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OF ELIJAH JORDAN

A DISSERTATION  
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PURPOSE AND POLITICS IN THE CORPORATE PHILOSOPHY  
OF ELIJAH JORDAN

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## PREFACE

This study is an analysis of the method and content of what appears to be one of the more critical bodies of socio-political thought in America: the corporate philosophy of Elijah Jordan. It was begun during a period when many important citizens were engaged in a search for "national purpose," and an attempt was made to relate it to that quest to emphasize the timeliness as well as the practical nature of the philosophy. To those who question the epistemological or ontological status of purpose, it can be answered that it automatically becomes "real" and vital when the question is asked by persons with political authority and responsibility --especially those in the major decision-making positions. Professor Jordan's philosophy, we feel, demonstrates the great importance and complexity of the problem of purpose, and stands as a critique of the shallow inadequacy of much of the thought given to it by those who were participating publicly in the quest.

Professor Jordan was born in Indiana in 1875. His life spanned the period characterized by the triumph of what he termed "business democracy" in the United States.



After attending Oakland City College in Indiana for three years, Professor Jordan was a rural school teacher for eleven years before completing his undergraduate education at Indiana University. He took his Master of Arts degree at Cornell University in 1908, at the age of 33, and his doctorate in philosophy at the University of Chicago in 1911.

He taught at Cornell for two years before accepting the chair of philosophy at Butler University, in Indianapolis, Indiana. Except for occasional summers spent teaching at the University of Chicago, he remained at Butler for 31 years. He was invited a number of times to regular posts in the larger graduate schools, but chose to remain at Butler.

Professor Jordan's philosophy appeared in a long list of books and articles, published during the period 1911-1952. His last work, Metaphysics,<sup>1</sup> was unfinished at the time of his death, in 1953, and was published posthumously under the editorship of a former student. A list of the books, and many of the articles, may be found in the bibliography at the end of this study.

As a political scientist, we were concerned primarily with the social philosophy of Professor Jordan, and no effort is made to consider other phases of his system--aesthet-

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<sup>1</sup>Elijah Jordan, Metaphysics, ed. by Max H. Fisch (Evanston: Principia Press of Illinois, 1956).

ics, metaphysics, etc.--except as these are bound at points to bear upon his "politics." This approach was simplified by the fact that Professor Jordan's philosophy is a social philosophy, harking back to the tradition of Plato and Aristotle. His concern, even in his metaphysics, is always social reality and the relation of that reality to the cosmos which is its environment. Indeed, the other parts of his system are in large degree logical implicates of his social theory.

Not only is the philosophy a social philosophy; at every point it is oriented directly to the political process as the form of the social relation. For Professor Jordan, as probably for no other philosopher since Aristotle, politics is the "master science." For this, if for no other reason, his philosophy would seem to merit consideration by political scientists.

A major problem, encountered at the outset, was the question of the proper treatment of Professor Jordan's rather difficult prose. His attitude toward language, a factor which probably contributes to its difficulty, is perhaps the weakest point of his entire philosophy. Even though it may be granted, as he maintained, that the primary function of language is "to constitute an object,"<sup>2</sup> and that communica-

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<sup>2</sup>Jordan, Metaphysics, op. cit., p. 116. He looked upon words as "stores" of meaning, after the manner of Ortega

tion is a secondary function, he stands indicted by his own attack upon subjectivity to the extent that the object thereby created is intelligible only to the creating intelligence.

We were forced, therefore, to decide whether to attempt a "translation" or to remain faithful to the language of the author. Either course was fraught with peril. For translation, there was the danger of misrepresentation, often accentuated, the more "free" the "translation." This approach, furthermore, would have required more extensive quotation for substantiation and illustration, and would have raised the same question as remaining too close to the language of Professor Jordan: Why this study?

We have attempted therefore to take the middle ground, recognizing that such choices usually fail on their own merits while failing to overcome completely the objections to either extreme. As against the charge that we have been too free in our interpretation, or that we have remained too close to the original, we can only hope that the total result will justify our choice. We have tried to use only short quotations to avoid much of Professor Jordan's tendencies to repetition and wandering from the point during the course of argument, while yet retaining, to provide relief from our own drab prose, some of the beautiful diction of

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and Cassirer in philosophy and Sapir and Whorf in semantics. They are objects within one's culture.

which he was capable. If the result still is difficult to comprehend, for reasons aside from our own inadequacy, we will plead only as Professor Jordan himself maintained, that "the fundamental issues of politics and of political and legal theory are not simple and that the philosophical method, which alone is competent to deal with them, can hardly be expressed in the pleasing rhetoric of the 'social' theorist and the sophistic philosopher."<sup>3</sup>

We have attempted to define the major terms as clearly as possible, since many are used in a different albeit usually more exact manner than in ordinary speech. We have tried, also, to limit ourselves to the fundamentals of the system, omitting the long, tedious and repetitious arguments through which Professor Jordan develops his points. When this threatened to cause statements well-reasoned in the original to take on the appearance of dogma, we have tried to suggest the outline of the supporting arguments, which, in turn, has required some repetition in our own analysis.

Another problem was the mode of presentation, wherein we were torn between our customary critical bent and our ego-involvement in the theory. The latter won quite early in the game, so we do not call this a critical analysis of Professor Jordan's philosophy. We rationalize this decision

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<sup>3</sup>Elijah Jordan, "Preface," Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 7.

in favor of straight-forward exposition on several grounds:

(1) Our primary objective is to make available an approach to political reality of which political scientists hitherto have not been sufficiently aware; basic criticism can well be left to others whose disagreement with the approach is more fundamental than our own.

(2) Within the framework of this approach, such criticism as would have been needed is alien to the broad outline to which we have tried to limit ourselves.

(3) In some cases where criticism seems indicated, it is likely that the reason therefor lies in the fact that Professor Jordan's writings were spread over a forty-year period. Where we could reconcile divergences for ourselves, it seemed useless to clutter these pages with their demonstration, and would have beclouded the remarkable consistency of the theory in view of the long period of time over which it was achieving expression.

(4) Because of the time factor, some of his illustrative material may seem somewhat dated, but this hardly calls for extensive treatment in a study such as this. In Business Be Damned,<sup>4</sup> for example, many of his remarks may seem to have been more timely in 1929 than in 1952, when it was published. The work actually was written, however, in the late 1920's, and published without revision as a response

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<sup>4</sup>Elijah Jordan, Business Be Damned (New York: Henry Schuman, 1952).

to a critic.<sup>5</sup> We, furthermore, must confess some lingering reservations as to the reality of the "reforms" of business during the period of its increased respectability.

