SCIENCE AND POLITICS

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I. REALITY AND VALUE

It is a commonplace to assert that science should be independent of politics. By this one usually means that the search for truth, which is the essential function of science, should not be influenced by political interests, which are the interests concerned with the establishment and maintenance of a definite social order or a particular social institution. Politics as the art of government, that is to say, the practice of regulating the social behavior of men, is a function of will and, as such, an activity which necessarily presupposes the conscious or unconscious assumption of values, the realization of which is the purpose of the activity. Science is a function of cognition; its aim is not to govern but to explain. To describe the world is its object. Its independence of politics means in the last analysis, that the scientist must not presuppose any value; consequently he has to restrict himself to an explanation and a description of his object without judging it as good or bad, i.e., as being in conformity with, or contrary to, a presupposed value. This implies that the statements by which a scientist describes and explains the object of his inquiry must not be influenced by values in which he himself believes. Scientific statements are judgments about reality; by definition they are objective and independent of the wishes and fears of the judging subject because they are verifiable by experience. They are true or false. Value judgments, however, are subjective in character because they are based, in the last analysis, on the personality of the judging subject in general, and on the emotional element of his consciousness in particular.

The principle of excluding value judgments from the field of science seems to have an exception. It is frequently maintained that there is
one value which science must presuppose, namely, truth, and that there is consequently one value judgment which a scientist may legitimately pronounce, the judgment that something is true or false. However, truth is not a value in the same sense as are the values at the basis of political activity, such as, for instance, individual freedom or economic security. The judgment that something is true or false is essentially different from the judgment that something is good or bad, which is the most general formula of a value judgment. Truth means conformity with reality, not conformity with a presupposed value. The judgment that something is true or false is the ascertaining of the existence or nonexistence of a fact; and such a judgment has an objective character insofar as it is independent of the wish or fear of the judging subject and is verifiable by experience of the senses, controlled by reason. That the statement “Iron is heavier than water” is true, and that the statement “Water is heavier than iron” is false, can be demonstrated by experiment; and the one is true and the other is false, even if the judging subject for some reason or another should wish the contrary. On the other hand, the statement that a certain social organization guaranteeing individual freedom but not economic security is good, and consequently better than a social organization guaranteeing economic security but not individual freedom, is not a statement about a fact; it cannot be verified by experiment and is neither true nor false. Rather, it is valid or invalid. As a value judgment (i.e., a judgment about individual freedom and economic security as values), it must not be confused with the statement that most men actually prefer individual freedom to economic security, which indeed is a statement about a fact, and may be true or false. If the statement that most men prefer individual freedom to economic security is false and the statement that most men prefer economic security to individual freedom is true, the latter statement logically excludes the first one; but it does not exclude the value judgment that individual freedom, although not preferred by most men, is a higher value, and hence “better,” than economic security. Judgments about values cannot contradict judgments about reality. Indeed, only if their meaning is such that they cannot contradict or affirm judgments about reality are they value judgments in the specific sense of this term. In this sense, reality and value are always two different spheres.

However, the terms “value” and “value judgment” are frequently used in another sense. Such is the case when the statement that something is an appropriate means to a certain end is considered to be a value judgment. The meaning of such a statement is that something, as a cause, is able to bring about a certain effect, which is supposed to be an end. The statement refers to the relationship between cause and effect; and
it is just this relationship between facts that constitutes a specific reality, the reality of nature. Natural science describes its object as real by applying the principle of causality—that is, by statements that under a given condition a specific consequence certainly or probably will occur. These statements are the so-called laws of nature. The statement that something is an appropriate means to an end is true or false; and in order to be true it must be verifiable by experience. If the statement that a communistic organization is "good" means only that it is an appropriate means to bring about economic security for everybody, and the statement that a capitalistic organization is "bad" means only that it has not this result, neither statement is, in itself, a value judgment in the specific sense of the term. Both statements are judgments about reality; and, if they are classified as value judgments, such value judgments are not different from judgments about reality, but only a special type of such judgments, and hence not to be excluded from the sphere of science. However, the statement that something is an appropriate means to a certain end preserves its scientific character only so long as its meaning is that if something is presupposed as an end, something else is an appropriate means; the scientific statement must not imply that something is an end. Thus a scientist may legitimately state that communism is, or is not, an appropriate means, provided that economic security for everybody is presupposed as an end. But he transgresses the field of science when he states that economic security for everybody is an end, or the end, of social life; for science can determine the means, but it cannot determine the ends.

The statement that something is an end is not identical with the statement that an individual, especially the judging subject, or several individuals want it. The latter is a statement about a fact, about the actual state of mind of human beings. If by "end" that which an individual actually desires is meant, the term signifies the intention of the individual, the purpose that he is actually pursuing. But in its specific sense the statement that something is an end, for instance, the statement that economic security for everybody is the end of social life, expresses the idea that something—here economic security for everybody—should be pursued as an end even if it is not actually pursued. In this sense, the concept of "end" is identical with that of a "right end." The statement that something should be done or, what amounts to the same, that men should behave in a certain way, expresses the meaning of a norm prescribing this behavior. Hence the statement that something is an end in the sense of a right end is equivalent to the statement that it is prescribed by a norm. A norm claims, according to its meaning, objective validity. (Whether this claim is founded, we shall see later.)
Hence, in the statement that something is an end in the sense of a right end, the term “end” has an objective meaning. It does not merely signify the end pursued by a definite individual. In this sense “end” means “value”; and in this sense a norm constitutes a value. To put it another way, only as a statement about what should be done in accordance with a norm presupposed to be valid, is the statement that something is an end a value judgment in the specific sense of the term, in contradistinction to a judgment about reality as a statement about what actually is done or probably will be done. Only if the judging subject presupposes a norm prescribing something as valid, is his judgment that something is or is not in conformity with this norm a genuine value judgment; only then does he approve or disapprove the object of his judgment.

