science is absurd. In other words, given a goal value, a science of political and legally instrumental values is meaningful, but a science of intrinsic or goal values is not.

Obviously, De Jouvenel's legal and political conclusions will not permit such answers, for he affirms that a political and legal theory of the normative content of the first constitution which places the political sovereign above the law involves not merely error but is also "evil." How, then, does he deal with the three questions posed above?

We can begin by examining his reason for believing any political theory erroneous that places the political sovereign above the law. He feels that such a theory commits the error which Whitehead has called the "fallacy of misplaced concreteness."¹¹ This fallacy confuses an abstract constructed entity of thought with a concrete element of fact. Any reader can prove that the Anglo-American Austinian legal positivist commits this fallacy by asking a representative of this school to describe concretely, within the legal system of the United States, where and what the political sovereign is. Some will locate "him" in the federal legislature. Others will identify the sovereign's locus as the Congress and the independent legislatures of the separate states when, as in one method of constitutional amendment, action is required both by the federal legislature and a specific number of independent states. On either answer, no Justice of the Supreme Court, or at least not the legal-positivist minded Justice Frankfurter, should have voted for the Court's decision on segregation in education, since the government had never passed a statute making it a crime for a state to prescribe segregated education. On the second interpretation, moreover, the problem arises of determining where sovereignty lies in a conflict of judgment between the state legislatures and the federal government. To avoid this difficulty, still other legal positivists will locate the political sovereign in the members of the original constitutional convention. Others will find it, contrary to Austin, in the American people as a whole. These different answers show quite clearly that De Jouvenel is correct when he refers to the legal positivists' political sovereign as a fictive entity. He is correct also when he speaks of "the fictive person in whose name we are governed."¹²

It should be noted, however, that law cannot meet the social needs of today's world without fictive entities. Any modern corporation is such an entity. So is any modern state when considered as a political and legal institution. Similarly, mathematical physics would not have attained its present dimensions without fictive entities, or what contemporary theoretical physicists and philosophers of science call "constructs." The error is not, as De Jouvenel suggests, in the introduction of theoretically constructed entities, for their introduction constitutes the genius of Western mathematical physics and of Western legal science in its law of contract form. Error arises only when properties appropriate for concrete entities are assigned to legal constructs, and conversely.

What he should have said, therefore, is that the legal positivist's political

11. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 75 (1954).

12. P. 200.

sovereign is a legal construct. Had he done so, he would have made his case even more decisively. For the scientific meaning of any constructed scientific object is precisely that it has no theoretical meaning apart from the axiomatically proposed laws which constitute its construction. Hence, once it is noted that the modern legal positivist's political sovereign is a constructed rather than concrete legal entity, talk about such a legal sovereign being above the law is self-contradictory.

Contemporary Anglo-American law contains many muddles because of the failure of judges, lawyers and law teachers to distinguish between concrete entities which do have a legal meaning apart from the legal rules in which they appear as instances and constructed legal entities which do not. This error has been prevalent in British and American corporation law.¹³ The mistakes of the pre-1932 Supreme Court in declaring unconstitutional child labor laws affecting fictive legal entities similarly stem from the confusion of rights of concrete individuals to their own religious and political beliefs, which exist antecedent to the construction of any political or legal institution, with legally constructed entities and their rights, and in attributing to the latter the prescriptive rules of the bill of rights which are appropriate only to the former.

The foregoing demonstration of the way in which cognitive knowledge and distinctions in epistemology and in the philosophy of natural science enable one to choose in a cognitively significant manner among differing theories of the norms of a first constitution is exceedingly important. It suggests that the criterion of the prescriptive, imperative measuring sentences of the social sciences is scientifically verified theory of that which is epistemologically meaningful in other sciences. Curiously, however, De Jouvenel misses this point, just as he confuses the use of fictive entities with their abuse.

Another clue to his method of making the imperative measuring sentences of politics and law scientifically verifiable appears near the beginning of his study in this sentence: "We reject utterly both . . . theories [of political association]—domination from without and voluntary association; our own theory is that of association brought about by the summons of a man."¹⁴ By the former of the two rejected theories he means legal positivism and its affirmation that law is just solely because it is the will of a political sovereign having the external physical power to enforce his commands. By the theory of voluntary association he means the thesis that people converge spontaneously and disjunctively to create a political and legal system whose authority they accept as the normative measurement of themselves. His own theory is that voluntary association happens only under the leadership of one or a very few men who, by the vigor and decisiveness of their personalities and by debate and other means, persuade the people to accept the leader's proposed norms as their own. Jefferson is an American example. This, I take it, would be De Jouvenel's answer to our Kelsenian question: why the first constitution?