(5) While the simple exposition of Professor Jordan's philosophy, as contained herein, may be open to the charge of tedium--from our language plus that of Professor Jordan--it is as nothing compared to the complication of this tedium with the amount of detail necessary to a fair critique.

(6) Lastly, a simple expository treatment seemed more appropriate in view of the fact that Professor Jordan's work is so little known among political scientists, and, seemingly, less understood.<sup>6</sup> Criticism more properly should come after the body of thought has become better known among the members of the profession.

Because of these factors, we have limited ourselves to critical and explanatory notes, usually presented as footnotes rather than incorporated into the text.

In conclusion, we have attempted to represent faithfully Professor Jordan's philosophy. For any "improvements" that may have been made during the course of interpretation,

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<sup>5</sup>Warner Wick, "Business Be Damned: Book Review," Ethics, LXIII (1953), p. 145.

<sup>6</sup>Cf. Glendon Schubert, The Public Interest (Glencoe, Ill.: The Free Press, 1960), p. 84n.

we accept full liability or give full credit, depending upon the nature of the "improvement."

It follows then that the ideas contained herein, if we have been successful, are those of Professor Jordan. Our task has been primarily the exposition, interpretation, illustration and expansion of these ideas. Whatever degree of success we have enjoyed is due in large measure to the untiring efforts of Professor John Paul Duncan, the director of this dissertation, who has allowed unlimited access to his extensive notes and materials on Professor Jordan, and who has given unstintingly of his time to the discussion and clarification of controversial points. Such literary merit as the finished product may possess may be credited to his careful supervision through several revisions.

Our appreciation extends also to Professors John H. Leek, Joseph C. Pray, Rufus G. Hall, and Carlton W. Berenda for their friendly cooperation and helpful criticism.

For whatever ability we have brought to our task, credit may be given to these and other members of the departments of government and philosophy; to Professor Muzafer Sherif, who has influenced our thinking perhaps more than he would care to admit; and to Professors Corbitt B. Rushing and Gregory D. Pritchard of Oklahoma Baptist University, who determined years ago that this dissertation would be written in the field of political philosophy.

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## CHAPTER I

### INTRODUCTION: CONTEMPORARY SETTING FOR A PHILISOPHY OF PURPOSE

In the latter part of the decade of the 1950's, political philosophy caught up with American history. By this it is meant that historic philosophic concerns became--temporarily, at least--practical concerns in the realm of politics, engaging the attention of a number of important citizens and public officials.

With reference to what Lord Russell has called the "world of being" and the "world of existence,"<sup>1</sup> or what are more commonly referred to as the realms of value and fact, one chronicler of western thought has concluded that "there is no 'modern' synthesis. Modern philosophy is characterized by a set of persistent questions, not by a set of enduring answers."<sup>2</sup> When these questions are asked by practical people--those whom Eric Hoffer has called the "administrators"<sup>3</sup>

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<sup>1</sup>Bertrand Russell, The Problems of Philosophy (New York: Henry Holt & Co., 1912), pp. 156-7.

<sup>2</sup>W. T. Jones, A History of Western Philosophy (New York: Harcourt, Brace & Co., 1952), p. 993.

<sup>3</sup>Eric Hoffer, The True Believer (New York: Harper &

--philosophy is put on its mettle to provide answers that are at least "operational." When the practical people who ask the questions are those charged with the welfare of the society as a whole--the politicians--political philosophy no longer can be merely an academic pastime but becomes a practical concern of the highest order.

The immediate focus of attention in the recent discussion was the definition of purpose, a problem that has always been peculiarly philosophic and which is integrally related to the other concerns of philosophy. The rebirth of interest in teleological questions, outside of a religious framework, actually occurred one or two decades prior to the date mentioned, with the publication of works by such men as Lewis Mumford,<sup>4</sup> Erich Fromm,<sup>5</sup> and John Wild,<sup>6</sup> to select from a host of thinkers three of particular relevance to political philosophy. It was in January, 1959, however, that the President of the United States focused national attention upon the problem and underscored its practical nature in his

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Brothers, 1951), p. 148.

<sup>4</sup>Lewis Mumford, The Condition of Man (New York: Harcourt, Brace, & Co., 1944); The Conduct of Life (New York: Harcourt, Brace & Co., 1951); among others.

<sup>5</sup>Erich Fromm, Escape From Freedom (New York: Farrar & Rinehart, 1941); Man for Himself (New York: Rinehart & Co., 1947); The Sane Society (New York: Rinehart & Co., 1955).

<sup>6</sup>John Wild, Plato's Modern Enemies and the Theory of Natural Law (Chicago: University of Chicago Press, 1953).

assertion that the United States should define its "national purpose."<sup>7</sup>

It should not be supposed that the United States has been entirely without political philosophy throughout its history. Indeed, the ideas upon which it was founded were rooted in the philosophy of the seventeenth century, one of those intellectual renaissances that have marked the course of western civilization. These ideas, however, were accepted largely as received, and little attempt was made to re-work them in light of the great revolution which occurred after their formulation. This refers, of course, to the Industrial Revolution, the most recent of those cataclysmic changes in technology which have separated and distinguished the economic ages.

In the period since the founding of the American Republic, and its subsequent industrialization, the only great philosophic movement was that of Pragmatism or Instrumentalism. This was a great movement because it was in rapport with the dominant bio-cultural facts of life to the extent that it offered to the culture an acceptable interpretation of itself. Its most important apostles were William James and John Dewey, and its tenets struck a ready response in the United States, to the point that it has been called the

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<sup>7</sup>President Dwight D. Eisenhower, "Annual Message on the State of the Union," January, 1959.

philosophy of America.

Pragmatism prided itself upon being a practical philosophy, with science as its method. As described by James, it was a "turning away from first things, principles, 'categories,' supposed necessities, and [a] turning towards last things, fruits, consequences, facts."<sup>8</sup> It concerned itself with problem-solving, and judgments involving proposed conduct were to be evaluated only by their effectiveness as instruments for solving human difficulties. Its positive accomplishments were legion, and it cleared the air of arguments that had lost, or seemed to have lost, whatever relevance they at one time may have had for American experience.