In this respect we must distinguish between an end which may be considered as a means to a further end and an ultimate end, or, what amounts to the same, a value constituted by a basic norm, i.e., as a supreme value. The statement that something is an end is a value judgment in the specific sense of the term only when referring to an ultimate end (as a judgment about a supreme value), not to an end as a means to a further end. Only then is it impossible for the statement to contradict a judgment about reality. To the question “Why is a particular value judgment or a particular norm valid?” the answer can be only another value judgment or another norm, never a judgment about reality—the ascertainment of a fact; and thus the question must lead to a judgment about a supreme value or to a basic norm. To the question “Why should a child honor his parents?” the correct answer is not “Because God has commanded children to honor their parents,” but “Because we should obey the commands of God, who has ordered children to honor their parents.” But to the question “Why should we obey the commands of God?” there is no answer. To obey the commands of God is an ultimate end, or what amounts to the same, a supreme value, the content of a basic norm. The statement that science can determine the means, but not an ultimate end, is equivalent to the statement that science must not presuppose the validity of a basic norm. Scientific statements about appropriate means can be made only as conditional propositions: if a basic norm constituting an ultimate end is presupposed to be valid, then something is an appropriate means. That is to say, then, as a cause, it is able to bring about as an effect that which is determined as an ultimate end by a basic norm, presupposed as valid—not by science itself but by the acting individual, who intends to bring about this effect.

It is of the utmost importance to be aware that within a rational process referring to the relationship of means to ends, the assumption
of an ultimate end is inevitable. Without such an assumption it is not possible to interpret the relationship between cause and effect as one of means and end. The reason that this is not self-evident is that most men are not conscious of the necessity for such an assumption. If, for instance, someone declares democracy to be a good, or the best, form of government, his explanation, when queried, may be that democracy is the only form of government by means of which the greatest possible degree of individual freedom can be brought about. This answer implies that he considers the guarantee of individual freedom as the end of government. To the question why he considers individual freedom to be an end, he will probably answer that it is because all men wish to be free. As a statement about a fact, this answer is highly problematical; and even if the statement were true, it is not an answer to the question. Why democracy is a good form of government is not a question of what end men actually pursue, but one of what they should pursue, of what is the right end to be pursued by men. Hence, the correct answer to the question of why democracy is a good form of government is, "Because men should be free"; and this answer means that freedom is a supreme value. This value judgment may seem so self-evident to the judging subject that he is not conscious of it as the fundamental presupposition of his judgment about democracy.

Since the judgment about individual freedom, or economic security, or something else presupposed as an ultimate end or supreme value does not allow a justification by a further value judgment, the only question that may be asked with respect to such a value judgment has to do with the fact that one individual presupposes freedom, another security, and a third something else as a supreme value. It is a psychological question, that is, a question concerning reality, rather than one concerning value. Inquiry into this problem can hardly be pursued beyond the ascertainment that the choice among the different presuppositions is in the last analysis determined by the personality of the judging subject in general and by the emotional component of his consciousness in particular. A man with strong self-confidence may prefer individual freedom, whereas one suffering from an inferiority complex may prefer economic security. If a man has strong metaphysical inclinations and if fear of death makes him believe in the immortality of his soul, concern for the fate of his soul in the other world may cause him to consider the so-called spiritual values, the "welfare of the soul," more important than the so-called material values; whereas a man of more rationalistic habits of thought, with an unhampered desire to enjoy his earthly life, will consider the material values as the only ones that count. In this sense, judgments about ultimate ends or supreme
values are, in spite of their claim to an objective validity, highly subjective. They thus differ from judgments about reality, which, being verifiable by experience and completely independent of the personality of the judging subject, particularly of his desires and fears, are by their very nature objective. This objectivity is an essential characteristic of science; and because of its objectivity, science is opposed to, and hence must be separated from, politics, an activity ultimately based on subjective value judgments.

II. SCIENCE OF POLITICS AND "POLITICAL" SCIENCE

The principle of objectivity applies to social science as well as to natural science, and in particular to so-called political science. The object of political science is politics—the activity directed at the establishment and maintenance of a social order, especially the state. In describing the phenomena concerned, the political scientist must, of course, take into consideration the values which men presuppose in their political activities. But in doing so he has to restrict himself to ascertaining the fact that the establishment and maintenance of the different political systems presuppose different values as ultimate ends, and to finding out these different values which are at the bases of the different systems; in describing the systems, he himself must not presuppose the one or the other of these values, or, what amounts to the same, he must not consider the norm constituting the value as valid—i.e., as binding upon himself. In other terms, he must neither approve nor disapprove of the object of his analysis lest his work, instead of being a science of politics, become a "political" science in the sense of an instrument of politics. Then it is no science at all but a political ideology.