13. I am indebted to my colleague on the faculty of the Yale Law School, Professor Francis W. Coker, Jr., for calling this development to my attention.

14. P. 29.

By his thesis, also, the norms of the first constitution retain their efficacy only so long as successive leaders of the political community revere the old norms and embody them and their symbols in their own speech and deeds. The role of religion in this process of keeping the people receptive to self-measurement by traditional norms is also noted.

This thesis is a distinct advance over the usual theories of political and legal obligation. Even so, the crucial question remains and requires an answer if it is to be maintained that law and politics are sciences and that intrinsic or goal values as well as instrumental values can be determined by the cognitive methods of empirical science. The question must be asked: what is the cognitive method by which the leader, or the few leaders, determine the intrinsic goal values that are to be put in the first constitution? What also of the imperative premise, "the positive law of the first constitution ought to be obeyed"?

Again we are back with the inescapable question, whether speaking of an imperative sentence as empirically true or false is meaningless. If so, is it not sheer nonsense, as the noncognitivists Stevenson, Ayer, Hägerström and Alf Ross maintain, to refer to government and law as sciences?

Certainly there is no government or law without judgments by political and judicial officials such as: "You ought to have conformed your *de facto* behavior to the normative content of the positive law; and since the facts of the case have established beyond a reasonable doubt that you did not so conform, I command that you be put to death as the positive law prescribes." Clearly the latter sentence is imperative and, as Kelsen has shown, can be generalized for any political or legal decision into the single imputative sentence, "The positive law ought to be obeyed," and its equivalent imperative sentence, "Obey the positive law." Now, the cognitive methods of empirical science can reveal the meaning of the positive articles of the first constitution and the positive statutes of the present political sovereign. Similarly, empirical scientific methods can determine whether the government has the physical policemen, jailers and electrical instruments necessary to put the convicted criminal to death. But what possible meaning is there to asking whether a prescriptive or imperative sentence such as "Shoulder arms," "Obey the positive law" or "Go to the electric chair" is empirically true or false, as one must ask if one claims that the policy decisions of statesmen and the judgments of judges are validated by the methods of empirical science?

Contemporary sociological jurists, such as Lasswell and McDougal, who emphasize the centrality of policy-determining decisions in "the political and legal process," and who at the same time describe their approach as a "policy-forming science," could well reflect on the foregoing question.¹⁵ If the non-cognitivists in ethics and law are correct, and sociological jurists have by no means shown them incorrect, to speak of "policy-forming science" is nonsense, since the end product of a policy-making political decision, as of any judicial

15. See Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

decision, is a prescriptive "ought" imperative sentence, and scientific method is meaningfully applied only to descriptive indicative sentences.

De Jouvenel is aware of the noncognitivists' thesis; he explicitly distinguishes indicative from imperative sentences and faces the difficulty which this distinction raises. His method of preserving the cognitive character of politics and law is not clear, however.

Sometimes he suggests that the method of preservation is that of an empirical study of history. But clearly, historical method produces merely indicative sentences about a sequence of past instances of an "is"; it cannot give a prescriptive "ought to be." Nor does it provide any criterion for saying, as he does, that the medieval theory of the relation of the political sovereign to law is "more true" or "better than" modern positivistic theory. One theory is as well confirmed by the empirical methods of historical science as the other.

He states also, again following his historical method, that "it would be a mistake to regard these theories as causes; they are, more truly, consequences."¹⁶ But if this is the case, each theory of sovereignty had to be and we are left again with nothing but an "is." On this basis, it is meaningless to talk about the theory of sovereignty being either true or false or good or bad since facts merely are. Truth or falsity are predicates of propositions, not of causally determined facts considered independently of the propositions which describe them. If theories of government and law are merely the effect of a causally antecedent historical "is" rather than causally significant in determining the historical "is," one wonders also why De Jouvenel bothers about them or thinks it so important that his readers realize that one of these theories is not merely error but also evil. At this point, he might profit by a reading of Professor Karl Popper's later book, *The Poverty of History*.