It would seem, almost by definition, that a problem-solving approach to philosophy is useful only where the problems are apparent--where there is a broad consensus upon the things that need to be done and relatively free access to the instruments to the accomplishment. Problems are problems, however, only in relation to more ideal constructs or "categories"--regardless of how vaguely these are conceived and from whatever source they are derived--from which presented fact is at variance. The quest for purpose, national or otherwise, raises just this question: What are the problems that need to be solved? Pragmatism qua pragmatism, it

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<sup>8</sup>William James, Pragmatism (New York: Longmans, Green & Co., 1907), pp. 54-5.

seems, offers and can offer no satisfactory answer to this problem.<sup>9</sup>

### The Recent Discussions of National Purpose

The President's belated response to his own suggestion was to create, in 1960, a privately-financed Commission on National Goals. This Commission, which made its report in the fall of 1960,<sup>10</sup> placed its task squarely within the context of the contemporary struggle against Communism and keyed most of its proposals to the exigencies of this struggle. Its preliminary statement of the "paramount" goals of the United States, "to preserve and enlarge our own liberties, to meet a deadly menace, and to extend the area of freedom throughout the world,"<sup>11</sup> is suggestive more of State Department propaganda or an appeal to the ideology of popular America than of systematic inquiry.

Except in the areas of racial equality and national defense, there was no significant attempt to examine the implications of this conception of the national goals in terms of concrete programs, with the result that the Commission report was largely a defense of the present American milieu as the "best of all possible worlds." The report was accompan-

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<sup>9</sup>Cf. Jones, op. cit., pp. 961, 964-5, 985.

<sup>10</sup>President's Commission on National Goals, Goals for Americans (Englewood Cliffs, N. J.: Prentice-Hall, 1960).

<sup>11</sup>Ibid., p. 2.

ied by a collection of articles written by specialists in various fields and submitted to the Commission for study during its deliberations; while some of these articles do contain suggestions for actual programs, there is little to indicate any connection between these and the goals postulated by the Commission.

The appointment of the Commission touched off a wave of attempts at goal-definition. First to enter the picture was Life magazine, which asked several distinguished Americans to try their hands at the task. The results, published serially during the spring of 1960,<sup>12</sup> were almost as disappointing as those of the President's Commission.

It is difficult to avoid agreement with Professor Sibley, one of the critics of the "goal-definers," that

the "goals" statements of the commission and of the Life series left many with the feeling that the individuals involved did not know exactly what they were about. There was little or no discussion of the metaphysical

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<sup>12</sup>Included were John K. Jessup, "A Noble Framework for a Great Debate," Life, IIL (May 23, 1960), p. 24; Archibald MacLeish, "We Have Purpose. . . . We All Know It," Life, IIL (May 30, 1960), p. 86; Adlai Stevenson, "Extend Our Vision . . . to All Mankind," Life, IIL (May 30, 1960), p. 87; David Sarnoff, "Turn the Tide of the Cold War in America's Favor," Life, IIL (June 6, 1960), p. 108; Billy Graham, "Men Must be Changed before a Nation Can," Life, IIL (June 6, 1960), p. 109; John W. Gardner, "Can We Count on More Dedicated People," Life, IIL (June 13, 1960), p. 98; Clinton Rossiter, "We Must Show the Way to Enduring Peace," Life, IIL (June 13, 1960), p. 99; Walter Lippmann, "The Country Is Waiting for Another Innovator," Life, IIL (June 20, 1960), p. 114; Albert Wohlstetter, "Purpose Hammered Out of Reflection and Choice," Life, IIL (June 20, 1960), p. 115.



implications of their assignments and little uniformity as to the method of ascertaining what "purposes" were or ought to be. Neither the commission statement nor the Life analyses could be regarded as high level political theory.<sup>13</sup>

It would not be too great an exaggeration to say that the goal-definers approached their problem in an essentially pragmatic manner: if we need goals, let's make some.

It is unquestionably true that among their efforts there is no recognition that teleological inquiry is not a new phenomenon. No reference was made to the rather large body of philosophic literature, representing the work of some of the most acute intelligences in the history of western civilization, on the problem of the nature, status, and function of purpose in the field of human behavior.

#### Contributions by Political Science

The President's request was met in the field of political science by a stony silence, broken only by Professors Hans J. Morgenthau<sup>14</sup> and Clinton Rossiter.<sup>15</sup> This is not surprising in view of what have been the dominant trends

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<sup>13</sup>Mulford Q. Sibley, "Ideas and Attitudes at the Turn of the Decade," American Government Annual, 1961-1962, ed. by Ivan Hinderaker (New York: Holt, Rinehart & Winston, 1961), p. 2.

<sup>14</sup>Hans J. Morgenthau, The Purpose of American Politics (New York: Alfred A. Knopf, 1960).

<sup>15</sup>Professor Rossiter wrote an article for the Life series, supra, p. 6n, and contributed an essay to the President's Commission: "The Democratic Process," Goals for Americans, op. cit., pp. 61-78.

within the discipline during at least the last twenty-five years.

Plato, as the first important student of politics in the western world, "began his study of the social order with a definition and analysis of the concept of justice . . . , a general principle of order, regularity, unity and lawfulness."<sup>16</sup> The common function of all states was the promotion of this end of justice--the necessarily imperfect actualization of the "idea." The truly important concept here, in terms of methodology, at least, is not the relative validity of his definition of justice as the end to be pursued, but rather the functional identity which he posits for all states in the process of actualizing the "idea." He posits, that is, a concept of the state as a political process, in terms of which the effectiveness of extant states can be evaluated; process, as the policy scientists have suggested,<sup>17</sup> can be evaluated only in terms of an end.

This teleological conception of the state, more or less assumed by Plato, was given what is perhaps its classic expression by Aristotle. Aristotle's actual study of poli-

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<sup>16</sup>Ernst Cassirer, The Myth of the State (Garden City, N. Y.: Doubleday & Co., 1955), p. 81.