The separation of science from politics, which means abstention from value judgments within a science the object of which is, so to speak, impregnated with value judgments, is not so paradoxical as it seems, if it is admitted that ascertaining the fact that men are consciously or unconsciously determined in their political activities by definite value judgments is quite different from endorsing these value judgments. It cannot be denied that it is much more difficult to separate social, and especially political, science from politics than to comply with this postulate in the field of natural science. But the latter is by no means immune from the danger of being politicized. It is well known that the Church tried to suppress the Copernican theory, not because it could be proved false, but because it endangered the authority of the Holy Scripture and thus the authority of the Church. And even in our time, the bolshevik government prohibits the Mendelian theory only because this theory
does not support belief in the inheritability of acquired qualities, which is an essential presupposition of the political system enforced by that government. This and other evidence indicate that there is no sufficient reason for differentiating between natural and social sciences regarding the postulate of separating science from politics.

Those who deny the legitimacy of this postulate with respect to political science accept—at least in part—one of the most characteristic principles of Marxian philosophy: the dogma that science cannot be separated from politics because science is only part of the "superstructure" of an economic (and that means, according to this philosophy, a political) reality, and consequently is never really more than a political instrument. This dogma denies the possibility of an independent science. But the splendid development of modern natural science may be attributed largely to its emancipation from political powers, and especially from the power of the Church. It is a characteristic feature of this political power that it assumed authority over science; and in this respect the bolshevik state has the character of a church, just as communism has the character of a religion. The fact that in the past natural science has been able to achieve complete independence is due—it is true—to a powerful social interest in its victory, an interest in that advance of technique which only a free science can guarantee. Social science does not lead, or does not yet lead, to such direct advantage afforded by improvement of technique as physics and chemistry produce on the acquisition of engineering knowledge and medical therapy. In social science there is still no influence to counteract the overwhelming interest that those residing in power, as well as those craving for power, have in a theory pleasing to their wishes—that is, in a political pseudo-science, which is nothing but a political ideology. If such a political science cannot free itself from politics, there will never be a real political science.

Although science must be separated from politics, politics need not be separated from science. It stands to reason that a statesman, in order to realize his ends, may use the results of science as a means. Science in general and political science in particular may furnish these means, and only science can furnish the appropriate means; but, as pointed out, it cannot determine the ultimate ends of politics. However, to admit that these ends are in the last analysis based on subjective value judgments seems to be too difficult for those who—for political reasons—look for an absolute justification of the political system which they try to establish or to maintain. If they are not willing to find such justification in religion, they try to get it from science. This tendency, too, is characteristic of Marxian philosophy, which claims to establish a "scien-
tific” socialism. True science, of course, refuses to be a substitute for religion and cannot but destroy the illusion that judgments of value can be derived from cognition of reality or, what amounts to the same, that values are immanent in the reality which is the object of scientific study. The view that value is immanent in reality is a characteristic feature of a metaphysical-religious (and this means non-scientific) interpretation of nature and society. It necessarily implies the assumption that both are the creation of God as the personification of the absolute good. This view leads inevitably to the insoluble problem of theodicy, that is, to the unsurmountable contradiction of a reality which, as the creation of God, is to be considered good but in which, nevertheless, evil is also immanent.

III. NORMATIVE SCIENCES

The postulate of the separation of science from politics presupposes that the object of science is reality, that scientific statements are statements about reality as opposed to value judgments in the specific sense of the term. There are, however, sciences, or disciplines usually considered to be sciences, such as ethics and jurisprudence, the object of which seems not to be reality but values. They describe norms constituting values, and in this sense may be called “normative” sciences. Morals, the object of the one, and the law, the object of the other, are indeed systems of norms, or normative orders, determining a definite human behavior by prescribing or permitting such behavior. In order to consider them as sciences, we must take into consideration the fact that there are two different kinds of norms, just as there are two different kinds of value judgments: there are positive norms, which are created by acts of individuals, and norms that are not created in this way, but are only presupposed in the minds of the acting and judging individuals. The act by which a norm is created may be performed in different ways: by spoken or written words, by a gesture, by conventional symbols, and the like. The norms of a positive moral order may be established by the sermons or writings of a religious founder or by custom, that is, by the habitual behavior of the members of a social community; the norms of positive law may be established by custom, by acts of legislation, by judicial decisions, by administrative acts, or by legal transactions. The acts by which the norms of a positive normative system are created are always facts manifested in the external world, perceptible to the senses. The followers of Christ could hear the voice of their Master when He, in the Sermon on the Mount, ordered them to love their enemies. We can read the Holy Scripture reporting this as a fact. We can also read a statute imposing upon us the obligation to pay taxes. As soldiers, we can hear the command of our superior officer ordering
us to do or to forbear from doing something, and, as drivers of cars, we can see the green traffic light permitting us to cross an intersection. To say that a norm is created by a fact, is a figure of speech. The norm is the specific meaning of the fact, and this meaning, not perceptible by our senses, is the result of an interpretation. To interpret the meaning of a fact as a norm is possible only under the condition that we presuppose another norm conferring upon this fact the quality of a norm-creating fact; but this other norm, in the last analysis, cannot be a positive norm. Thus what Christ ordered us to do in the Sermon on the Mount are norms binding upon us only if we presuppose that Christ is the supreme moral authority, and to do this means that we presuppose a norm that we should obey the commands of Christ. But this norm is not, as are the commands of Christ, a positive norm, that is to say, the meaning of a fact, a norm-creating act performed in space and in time, but rather a norm the validity of which is only presupposed in our mind.