In part II—"The Political Good"—De Jouvenel seems to employ a different method. There he defines a "good" sovereign as one who tends to the public good.¹⁷ But is not this definition obviously circular? He thinks not. When a person affirms that an object of ethical, political or legal judgment is politically good, De Jouvenel explains, he is affirming not merely the subjective psychological fact that "I approve of the object x ," but also that this approval is made with respect to an objective constant k having a cognitive meaning which is the same for everybody and which, therefore, provides an objective cognitive criterion of "the political good." He illustrates this by substituting France for the constant k .

Does this meet the methodological difficulty involved in making his particular ethical judgments concerning the facts of history scientifically verifiable? Clearly it does not. Although there is a sense in which France is cognitively objective, that is, for example, a specific geographical area of Europe, France in this sense does not provide a norm; it yields a mere empirical "is." Were one to turn to France in the normative sense, one would not find that all mem-

16. P. 190.

17. P. 92.

bers of this political community have a common object. On De Jouvenel's own historical evidence, some Frenchmen believe in a political sovereign subject to law, while others, following Descartes, Hobbes and Rousseau, believe in a political sovereign whose commands cannot, logically, be characterized as unjust. Thus, the author seems to verify his normative political, ethical and legal judgments with respect to the historical "is" only through surreptitiously shifting from France in the sense of the denotative geographical "is," which can be shown to be objective by the methods of empirical science, to France in the sense of a normative "ought to be"; and the latter France, on the evidence of his own historical method, is not objective.

Near the end of his study a still different cognitive method of validating the prescriptive judgments of ethics, politics and law is suggested. He writes:

"But, if social science has to recognise the power of the image [of the ideal norm] to modify behaviour in the milieu in which it gets diffused, its true premise is still the behaviour (as modified) and not the modifying image."¹⁸

Clearly, this is legal instrumentalism. The reference to the milieu suggests also the pragmatic, problematic situation of American legal realism and the living law of sociological jurisprudence. On the next page he adds:

"Over the whole field of temporal organisation, the image of man most regarded was the predictable, as we have called it, and not the ideal."¹⁹

The word "predictable" is reminiscent of Holmes. Yet, curiously enough, nowhere does De Jouvenel evidence any awareness of American legal realism.

But would such an awareness make any difference? Does the instrumental pragmatic criterion of scientific confirmation or of Holmes' prediction theory of ethics, politics and law tear the disguise from political and legal imperative sentences affirming what ought to be to reveal nothing but indicative sentences? Obviously not, for reference to, or prediction of, a future "is" can no more verify a prescriptive imperative political or legal judgment concerning what ought to be than can empirical reference to a present or a past "is." The prescriptive sentences of government and law do not conform to cultural facts, past, present or future; they measure such facts.

It appears, therefore, that the methods proposed by De Jouvenel for showing the cognitive truth or falsity of normative imperative measuring sentences in political decisions and legal judgments fail to accomplish his purpose. Given his proposed methods, the noncognitivists have made their case, and it is nonsense to speak of political or legal science; furthermore, most of the normative judgments of his study are merely De Jouvenel's private imperatives rather than the empirically established indicative sentences he claims them to be.

Even so, his claims are not necessarily invalid. They are invalid only on the

18. P. 222.

19. P. 223.

basis of his proposed methods of validating them. Hence, other methods might establish his claims. Is this the case?

To answer this question would exceed the limitations both of De Jouvenel's study and this Review. His book does contain two suggestions, however, which indicate a possible positive answer.

At the beginning of his inquiry, he refers to "the tendency of the modern mind to think entirely in terms of consequences—never of conditions."²⁰ How this statement is to be reconciled with the pragmatic instrumentalism and predictive theory of ethics, politics and law of his last section is not clear. In any event, it is clear that if the prescriptive rules of politics and law are to be cognitively meaningful, their empirical confirmation must occur antecedent to the social facts and *de facto* human behavior which they measure; their verification cannot be based on a consequential appeal to the very facts measured. Otherwise, the law would have to be changed to conform to the criminal's *de facto* behavior.