<sup>17</sup>Cf. Harold D. Lasswell, "The Policy Orientation," in The Policy Sciences: Recent Developments in Scope and Methods, ed. by Harold D. Lasswell and Daniel Lerner (Stanford: Stanford University Press, 1951), pp. 3ff.

tics, however, dealt in greater detail and with greater emphasis upon the diversity of form among states, with little explicit reference to their functional identity. Later students of politics, for reasons unknown, patterned their analyses after his formal emphasis, and the study of politics was diverted into a blind alley from which it has yet fully to extricate itself.<sup>18</sup> In the period since Aristotle, students of politics--philosophers and political scientists alike--have observed and classified, re-observed and re-classified, with a fruitless monotony that would have sounded the knell for any less vital and less immanent concern. Political life flowed on past this activity, even while it proceeded, thus lending credence to the common criticism of "theorists" by the practitioners of politics.

In recent years political science has refocused its attention upon the political process. This rebellion against the per se sterile<sup>19</sup> description of governmental institutions

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<sup>18</sup>There are hopeful signs of change, as, e.g., "The comparative study of political institutions and systems, therefore, entails the comparison of variables against a background of uniformity, either actual or analytical, for the purpose of discovering causal factors that account for variations.

"[T]he descriptive study . . . [of] the formal paraphernalia of politics . . . evaded the issue of what the function of politics was in society." Roy C. Macridis, The Study of Comparative Government (Garden City, N. Y.: Doubleday & Co., 1955), pp. 2-3.

<sup>19</sup>David Easton, The Political System (New York: Alfred A. Knopf, 1953), p. 159.

in their legal aspects--never as extreme as painted by its critics--has taken the name of political behaviorism. But although the study of political behavior brought new emphasis upon the political process, it brought with this emphasis a methodological framework that largely has excluded the characteristics which to Plato and Aristotle distinguished politics as a science and caused Aristotle, at least, to regard it as the "master science." Concern over these methodological developments, and the resulting debate thereon, caused one commentator to ask, "Whatever Happened to the Great Issues?"<sup>20</sup> After examining present trends within the discipline, the same commentator suggested that "political science is a discipline only by the grace of God, the indifference of the other sciences, and the toleration of the humanities."<sup>21</sup>

The political behaviorists, then, while emphasizing the element of process, had accepted the narrow conception of science advocated by the logical positivists as the basis of their methodology. From the point of view of Aristotle's conception of political science, logical positivism's primary contribution was to justify the purging of the discipline of all problems which may not be subjected to the rigorous

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<sup>20</sup>A. A. Rogow, "Whatever Happened to the Great Issues?" American Political Science Review, LI (1957), p. 771.

<sup>21</sup>Ibid.

criteria of knowledge advanced by the positivists. Such problems, including the aspects of politics which Plato and Aristotle regarded so highly, were placed under the increasingly general heading of "value questions," while political science retreated (or advanced) to what has been described, in its most generous statement, as "Scientific Value Relativism."<sup>22</sup>

All questions concerning purpose, of course, would fall under this heading. Thus, the contributions of Professors Morgenthau and Rossiter to the quest for a national purpose may well be regarded as exceptional in the sense that they represent what is probably a minority of the members of the discipline--those who view such matters as "purpose" as a legitimate object of professional concern.

Professor Morgenthau's contribution to the discussion of national purpose was exceptional in another sense: it was by far the most significant contribution in the entire quest. His method, although Professor Sibley's charge of Hegelianism is perhaps too extreme,<sup>23</sup> was historical; he sought to find the purpose of the nation in its history. In fact, and with the possible exception of the original founding of the United States, he suggests that "purpose" can never be determined

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<sup>22</sup>Arnold Brecht, Political Theory (Princeton: Princeton University Press, 1959), pp. 117-35.

<sup>23</sup>Sibley, op. cit., p. 3.

except in retrospect.<sup>24</sup> Unfortunately, he does not elaborate this curious denial of the actual futurity of purpose, which seemingly contradicts his own attempt to explain the national purpose of the United States for the future.

Not only is purpose to be found only through retrospection in Professor Morgenthau's analysis; it is also blind.

[I]n the search for national purpose, action takes precedence over reflection, the implied meaning over the explicit interpretation, and only in so far as the latter is borne out by the former do reflection and interpretation help rather than hinder understanding.<sup>25</sup>

To hold, as Professor Morgenthau seems to hold, that purpose can be determined only in the wake of action would seem necessarily to posit social processes as entirely atavistic and totally beyond human control and direction. This would be contrary to the assumptions upon which man has reasoned throughout the period known as western civilization. Such a formulation would seem also to cast doubt upon Professor Morgenthau's earlier position,<sup>26</sup> since he now asserts that national interests can be defined only in terms of a national purpose.<sup>27</sup>

Professor Morgenthau's final position, as the result

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<sup>24</sup>Morgenthau, op. cit., pp. 7-11.

<sup>25</sup>Ibid., p. 11.

<sup>26</sup>Hans J. Morgenthau, In Defense of the National Interest (New York: Alfred A. Knopf, 1951).

<sup>27</sup>Morgenthau, The Purpose of American Politics, op. cit., p. 309.

of a subtle transition which he himself does not seem to recognize, shows a conception of purpose neither as obtuse as he suggests nor as peculiar to the American nation as he supposes. Thus, while he sees "freedom and equality" of the individual as the basic national purpose, he thinks that

America lost its innocence in relation to itself when society engendered out of its own womb that ubiquitous, crude, and brutal domination of man by man which the Constitution and the American political system were thought to have confined, tamed, and restrained.<sup>28</sup>

This loss of innocence came as a result of the industrial revolution and the concomitant concentration of economic power; under the sway of this power, freedom undefined came to be only a freedom to "sleep under bridges." Thereafter the purpose--to achieve freedom and equality--found expression in movements for social reform.

The movements of social reform . . . appear in retrospect as different phases of a single endeavor, born of and nourished by one experience and seeking the same goal by essentially identical means. That experience was the exploitation of human and material resources for private gain, which tended to negate the American purpose of vertical social mobility. That goal was the restoration of the American purpose under the conditions of an urban and industrial society. The means employed was the Federal government's assumption of responsibility for the achievement of the goal.<sup>29</sup>

Upon closer analysis, then, it appears that freedom and equality are not the purpose of American politics; in fact, their achievement

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<sup>28</sup>Ibid., p. 113.