The difference between a positive and a non-positive norm is particularly clear in the field of law. The fact that a man orders another man to pay a certain sum of money is interpreted to have the meaning of a norm issued by the one and binding on the other, and not an attempt of a gangster to extort money from another, if the one issuing the order is considered to be an organ of the community, a tax officer for instance, acting as authorized by a statute. The act by which the statute has been adopted that confers on the official his authority, has the meaning of a binding norm only if it is performed in a way determined by the constitution. But the historically-first constitution has the character of a binding norm only if we presuppose a norm that we should behave as those who established the constitution ordered us to behave. If we do not suppose that the fathers of the constitution had their authority from God, this norm is a basic norm. It is not established, as was the constitution itself, by the acts of human beings; it is only presupposed by those who want to interpret certain human relations as legal relations, or as relations determined by legal norms.

Jurisprudence as a science of law has positive norms for its object. Only positive law can be the object of a science of law. This is the principle of legal positivism as opposed to the natural-law doctrine, which pretends to present legal norms not created by acts of human beings but deduced from nature. To deduce norms from nature, that is to say, to consider nature as a legislator, presupposes the idea that nature is created by God and is thus the manifestation of His will, which is absolutely good. Hence the natural-law doctrine is not a science but a metaphysics of law.1 Positive law may be national law, the law of a def-

inite state based on its constitution and created by law-making acts of legal authorities instituted by this constitution; or international law created by custom, i.e., the habitual practice of the states, based on the presupposition that the states should behave as they regularly behave, which presupposition is the basic norm of international law. But the norm on which the validity of a positive legal order is based is, as a matter of fact, a non-positive norm, and the principle of legal positivism can be maintained only as restricted by this fact. This restriction, however, does not abolish the opposition between legal positivism and natural-law doctrine. The basic norm of a positive legal order—in contradistinction to the substantive norms of natural law prescribing a definite human behavior as in conformity with nature (and that means as just) and prohibiting a definite human behavior as contrary to nature (and that means as unjust)—has a merely formal character. It serves as a basis for any positive legal order, regardless of its conformity or non-conformity with natural law; and it has, within the science of law, a merely hypothetical character. The statements by which the science of law describes its objects as positive norms have the character of conditional propositions. As a science, it cannot state absolutely that individuals or states are obliged or entitled by legal norms to behave in a certain way. It ascertains only that under the condition that the basic norm conferring on the fathers of the constitution a law-making authority is presupposed as valid, are individuals obliged or entitled, by legal norms based on the constitution, to behave in a certain way; and only that under the condition that the basic norm instituting the custom of states as a law-creating fact is presupposed as valid, are states obliged or entitled, by legal norms created by custom, to behave in a certain way. A science of law cannot itself presuppose either of these basic norms as valid, nor can it decide that any non-positive norm is valid. To ascertain the validity of the non-positive basic norm of a positive legal order is beyond the sphere of a science the object of which is this positive legal order.

Positive legal norms can be the object of a legal science because the existence—and this means the validity—of a positive norm depends not only on the presupposed validity of a basic norm but also on the existence of a fact, on the existence of such norm-creating acts, which take place in space and time as the custom of individuals or states, a legislative, judicial, or administrative act, or a legal transaction. In describing its object as norms, the science of law refers to these facts; and the positivity of the law consists just in this relation to the law-creating facts. If it is assumed that norms prescribing or permitting specific human behavior (implying also acts of state) constitute a value, and that consequently the statement that the human behavior (or
perhaps the act of state) is or is not in conformity with a norm of positive law (that is, is legal or illegal) is a value judgment, it must be remembered that this value is not opposed to reality. Such a value judgment is—like a judgment that something is an appropriate means to a presupposed end—not a judgment essentially different from a judgment about reality, but a special kind of judgment about reality. The statement that a certain human behavior (or a certain act of state) is legal or illegal may be true or false; it is verifiable by experience. Such a statement is possible only with respect to a definite national, or the international, legal order. The statement, for instance, that it is illegal under a definite national law not to fulfill a promise of marriage is false if within this legal order there is no norm attaching a sanction to the non-fulfillment of a promise of marriage; and it is true only if there is such a norm. There exists such a norm only if it is created in accordance with the constitution which is at the basis of that law. The creation of the norm is a fact which can be ascertained by the science of law, just as facts can be ascertained by the science of nature. Hence the statement that norms are the object of the science of law does not mean that the object of this science is not reality. It means only that this object is not a natural reality as described by natural science. But the object of legal science may be characterized as legal reality. The difference between natural reality and legal reality is that legal reality as described by legal science consists of facts which have—under the condition that the validity of the basic, non-positive, norm is presupposed—a specific meaning: the meaning of positive norms.