This clarification permits a more exact criticism of De Jouvenel's attempt to verify the imperative sentences of politics and law by an empirical appeal to the "is" of history. His error consists of interpreting the antecedents of the historical prescriptive theories of government and law in factual and temporal rather than theoretical and logical terms. Since facts merely are, and are neither true or false nor good or bad, his empirical historical method cannot provide, as Kelsen has seen, the required prescriptive "ought to obey the law." And since facts are causally related, each of his rival medieval and modern theories of sovereignty had to be—one as much a historical "is" as the other; and there is no basis for choice between them.

But suppose that the antecedents of the prescriptive sentences of government and law are theoretical rather than factual, and logical rather than temporal. Certainly, a theory of the facts can be true or false. It then becomes meaningful for De Jouvenel to affirm with cogent reasons that one of the theories of sovereignty is false. Furthermore, if the word "bad" means to err about the truth of a theory, he may meaningfully affirm that a particular historical relation between the political sovereign and the law, based on a false theory, is evil.

Nevertheless, meaning does not suffice for empirical verification. A meaningful theory may be false.

Here, a conception of the antecedents of the prescriptive sentences of politics and law as logical rather than temporal becomes important. The logical antecedents of political and legal prescriptive sentences might be indicative sentences in a cognitive science such as epistemology, logic, the philosophy of natural science or natural, as distinct from cultural, psychology. Were this the case, the persuasive imperative sentences of government and law would be incomplete and, hence, contain implicit indicative sentences referring for their cognitive meaning to empirical facts in fields other than the social sciences. The method-

20. P. 9.

ological paradox of political and legal obligations would then be resolved. As the implicates of implicit indicative sentences are verified by appeal to facts other than those which they measure, the prescriptive laws of the social sciences are cognitive; hence, it is not meaningless to speak of political and legal science. Thus capable of being implicitly verified logically antecedent to, and by appeal to, facts other than those which they measure, the prescriptive laws of the normative social sciences can measure the facts of these sciences without begging the question or confusing the "ought" of these facts with their "is."

There are suggestions in De Jouvenel's extensive analysis that he in fact uses this method. His conclusions probably carry the weight they do only because such is the case.

His final major section concerns "Liberty." It opens with a chapter on Descartes' cognitive theory of knowledge and his concept of the person. Clearly, the propositions of these subjects are indicative sentences. From them, De Jouvenel derives the modern prescriptive political and legal sentences concerning the relation of the political sovereign to law. His next chapter is on Hobbes. This chapter logically relates the prescriptive sentences of the *Leviathan* to the indicative sentences of Hobbes' conception of men and nature, logically antecedent to the origin of government and law. It will be recalled that De Jouvenel's argument against the modern theory of the political sovereign, which was found valid, was derived from Whitehead's fallacy of misplaced concreteness. The fallacy rests on an indicative sentence in epistemology and the philosophy of natural science. One must conclude, therefore, that with respect to De Jouvenel's method of verifying the normative laws of political and legal science, his practice is superior to his theory.

It remains to combine the suggested method for exhibiting the implicit cognitive character of man-made measuring imperative sentences of politics and law with De Jouvenel's theory of the origin of political associations. His theory, again, is that such associations are effected by "the summons of a man"; they do not merely arise from a spontaneous, theoretically unconscious converging of individual members, nor are they created solely by means of external force. To this thesis is added the condition that a political association is preserved or changed in a cognitively correct way only under the summons or guidance of a single man or a few men. What is the significance of this emphasis upon the role of a small number of men, as well as the role of the majority, in any political community which escapes tyranny?

De Jouvenel's point is that since the normative prescriptions of political, ethical and legal science are cognitively confirmable rather than arbitrary imperatives, the method for determining their scientific validity calls for expertness. Hence the requirement of the leadership or summons of the few as well as the free assent of the many. Consequently, majority assent is a necessary but not a sufficient condition for just government.

At first, De Jouvenel's theory may appear incompatible with democracy. The slightest reflection on the method and theories of natural science shows, however, that such is not the case. The very essence of popular acceptance of

Einstein's relativity theory and of quantum mechanics is that the majority of men who give their consent to these theories do not independently make the observations, the experiments and the logical deductions from axiomatically constructed postulates which are necessary to confirm these theories. Instead, they depend upon experts and upon experts checking the experts. In short, the many are brought to their assent by "the summons of a man" or a few men. No one would say that this procedure in natural science is undemocratic. To make the norms of social science cognitive in this sense is no more undemocratic. Even so, the principle of pluralism in its bearing upon the open society, noted earlier, must be kept in mind.