<sup>29</sup>Ibid., p. 70.

constitutes but one of the preconditions of man's self-fulfillment. To achieve that self-fulfillment itself equality and freedom must be directed toward a transcendent substantive goal, for the sake of which freedom and equality are sought. It is from such a goal that equality and freedom receive their order, their limits, and their purpose--that is, their meaning. Thus, paradoxically enough, equality and freedom, divorced from such a goal and sought for themselves, evolve into an egalitarianism and a libertarianism which first stunt both individual and social development and then put in to jeopardy equality and freedom themselves.<sup>30</sup>

The point is, of course, that if freedom and equality are not ends in themselves, but are always freedom to and equality of something, then that "something" is the actual goal. In such a case, the actual goal should be stated, examined, criticized, and defended in order that means to its accomplishment can be rationally discovered despite inequality and unfreedom in actual fact. Compulsory school attendance laws, for example, are rationally defensible in terms of a purpose of self-fulfillment, while their defense in terms of freedom and equality is a circuitous one at best. In terms of a goal of self-fulfillment, and on the basis of the oft-stated conception of freedom as procedural rather than substantive,<sup>31</sup> even the pragmatist could point out that freedom is a valid sub-goal only in so far as it is instrumental to the achievement of the goal.

In a very real sense, then, Professor Morgenthau's

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<sup>30</sup>Ibid., p. 238.

<sup>31</sup>MacLeish, op. cit., p. 93.



work, despite the excellent commentary contained therein, leaves off at the point where it should begin if it is in fact to be a discussion of the national purpose.

The Corporate Philosophy of Elijah Jordan

There is one body of thought that does begin at just this point; this is the philosophy of the late Elijah Jordan, former Professor of Philosophy at Butler University, in which there is a growing interest among certain American philosophers.

Professor Jordan faces squarely the implications of his approach, and rejects forthright the philosophy of individualism which led, in the first instance, to such conceptions of freedom and equality as political purposes. He points out that individualism, in an age characterized by organization, not only fails to embody the real values which the individualists desired, but also confuses the issues to the point that meaningful analysis of society and social processes becomes virtually impossible. As one commentator has said, "He was one of the few non-Marxist philosophers who took seriously the rise of Standard Oil, General Motors, the C.I.O. and the T.V.A."<sup>32</sup>

Professor Jordan finds that

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<sup>32</sup>Max H. Fisch, "Preface" to Metaphysics, by Elijah Jordan, ed. by Max H. Fisch (Evanston: Principia Press of Illinois, 1956), p. xiv.

for the man who has abstract "political" freedom in the protection against interference by others, but who nevertheless has no access to the tools and materials necessary for successful action, freedom is not likely to mean much.<sup>33</sup>

This is the essence of his critique of the individualist goals. At one juncture in history it appeared feasible if not probable that the "development and fulfillment of the individual," which Professor Morgenthau views as the ultimate purpose of the goals of individualism, could be best secured through freedom and equality. Subsequent socioeconomic developments, however, proved this erroneous. Freedom and equality, in other words, were actually means, although posited and defended as ends; under changed social circumstances it appears that the actual ends no longer can be pursued through Jeffersonian policy ideals.

Failure to provide an adequate interpretation of life in terms of modern social conditions was viewed by Professor Jordan as a failure of social philosophy. Although this failure became apparent and critical under the effects of industrialization, he thought that it had begun in the period of classical Greece, and was traceable to the collapse of the city-state as an institution. The city-state, of course, was in the process of collapse before its theory was formulated in the works of Plato and Aristotle, but in that

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<sup>33</sup>Elijah Jordan, The Good Life (Chicago: University of Chicago Press, 1949), p. 418.

milieu it had seemed to men that they could achieve security and well-being through their own unified endeavor. The feeling of alienation which set in during the period of disintegration--the disintegration that Socrates and Plato attempted to counter and Aristotle witnessed in its final stage--wrote finis to the effort. As one historian has put it, "man as a political animal, a fraction of the polis or self-governing state, had ended with Aristotle; with Alexander begins man as an individual."<sup>34</sup> Or, in Professor Sabine's words, "men had to learn to live alone as they had never done. . . ."<sup>35</sup> Professor Jordan's interpretation of the philosophic result of this development is that

instead of referring to the rational problem of reconstituting "nature" with reference to ends, as had previously been the constructive genius of the Greeks, the mind of the time lost itself in a mystical and futile "searching of heart."<sup>36</sup>

Thus, Professor Tarn relates, "at a banquet at Opis, Alexander prayed for a union of hearts (homonoia). . . ."<sup>37</sup>

The effect of this traumatic change in the condition of life upon social philosophy was that the self, which the

<sup>34</sup>W. W. Tarn, Hellenistic Civilization (London: E. Arnold & Co., 1927), p. 69.

<sup>35</sup>George H. Sabine, A History of Political Theory, rev. ed. (New York: Henry Holt & Co., 1950), p. 141.

<sup>36</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 95.

<sup>37</sup>Tarn, op. cit., p. 69.

earlier Greeks had discovered "in the tie which bound him to the whole of what appeared to him as real,"<sup>38</sup> became an idea which was

identified with a mass of vaguely unsatisfactory subjective states [of mind], and as feelings do not submit to law, cannot be generalized, gets identified once for all with what is private and exclusive and inner and "metaphysical." This idea of self lost in the struggle with the Greek-Christian objective idea of self during the middle ages, but finally triumphed with the Reformation and modern individualism.<sup>39</sup>

The twin results of this idea of self as consciousness were "an abstract religious hope, which eternally attempts to be its own object, and an equally abstract industrial machine. . . ." <sup>40</sup> The relation of the former, as custodian of ethical values, to the latter, as custodian of the means to the production of the material necessities of life, was supposed to exist only in subjective "states of mind."

In so far as there was any connection between the social and the ethical theory of the individualists, it was to be found in the Benthamite "greatest good for the greatest number," wherein the "good" is conceivable only as the individual's pursuit of his subjective interests. It requires no discussion of the notorious unreliability of introspective reports, or of the generally accepted lack of rational-

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<sup>38</sup>Jordan, Forms of Individuality, op. cit., p. 92.

<sup>39</sup>Ibid., p. 95.

<sup>40</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), pp. 190-1.

ity in the ordinary behavior of human beings, to conclude with Professor Jordan that "interest cannot be made the proper concrete subject-matter for public order considered as an organization of political values."<sup>41</sup> Interest is private, exclusive, and particular, while social order presupposes a content that is public, inclusive, and universal.<sup>42</sup>

Professor Jordan believed, then, that any social theory that begins with individual human beings and tries to build a society from these components is a reductio ad absurdum both logically and practically.