Natural science describes its object as real in statements that under certain conditions (causes), certain consequences (their effects) necessarily or probably take place. These propositions are, as pointed out, the so-called laws of nature, which are laws of causality. Causality is not a force immanent in reality; it is a principle of cognition, the specific instrument by which natural science describes its object. Since norms determine human behavior, the science of law, in describing the law as a set of norms is also describing human behavior; but it does not describe it as it takes place as cause and effect in natural reality. It describes behavior as it is determined, i.e., prescribed or permitted, by legal norms. The statements by which the science of law describes its object are not an application of the principle of causality; they do not have the meaning of the laws of nature, although they have the same grammatical form. They are propositions connecting a condition with its consequence, but this connection has another meaning than that expressed in the laws of nature. Their meaning is not that under a certain condition a certain consequence actually, i.e., necessarily or probably, takes place; but that under the condition of certain human behavior, other human
behavior as consequence *ought* to take place. These statements are the rules of law. In the rule of law that "If a man commits theft, another man ought to punish the thief," the punishment is not described as the effect or the theft as the cause. The term "ought" expresses the specific meaning of the connection between condition and consequence established by a legal norm (a prescription or permission) as different from the connection between cause and effect. It may be designated as imputation. It is the principle according to which the social sciences, the object of which are norms determining human behavior, describe their object. It is the principle which, in the field of certain social sciences, such as ethics and jurisprudence, corresponds to the principle of causality in the field of natural sciences. It is necessary to remember, of course, that when the principle of imputation is applied, and when it is stated that under the condition of certain behavior, other behavior *ought* to take place, the term "ought" has not its usual moral, but a purely logical, meaning. It designates, like causality, a category in the sense of Kant's transcendental logic.²

IV. SCIENCE OF LAW AND POLITICS

If the propositions by which the science of law describes its object are called rules of law, they must be distinguished from the legal norms described by the science of law. The former are instruments of the legal science, the latter are functions of the legal authority. In describing the law by rules of law, the science of law does not exercise the function of a social authority, which is a function of will, but the function of cognition. Although the legal norms issued by the legal authority may be considered as constituting a specific value, namely the legal value, the rules of law are not judgments of value in any possible sense of this term, just as the laws of nature by which the natural science describes its object are not value judgments. If the statement that something is or is not in conformity with a legal norm may be classified as a value judgment, it is such a judgment only in the same sense as is the judgment that something is an appropriate means to a presupposed end—that is to say, it is a value judgment not in the specific sense of this term as essentially different from a judgment about reality, but rather a special type of judgment about reality. As such it is, by its very nature, not incompatible with a science of law, just as the judgment that something is an appropriate means is not excluded from the science of nature. But as the result of a peculiarity of positive law of which we shall speak later, even the judgment that something is legal or illegal has no place within the science of law.

The judgment that something is legal or illegal must be distinguished from the judgment that something is just or unjust. These two judgments differ from each other in the same way as do the statements that something is an appropriate means to a presupposed ultimate end and that something is an ultimate end. If the statement that something is an appropriate means and the statement that something is legal are considered to be value judgments, they are, as pointed out, at the same time judgments about reality; whereas the statement that something is an ultimate end and the statement that something is just, are genuine judgments of value, essentially different from judgments about reality. Their meaning is not that something is or is not in conformity with a positive norm, but that it is or is not in conformity with a non-positive norm. Consequently they are excluded from the field of science—of nature or of law.

The only non-positive norm that the science of law may take into consideration, not as its object but as a condition of its statements describing its object, is the basic norm of the legal order which is its object. The specific function of the basic norm of a positive legal order constituting the legal value, is to serve as the ultimate source of law, that is, as the reason for the validity of the constitution of a legal order; and the constitution is that positive legal norm (or set of norms) which regulates the creation of the other norms of the legal order. Hence the basic norm of a positive legal order has, as pointed out, a merely formal character; it does not constitute a substantive value as, e.g., the non-positive norm that men ought to be free, or that men ought to live in security—which constitute the value that we call “justice.” In fact, the positivity of the law consists in that its validity does not depend on its conformity with justice, but in that it is created in a definite way determined by the basic norm. A positive law may be just or unjust; the possibility of being just or unjust is an essential consequence of its being positive. The judgment that something is legal or illegal, as pointed out, necessarily refers to a definite legal order valid for a certain space and at a certain time. What is legal according to one legal order may be illegal according to another. In this sense, the value constituted by positive legal norms is always a relative value. But the idea of justice, in its specific sense, designates an absolute value, constituted by a non-positive norm claiming to be valid everywhere and at all times, a substantive norm with an unchangeable content. Even if the statement that something is just or unjust means that it is or is not in conformity with a norm of a positive moral order established by custom or by the commands of a religious founder, it is excluded from the field of a science of law. For the validity of such a positive normative order depends on a basic norm different from the basic norm of positive law, which is
the only condition under which the science of law may describe its object as a set of valid norms constituting the specific legal value.

Other values, especially the value of justice, which is the specific value according to which the positive law as the legal reality may be evaluated, are properly called political values in order to distinguish them from the legal value. The differentiation of law and politics means the differentiation of two normative systems. When politics is opposed to law, the term "politics" is used in a narrower sense than in the postulation of the separation of natural science from politics, where politics means any normative system whatever. The postulation of the separation of the science of positive law from politics means that the legal scientist, in describing his object, must refrain from political value judgments as judgments referring to norms other than norms of positive law, especially from evaluating his object as just or unjust. It is not for the legal scientist but only for the legal authority to prefer something as just to something as unjust.