This conception of political association places the restrictions of verified knowledge upon the impulsive assents, approvals and not infrequent demagoguery of the many. Furthermore, it avoids the error present in contemporary democracy of producing quantitative conformity at the expense of variety, important chance variations, and creative individual originality. The expert insures the creative advance, the empirical verifiability and the quality which comes from thinking through the paradoxical problem present in any law which is made by, yet measures, men. The many free people, any one of whom may become an expert, provide the assent without which the law suggested by the scientific experts would be a law of tyrants. The many provide the assent, also, without which the law of the community would fail to carry moral or legal obligation for its subjects. Finally, the requirement of scientific verifiability for the normative prescriptions of any just law provides the cognitive component, located outside the sovereign, that is necessary to bring the democratic legislative sovereign under the rule of law. The citizens of the United States should not find it difficult to understand and appreciate this theory of political association since the government of the United States was created through popular assent to the summons of a few men.

Apparently, then, the paradox of political and legal obligation can be resolved—but only if a method other than one suggested by De Jouvenel is used to determine which of several normative ethical, political and legal prescriptive theories is the scientifically confirmed one.

Two conclusions follow. First, normative subjects, such as politics and law, can be scientific only if they become philosophical in the suggested manner through analysis of the prescriptive, imperative sentences of policy decisions and judicial judgments to exhibit their implicit cognitive assumptions in epistemology, the philosophy of natural science and natural psychology, and through subsequent testing of these indicative sentences against the empirical data of man and nature logically antecedent to, and independent of, the artifacts of man-made and man-measured cultural behavior and institutions. Second, one cannot assume, as De Jouvenel does, that the cognitively correct choice of a political and legal theory must be made from the traditional theories and cultural artifacts depicted in history, least of all in Western history. The Orient has discovered and applied important theories also, as exponents of

American legal realism have recently confirmed independently.²¹ Still more important, notable advances have recently been made in empirically verified theories of nature and neurological man. Analysis of the verified theories of contemporary mathematical physics has exhibited far more complex and diversified types of conceptual meaning than contemporary legal analysis or traditional political and legal theory has envisaged. An adequate cognitive theory of government and law is more likely, therefore, to be ahead of us rather than behind us.

Even so, the paradox of political and legal obligation seems to be resolvable only along the lines previously mentioned. Unless man-made normative laws are scientifically verified or verifiable, they do not have the objectivity necessary to impose an obligation upon both sovereign and subject. But if their verification consists in their conformity to the *de facto* "is" of human behavior and man-made institutions, then they cannot measure, they are not normative. Only if the normative laws of social science are verified by appeal to facts logically antecedent to and independent of those which they measure can the paradox of political and legal obligation be resolved.

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THE UNFINISHED STORY OF ALGER HISS. By Fred J. Cook. New York: William Morrow & Co., 1958. Pp. 184. \$3.50.

IT has long been a cantankerous conviction of mine that nobody writes about legal stuff for non-legal eyediencies with such consummate ineptness as do lawyers. The bench-and-bar boys, however articulate, can never resist, when writing for laymen, the flat, solemn style that poses as profundity, the cautious and irrelevant qualification of statement, the whole linguistic jungle of legal-dygoon that is their chief stock in trade. This crusty conviction of mine was recently strengthened by my reading of two books on precisely the same subject, based on almost identical material. One was written by a lawyer—or rather (lawyerly qualification) by an ex-lawyer; his name is Alger Hiss and his book is titled *In the Court of Public Opinion*; reviewing it—in the *Texas Law Review*, if anybody cares—I said that it was just as surgically sterile as its title implies; it is. The other book was written by a veteran New York crime reporter who, so far as I know, never set seat in a law school—unless perhaps a criminal suspect was around; his name is Fred J. Cook and his book is titled *The Unfinished Story of Alger Hiss*. The Hiss story may be unfinished, but the Cook story will not be by anyone who starts to read it; it is that good.

21. Northrop, *The Mediatonal Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347 (1958).

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