What is required in social theory is not the element of social structure but the principle of social constitution. Not the technical principle which tells how to proceed if you want to make a society out of non-social elements, but the diagnostic principle which enables you to understand society as an order already constituted in nature.<sup>43</sup>

The isolated individual is not experienced in nature. To sense experience, the human individual in all his factual detail is presented as a part of the mass--living in the institutions and demonstrating in his "make-up" the common culture of his society. To examine the individual human being in

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<sup>41</sup>Ibid., p. 123.

<sup>42</sup>Thus Adlai Stevenson saw the main evidence of a failure of national purpose in the fact that, under the shibboleths of freedom, the public realm had become peopled with private interests, resulting in "social evils [which] pile up when little more than unchecked private interest determines the pattern of society." Stevenson, op. cit., p. 94.

<sup>43</sup>Jordan, Forms of Individuality, op. cit., p. 74.

terms of social theory requires that he be individuated--i.e., differentiated within the mass of the whole through a statement of the relations which bind him to that whole.

What is needed in socio-political theory, then, is a reaffirmation of the Greek conception of rationalism, wherein rationality was postulated as an attribute of the whole. Rationality, that is, means only "that the state, out of whatever materials made, is speculatively knowable."<sup>44</sup> The task of philosophy is the formulation of concepts, or categories, through which this postulated or assumed rationality can be utilized as reliable knowledge, and it is to this task that Professor Jordan devoted his intellectual endeavors.

#### Philosophy as a Practical Concern

Before beginning the analysis of these categories--the principles of Professor Jordan's corporate philosophy--mention must be made of his view of philosophy as a practical concern. It is perhaps surprising that in an age characterized by awareness of the crucial importance of the "sociology of knowledge"<sup>45</sup> philosophy is regarded widely as a mere academic pastime. Not least among those who so regard philosophy are those students who claim the methodology of science as the only valid approach to knowledge.

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<sup>44</sup>Jordan, Theory of Legislation, op. cit., p. 42.

<sup>45</sup>Karl Mannheim, Ideology and Utopia (New York: Harcourt, Brace & Co., 1936), pp. 264-311.

One of the most ardent advocates of a science of politics recently insisted that "political philosophy, political theory, and political science are no longer interchangeable terms as they were in the past."<sup>46</sup> He, of course, was arguing for recognition of the more rigorous methodological requirements of the scientific method in politics, which is a legitimate demand. There is a danger, however, that such semantic niceties will confuse the functional similarity of all attempts at conceptualization. In practical terms, the view of Cassirer is of equal importance. He writes that

in language, in religion, in art, in science, man can do no more than to build up his own universe--a symbolic universe that enables him to understand and interpret, to articulate and organize, to synthesize and universalize his human experience.<sup>47</sup>

Whether the term "theory" be used in this functional sense or only as qualified by formal requirements of validity, it should be recognized that all of experience has not been reduced to the positivist's canons of science, and that all attempts to render experience intelligible are "theoretical," whether the method be science, art, philosophy, religion, or whatever. As one commentator on Professor Jordan's philosophy has stated, "the world is intelligible only in terms of the theories with which we interpret it."<sup>48</sup>

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<sup>46</sup>Brecht, op. cit., p. 17.

<sup>47</sup>Ernst Cassirer, An Essay on Man (Garden City, N. Y.: Doubleday & Co., 1954), p. 278.

<sup>48</sup>Robert D. Mack, "Introduction" to Essays in Criti-

The practical importance of philosophy, however, goes beyond the relation of philosophy to science and into the realm of everyday life. As Professor MacIver points out,

the myth mediates between man and nature. From the shelter of his myth he perceives and experiences the world. Inside his myth he is at home in the world.<sup>49</sup>

Thus the attempt to avoid theory is futile, leading only to an unquestioning acceptance of "received" theory. Professor Jordan's conception of language as an object, used primarily to constitute objects, means that language is composed of symbols that are real in themselves. The things to which the theoretical statements contained in and constructed from language refer are not represented as found in nature but as interpreted. In Ortega's words:

Every word shows us a thing--that is, the word says it to us, shows it to us, already interpreted, qualified. Language is in itself theory, perhaps theory that is always archaic, mummified, in some cases completely outdated. But . . . every word is already a contracted, and as it were, saturated definition.<sup>50</sup>

The very use of language, then, presupposes conceptualization. The alternatives are not whether one is theoretical or non-theoretical, but whether one adopts a critical or an uncritical attitude toward theory. Simply to ignore it, or

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cism, by Elijah Jordan (Chicago: University of Chicago Press, 1952), p. 5.

<sup>49</sup>Robert M. MacIver, The Web of Government (New York: The Macmillan Co., 1947), p. 5.

<sup>50</sup>Jose Ortega y Gasset, Man and People (New York: W. W. Norton & Co., 1957), p. 181.



to deny its importance, is to adopt an uncritical attitude.

Any political behavior, then, involves a set of theoretical assumptions. Professor Easton, discussing the uses of political science, has stated that "statesmanship is an art, not an applied science,"<sup>51</sup> elaborating as follows:

Since decisions must be made in practical affairs, where, even at its best, science is usually ignorant of some of the consequences, then the choice must include foresight based on prudence; it becomes the application not only of scientific knowledge but also of prudential knowledge.<sup>52</sup>

Accepting "prudential knowledge" as meaning perception or understanding characterized by sound judgment in practical matters, we come to the core of the problem: assuming that political science can supply the scientific knowledge, whence comes the prudential knowledge? To ignore the real problem here is to equate sound judgment with private self-interest, with culturally determined behavior patterns, or with some other such alternative, any or all of which may or may not be "prudential."

Assuming that prudential knowledge may not be equated with chance, some effort must be devoted to the determination of what it is. Since, as Kant demonstrated, judgments can be made only in reference to principles, sound judgment must be judgment consistently derived from sound

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<sup>51</sup>Easton, op. cit., p. 87.

<sup>52</sup>Ibid., p. 87n.

principles. The establishment of sound principles is a task of philosophy, and philosophy, therefore, is no more impractical than the making of judgments.

The function to be performed by the philosophic method is nothing other than making secure the contemplated regress to principles, for without the guidance of method, such a regress would be merely a leap in the dark and would leave us where we were before--prey to the arbitrary.<sup>53</sup>

Thus, while others debate, the practical man must assume the intelligibility of his world. But the degree of intelligibility that does in fact exist, and the validity of action grounded therein, varies with the soundness of the principles in terms of which the world is intelligible.