But although the science of law can and must be separated from politics, that is to say, although the legal scientist must refrain from political value judgments, the law-making process, which is the function of the legal authority, cannot be separated from politics. For this function is determined not only by legal norms but also by norms of another normative system which, in order to distinguish them from law, are, as pointed out, called "political." It is a peculiarity of the law to regulate its own creation. Just as the constitution regulates the creation of statutes or institutes custom as a law-creating fact, statutes and rules of customary law regulate the creation of individual norms by the courts in the judicial decisions. In creating a norm, the legal authority applies a higher norm determining the creation and the content of the lower norm. But because a norm can determine the creation and the content of another norm only to a certain extent, the norm-creating authority always has a certain degree of discretion in his norm-creating function. Insofar as his norm-creating function is left to his discretion, the legal authority may be, and actually is, determined by other than legal norms—and insofar his function has a political character; whereas it is a legal function insofar as it is determined by legal norms. Normally, the legislative organ is legally bound by the constitution only with respect to the law-making procedure. The content of the norms to be created by the legislative organ is only exceptionally determined by the constitution. This is the case when the constitution prohibits or prescribes a certain content for these norms, such as when the constitution prohibits restriction of religious freedom. Insofar as the legislative function is not determined by the constitution, the legislator may be, and actually is, determined by political principles, especially by his idea of justice. He may prefer
one regulation to another in the same field because he considers the one to be just, the other to be unjust.

The legal scientist does not have the choice between accepting or rejecting the law, as established by the legislator, on the basis of his judgment about what is just and unjust. The scientist has to describe the decision of the legislator as the existing law, whether he considers it in conformity or not in conformity with what he considers to be justice. He may only examine whether the norms created by the legislative organ are or are not in conformity with the positive norms of the constitution, and the result of this examination is in the last analysis the objective ascertainment of a fact, not a subjective value judgment. But even the statement by the legal scientist that a statute is or is not constitutional, is of no legal importance. For the question as to whether a statute is or is not constitutional is not to be decided by the science of law, but by the legal authority on which the law confers this power. The same applies to a judicial decision with regard to the function of a court. It is normally much more closely determined by a higher legal norm—a statute or a rule of customary law—than is the legislative function by the constitution. But there is always a wider or narrower sphere of discretion left by the higher legal norm to the law-creating function of a court, and within this sphere of discretion the judicial decision may be, and actually is, determined by norms other than those of positive law. In creating an individual norm by the judicial decision, the court has always the choice between different decisions which are possible within the framework of the general norm determining the judicial function. The court may prefer the one to another because it considers the one to be just and the other to be unjust. But the legal scientist has no such choice. He has to take the decision rendered by the court as the existing law, valid for the concrete case. He may examine whether the judicial decision is or is not in conformity with the general legal norm to be applied by the court, and may come to the conclusion that it is or is not legal. But this judgment—in the last analysis a judgment about a fact—is legally irrelevant. For the decision on the question as to whether the decision of a court is legal or illegal is not within the competence of the science of law, but is within that of the legal authority on which the law has conferred this power.

The application of the law by a legal authority, as well as the description of the law by the legal scientist, implies an interpretation of the law. To interpret a legal norm is to find its meaning. It is a requirement of legal technique that a legal norm shall be formulated as clearly as possible, so that its meaning is unquestionable. However, since legal norms are mostly expressed in human language, and human language is frequently ambiguous, this requirement can only approximately be
complied with. Hence, very often more than one meaning can be found in a legal norm. The doctrine that a legal norm has actually only one meaning and that there is a scientific method which enables us always to find this single correct meaning of it, is a fiction used by traditional jurisprudence in order to maintain the illusion of legal security.

There are, of course, different methods of interpretation which are as follows: an interpretation according to the intention of the law-maker or according to the wording of the legal instrument; a historical or a logical interpretation; and a restrictive or an extensive interpretation. If the law itself does not prescribe one of these methods, each of them is applicable and may lead to a result different from that of another. Even if one method of interpretation is obligatory, it may furnish different and contradictory meanings. In applying a norm, the legal authority chooses one of these meanings and thus attributes to it the force of law. This may be called an authentic interpretation, although in traditional language this term is used only to designate a legal norm the express purpose of which is to interpret another, previous norm, not the interpretation implied in the application of a norm. The choice of one of the several meanings of a legal norm by a legal authority in its law-applying function is a law-creating act. Insofar as this choice is not determined by a higher legal norm, it is a political function. For the choice between the different meanings of a legal norm, if not determined by a higher legal norm, may be, and actually is, determined by norms other than legal, and this means by political norms. Hence the authentic interpretation of the law by a legal authority may be characterized as a political interpretation. On the other hand, the task of a legal scientist interpreting a legal instrument is to show its possible meanings and to leave it to the competent legal authority to choose in accordance with political principles the one which this authority thinks the most appropriate. In showing the possibilities which the law to be applied opens to the legal authority, the legal scientist scientifically serves the law-applying function; and in revealing the ambiguity, and thus the necessity for improving the wording, he serves the law-creating function in a scientific way. If the legal scientist recommends to the legal authority one of the different meanings of a legal norm, he tries to influence the law-making process and exercises a political, not a scientific, function; if he presents this interpretation as the only correct one, he is acting as a politician in the disguise of a scientist. He is veiling legal reality. But science has to unveil reality; only political ideologies try to veil it. Hence the scientific interpretation of the law, which is the interpretation of the law by a legal scientist, may be characterized as a legal interpretation—in contradistinction to the interpretation applied by a legal authority. By preferring one of several possible interpretations to the exclusion of the
others, the latter offers what may be characterized as a political interpretation.