To Professor Jordan, the modern world was attempting to understand the world in terms of the principles of individualism, which had violated a basic rule of logic in attributing ultimate social reality to private individuals, and had located "purpose" in the private "minds" of these individuals. To obtain a social philosophy, then, the society had to be constructed from these particularistic elements. Since it was illogical, the approach was unsound, and action based thereon was accordingly less valid than it should be. He suggests, in fact, that the theory has been workable only because of the exceptions which have been made

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<sup>53</sup>Leonard Nelson, Socratic Method and Critical Philosophy, trans. by Thomas K. Brown III (New Haven: Yale University Press, 1949), p. 108.

to it. Fewer exceptions, it is true, were required under earlier, simpler conditions of existence, but "the tendency to small unit organization with superindividuation into large practical or administrative systems is upon us and is the characteristic fact of modern life."<sup>54</sup>

In eras of less complex social structure and process, for example, the definition or objectification of "purpose" by public agencies was less critical. In modern industrial society, characterized by mass organization, it no longer can be taken for granted that public ends are being served when private, subjective interests are sought as purposes.

What is needed, then, is a new social philosophy, based upon sound principles consistent with the facts of contemporary life. This is the task which Professor Jordan set for himself, the results of which will be examined herein. The effort was a practical effort, because action is always grounded in the theory in terms of which the world is viewed, and only through which can the world become intelligible. His effort, then, was not just to construct a new social philosophy the better to explain social phenomena, but also to provide a theoretical basis for action that would be valid in contemporary socio-political life.

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<sup>54</sup>Jordan, Forms of Individuality, op. cit., p. 322.

Part I:

The Principles of Jordan's Corporate Philosophy

## CHAPTER II

### PURPOSE AS PUBLIC OR OBJECTIVE

Professor Jordan then believed the great need of our age to be an adequate social philosophy--one that could account for the tremendous changes in the order of the life of contemporary man through a meaningful interpretation of that order, including the status of man within it. The truly adequate social philosophy, however, also must be a practical philosophy, which means that it must be of sufficient validity to serve as a basis and guide for human activity.

He thought that modern social philosophy had failed in this regard, and that its failure was traceable to its subjectivity--that is, to its concern with the "minds" of men considered as abstract individuals. Thus his demand as a criterion of adequacy in social philosophy was, in the first instance, objectivity; philosophy must escape the morass of abstract psychologizing into the objective world of fact--the active world of everyday life.

If purpose, therefore, is to be a meaningful datum for practical philosophy, assisting not only in the explana-

tion of social life but also in the provision of a theoretical basis for human action, he believed that the concept had to be rescued from the individualist formulation, wherein it appeared as arbitrary volitional activity by the isolated individual. The concept of purpose must be given objective status in the world of persons and things. His basic assumption, which he demonstrated at great length, was that "life is embodied order,"<sup>1</sup> and his formulation of purpose was in part an attempt to give it a status within that order.

#### From Subjectivity to Objectivity

Professor Jordan believed that the subjectivist philosophy of individualism had failed in the modern period because the best that it could do with Aristotle's famous assertion that man is a political animal was to interpret it as "something" in the "mind" of man that "draws" him to his fellows. To Aristotle, on the other hand, it had meant the objective ties, the functional solidarity, inherent in life.

Professor Jordan believed, furthermore, that subjectivist philosophy had failed not only to produce an adequate social philosophy, but also to deal adequately with the "mind" of man--its object of special concern. This latter failure he found in its inadequate accounts of the relation of the "mind" to the whole of which "mind" is only a part. Thus,

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<sup>1</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 326.

failure in the one necessitated failure in the other, since

in the very stuff of the simplest experience there are [both] the inner subjective phase or ground sense of feeling, and the outer objective reference to fact, the meaning which gives wholeness and universality. "Social" reality is, then, merely a case of objective reality.<sup>2</sup>

States of mind, "even in their mere descriptive aspects, implicate themselves with objective orders of fact, and fact in this sense of organization is the basis of social reality."<sup>3</sup>

The "state of mind" as an inward characteristic of the individual human being can be meaningful only, if at all, in the study of the individual as an isolated organism; otherwise, "the 'state of mind' or inner process is as nothing until something is or happens which can be related to something else that is or happens, that is, until the state of mind is stated as fact."<sup>4</sup>

This conception of the mind-body problem (which, in its usual formulation, he sees as a pseudo-problem), may be expressed in terms of the institutional-behavioral controversy within political science.<sup>5</sup> In Professor Easton's words,

<sup>2</sup>Ibid., p. 142.

<sup>3</sup>Ibid., p. 143.

<sup>4</sup>Ibid., p. 159.

<sup>5</sup>Cf. David Easton, The Political System (New York: Alfred A. Knopf, 1953). Also, Muzafer Sherif and Bertram Koslin, The "Institutional" vs. "Behavioral" Controversy in Social Science with Special Reference to Political Science (Norman: Institute of Group Relations, University of Oklahoma, 1960).

one group of political scientists study behavior, which "indicates an intention to look at a particular aspect of data, the psychological,"<sup>6</sup> while another concerns itself with "situational data." Professor Easton asserts that both are ways of exploring the "functioning of the political process."<sup>7</sup>

Professor Jordan actually attempts to synthesize the two into a theory of the political process, as Professor Easton suggests should be done. His assertion that the state of mind must be stated as fact is equivalent to the behaviorist position that behavior is the important datum.<sup>8</sup> His criticism of the political behaviorists would be that many of them use this datum as psychologists, trying to infer from it the "state of mind" of the agent, whereas it should be a beginning point for the analysis of the political process.<sup>9</sup> That is, concern with behavior by political scien-

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<sup>6</sup>Easton, op. cit., p. 205.

<sup>7</sup>Ibid., p. 206.

<sup>8</sup>Professor Jordan agrees that, in psychology, the fact in the type of behavior called the "reflex arc" is the arc itself. The arc involves both sense feeling and organic movement, the former serving as ground for the latter. Where the behaviorists in psychology were concerned with the arc--the fact--primarily as a datum from which to infer the "state of mind," however, Professor Jordan accepts the whole--subjective feeling and objective movement as expressed in the arc--as the datum for social theory.