V. THE "LEGAL" AND THE "POLITICAL"

The distinction between the legal and the political functions as a function determined by legal norms and one determined not by legal norms but by political norms, is often of considerable importance. A typical example is the problem of recognition of a community as a state, or of a body of individuals as the government of a state. The fact that traditional doctrine does not distinguish between a legal and a political recognition has caused the confusion prevailing among the writers who have treated this problem. According to some writers, recognition has only a declaratory character; that is to say, it has no legal consequences. Hence a community is a state, and a body of individuals a government, if each fulfills the requirements of international law, regardless of whether the community or the government is or is not recognized as such by the governments of other states. According to others, recognition has a constitutive character, which means that it has essential legal consequences. They assert that a community is a state and a body of individuals the government of a state, only when recognized as such by the governments of other states, and only in relation to the recognizing states. But, in truth, recognition is both a constitutive and a declaratory act; or, more precisely formulated, the act called recognition comprises two functions—a legal function which is constitutive and a political function which is declaratory.

Recognition of a community as a state or of a body of individuals as the government of a state means, in the first place, the ascertainment of the fact that a community is a state or that a body of individuals is the government of a state. This recognition is determined by norms of general international law, which stipulates the conditions under which a community is a state and a body of individuals the government of a state. Hence this recognition, as a function determined by the law, is a legal function and may be called legal recognition. The ascertainment of a legally relevant fact always has a constitutive character, since in the realm of law a fact to which the law attaches legal consequences exists legally only if ascertained in the way the law prescribes. International law confers upon the governments of the states the power to ascertain the existence of the facts "state" and "government" in the sense of international law. Hence the legal recognition of a community as a state or of a body of individuals as the government of a state has a constitutive character, just as the decision by which a court ascertains that a definite individual has committed a definite crime is by its very nature constitutive, insofar as the individual is a criminal and hence punishable only if
the court has ascertained this fact. However, by recognition is meant not only the act by which the existence of the facts "state" or "government" is ascertained, but also the act by which the government of a state expresses its willingness to enter into the normal relations with the recognized community or government. This act is not determined by norms of international law; it is left to the discretion of the existing states, who may for any reason whatever enter, or refuse to enter, into the normal relations with another state or with the government of another state. This act may be—and actually is—determined only by political principles, and hence it may be called political recognition, in contradistinction to the legal recognition. Insofar as it has in itself no legal consequences, it is not constitutive and insofar has merely a declaratory character. Usually both functions, the legal and the political recognition, are combined in one and the same act called "recognition," which, with respect to its legal function is constitutive, and with respect to its political function is declaratory.

As useful and necessary as is the distinction between the "legal" and the "political," it is capable of misuse fully as harmful and objectionable. Such misuse is, unfortunately, quite frequent in the traditional theory of law. A characteristic case is the distinction between two branches of national law, one of which is opposed as "political" law to the other as "legal" law, or law in the strict and genuine sense of the term. This is the significance attributed to the traditional dichotomy of law into public and private law, the definition of which concepts is one of the most controversial of questions. Whatever the difference between so-called public law and so-called private law may be, it certainly does not consist—as the distinction between a political and a non-political law pretends—in the fact that public law is "law" in a lesser degree than private law. In this sense, law cannot be "political." Law being by definition opposed to politics, a political law is a contradiction in terms. The fact that so-called public law regulates the organization of the state and the competence of its organs, that is political matters, is no reason to assume that this law is, as law, inferior to private law regulating the economic and family relations among the subjects of the state. The attempt to minimize the legality of public law (as compared with private law) by defining public law as the regulation of the relation between the state and its subjects, as a relation of superiority and inferiority and hence a "power" relation, and by defining private law as the regulation of the relation among the subjects of the state, as a relation among equals and hence as a non-power or a true "legal" relation, has been proved again and again to imply a logical fallacy. The state as a legal person can be conceived of only as subjected to the law like all other persons; and a relation between legal persons established by the law can be conceived of only as a legal
obligation or a legal right one person has in relation to another, and hence not as a "power" relation but only as a legal relation, that is to say, as a relation between subjects equally subjected to the law establishing the obligation or the right, whatever their content may be. If the doctrine that public law is "political" law and as such less law than private law, has in spite of the contradictions demonstrated by its critics, been obstinately maintained by many writers, it is still not based on scientific grounds. The insensitivity of its proponents to logical contradictions shows that the purpose of this doctrine is not to describe the law in an objective and consistent way, but to furnish an ideology justifying non-observance of the law. If public law, especially the norms regulating the jurisdiction of the organs of the state, is not law in the strict sense of the term, the government is not bound by these norms as a private subject is bound by the law. The government may then always act as it considers it politically expedient to act, even if such action is not authorized by the law. The doctrine that public law has a political and not a strictly legal character is not a scientific theory; it is a political ideology.

In close connection with this doctrine is the frequently advocated view that the constitution of a state, or the constitution of an international community laid down in a treaty, is not a legal but a political instrument, which, consequently, must be interpreted not juridically but politically. An instrument is a legal instrument if it contains legal norms establishing legal obligations and legal rights. Hence there cannot be the slightest doubt that the constitution of a state or the constituent treaty of an international community is a legal instrument. The only question is whether they are at the same time also political instruments. If the answer is affirmative, it is certainly not based on the content of the instruments, which by its very nature is law and nothing but law—constitutional law in one case and international law in the other. The instrument in question may be called political only with respect to the purpose of the law it contains. But if it is admitted that the purpose of a state constitution or a treaty constituting an international community is "political" such an admission does not alter the fact that this purpose is to be achieved by law as the only and specific means; otherwise the establishment of a constitution would be superfluous. The political purpose by no means deprives the instrument of its legal character. There is no legal instrument which has not an extra-legal purpose, for the law, seen from a teleological point of view, is always a means and not an end. That a loan contract has an economic purpose, and therefore can be designated as an economic instrument, has not the slightest effect on its legal character. Hence the political or economic purpose of a legal norm cannot exclude a juridical, i.e., a legal, interpretation, all the more since
a legal interpretation includes—as pointed out—all possible interpretations of a legal norm. But the view that a constitution is a political, not a legal, instrument, evidently has the same tendency as the doctrine that public law is political, not legal law: it tries to justify actions of the organs of the state or of the international community which no possible interpretation of the constitution warrants.

The same tendency is involved when an unconstitutional action of the organ of a national or an international community is justified by the statement that this organ is not a legal, but a political, agency. In view of the fact that the function of any organ of a legal community is legal insofar as it is determined by the law, and political insofar as it is not determined by the law but left to the discretion of the organ, each organ is at the same time a legal and a political organ. But the function of some organs is much more closely determined by the law than that of others; consequently, in the exercise of their function, they have much less discretion, and hence political character in much lesser degree, than the others. Most courts are so restricted, while most administrative organs are not. But this rule has important exceptions. There are courts which have a far-reaching discretion and administrative agencies whose functions are very much restricted by administrative law. Who can deny that, e.g., the Supreme Court of the United States is not only a legal but—in this sense—to a great extent also a political agency? There is no organ of a legal community to which the law does not leave at least a certain degree of discretion in the exercise of its function, and hence no organ that is a legal, and not at the same time a political, agency. But however wide the sphere of discretion may be which the law leaves to an organ in the exercise of its function, this function can be conceived of as the function of an organ of the legal community only if it is performed within the discretion conferred upon the organ by the law; i.e., if the function is in conformity with the law, it is legal.

One of the worst cases of abuse of the distinction between the legal and the political is its ill-famed but widespread application to international disputes. There are, it is argued, both disputes which refer to legal matters and disputes which refer to political matters. The former, as legal disputes, are justiciable; the latter, as political disputes, are not. That is to say, only legal, but not political, disputes can be settled by the application of international law and hence by decisions of international tribunals. If it were true—as this doctrine pretends—that there are disputes to which, because of the nature of their subject matter, existing international law cannot be applied, the distinction between legal and political disputes would be justifiable. But there are no such disputes. For any dispute consists in the claim of one party that the
other party is obliged to behave in a certain way, and in the rejection
of this claim by the other party. In this respect there are only two pos-
sibilities. Either the existing international law establishes the obligation
disputed by the parties or it does not. In both cases, existing intern-
national law is applicable to the dispute. In the first case the dispute has
to be decided in favor of the plaintiff; in the second case, in favor of the
defendant. In the first case the international tribunal, in applying exist-
ing international law, has to decide that the defendant is obliged to
behave as the plaintiff claims; and in the second case, likewise applying
international law, it must decide that the defendant is not obliged to
behave as the plaintiff claims, that this claim has no basis in internation-
al law and that, consequently, the defendant is legally free to behave in
this matter as he pleases. This freedom is legally guaranteed; for it is a
principle of every legal order that what is not legally forbidden to the
subjects of the legal community constituted by the legal order, is legally
permitted to them. In applying this principle to the case, the tribunal
applies existing law. Hence there is no dispute to which the existing
international law is not applicable, and no dispute which, for this reason,
is political and therefore not justiciable.

It may be, however, that the application of existing international law,
although logically possible, is from one or another point of view politi-
cally unsatisfactory. This means that according to norms other than those
of existing law, the dispute might be settled in another way than it has
to be settled according to existing law—e.g., that it might be decided
not for the defendant, but for the plaintiff. But the judgment that the
application of existing law to a dispute is unsatisfactory is a value judg-
ment of a highly subjective character; what is unsatisfactory to one
party may be very satisfactory to the other. Anyway, the judgment
refers to a value different from the legal value. The doctrine that there
are non-legal, or political, disputes, not justiciable because of the in-
applicability of existing international law, misinterprets that which
from a non-legal point of view is an inadequacy by labeling it a legal
impossibility. Its purpose is not to interpret the law in an objective way
but to justify the attempt to exclude the application of existing law, in
contradiction to its scientifically ascertainable meaning. The doctrine
thus is not a scientific theory, but an instrument of politics.

The misuse of the distinction between the legal and the political is one
of the most effective, although not the only, means employed to con-
found the science of law with politics. To avoid the mingling of these
two heterogeneous spheres is as essential for the preservation of the
scientific character of jurisprudence as the separation of science from
politics is a vital condition for the existence of all independent science.