<sup>9</sup>Professor Easton takes the behaviorists to task for their usual efforts to use "situational data" to infer the psychological make-up of individuals, rather than attempting to isolate "genuinely psychological variables." Easton, op. cit., pp. 206-18. Professor Jordan views the creative intel-



tists should look forward to its culmination in and through the political process, rather than backward to the state of mind from which it issued. Knowledge of states of mind, he contends, cannot provide the basis for an understanding of political order.

It is from the outward aspects of life, through the objective complication of ordered purposes, and not from the inwardness and distracted separateness of abstract uniqueness, that our insight into the reality of the order of life is to come.<sup>10</sup>

Political order is objective in that it is the order which both creates and results from the totality of the objective ties among the human and material fact<sup>11</sup> involved in the processes of life.

Ultimate concern with states of mind, whether by social philosophers or political behaviorists, is, as far as social theory is concerned, subjectivism. As a practical philosophy, such subjectivism leads directly to the near-solipsism of Berkeley's precept of subjective idealism, esse est percipi. Professor Jordan does not, however, ignore the aspect of fact with which subjectivism attempted to deal. On the contrary, this "inner" aspect of fact is an integral part

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ligence as the only "genuinely psychological variable," in the sense in which Professor Easton uses this term. All other factors in the psychological make-up he views as "situationally determined" (Professor Easton's terminology).

<sup>10</sup>Jordan, Forms of Individuality, op. cit., p. 66.

<sup>11</sup>Professor Jordan uses the term "fact" as a collective noun. We will follow his usage.

of the total fact, furnishing the form of which the external becomes the content.

Without . . . content the inner volatalizes [sic] in pure "idea," just as in the absence of the intent as the formative or organizing principle of integration, the content becomes inert and inane matter. On the one hand the result is the philosophy of pure abstract purposiveness, and on the other, the equally abstract materialistic positivism of science.<sup>12</sup>

Behavior is then the fact with which one must deal. Behavior, however, considered in the Aristotelian sense as mere movement, is little more intelligible as ground for a social and practical philosophy than states of mind. As the behavior with which political science must deal looks forward to its culmination in a process, behavior is important for social theory in terms of the end toward which it is directed. Such behavior is purposed behavior, to which Sherif and Sherif, social psychologists, refer in their observation that "human experience and behavior are characteristically goal-directed."<sup>13</sup>

Purpose in this sense is not, however, the arbitrary volition characteristic of subjectivist philosophy. It is rather the purpose of the ethic of Greek eudaemonism, wherein all natural entities are conceived as having an end, or

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<sup>12</sup>Jordan, Forms of Individuality, op. cit., pp. 154-5.

<sup>13</sup>Muzafer and Carolyn W. Sherif, An Outline of Social Psychology, rev. ed. (New York: Harper & Brothers, 1956), p. 11.

a function, or a purpose--different formulations of the same phenomena.<sup>14</sup>

To provide a basis for the objectivity of purpose, Professor Jordan turns to naturalistic fundamentals as evidenced in the facts of evolution or growth-process. Thus, "man and his life-order are simply a part of the universal system of energy which is evident in the revolution of the planets and the movement of bodies on the earth."<sup>15</sup> In the case of living forms, this system of energy expresses itself characteristically in growth-process. He finds, then, in growth-process the basis of objectivity, for in that process a form continually absorbs new content to achieve or realize a purpose which, while inherent within the form, yet lies beyond it as an end and requires the comprehension of content external to the form for the realization of the end.

Growth-process then serves as a synoptic principle which comprehends continuity of permanence, which "is necessary to any conception of a cosmos whatever,"<sup>16</sup> as well as change, which is a fact of life and the objective relation between present fact and future fact as including end.

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<sup>14</sup>The relation of these terms is explained infra, pp. 35-6.

<sup>15</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 235.

<sup>16</sup>Ibid., p. 49.

In growth there is a continuous and identical organization furnishing definiteness of order and structure for a serial variety of relation-content, and it is the common and natural instance of growth to assume that this organization has original and active capacity for imposing itself upon the content, or of subjecting the content to such modification as makes it compatible with the identity of its own structure.<sup>17</sup>

Continuity, or permanence, is necessary if there is to be any conception of order in life--the regularity of events which attempts at knowledge presuppose. Growth, however, is a fact which cannot be denied, so the continuity that is assumed must allow for a change, and for the comprehension of the new content that is necessary for change.

The synoptic principle of growth-process is a philosophic principle, because "at present . . . growth has no adequate representation in the categories of science. . . ."18

In the world of facts each detail is hurrying on to become not its larger self of fulfillment, but its next; the philosophy of the next is the obverse of the philosophy of the abstract other.<sup>19</sup>

Science with its static categories conceivably could deal with fact postulated as fulfilled,<sup>20</sup> but not with fact as emergent in growth.

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<sup>17</sup>Ibid., p. 274.

<sup>18</sup>Ibid., p. 280.

<sup>19</sup>Jordan, Forms of Individuality, op. cit., pp. 199-200.

<sup>20</sup>This, for example, is the assumption of the "policy sciences." Cf. Harold D. Lasswell and Daniel Lerner, The Policy Sciences (Stanford: Stanford University Press, 1951), esp. Chapter 1. Also, Harold D. Lasswell, "The Immediate

The philosophic principle of growth-process is also inherent in Greek eudaemonism: "In human affairs it is, as Aristotle said long ago, the complete or 'perfect' form of a thing that is its nature; not what the thing was, but what it may be is the index to what it eternally is."<sup>21</sup> What a thing may be, however, is grounded in its present; thus the philosophy of the "abstract other," or arbitrary purposiveness, or "pure idea," is as inadequate as is science for a practical philosophy.

Any situation of fact, therefore, includes, when viewed from the present, both its present detail and its purpose; purpose is the principle around which the fact is organized. An automobile plant must be organized in such a way as to make possible the manufacturing of automobiles--its purpose.

Viewed from the standpoint of its postulated completion in perfection, the situation of fact is the end, with its structure and content identified as an object--e.g., the organization of men, machines and material active in the process of manufacturing automobiles.

From the standpoint of the connection between the

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Future of Research Policy and Method in Political Science," American Political Science Review, VL (1951), p. 133.

<sup>21</sup>Jordan, Forms of Individuality, op. cit., p. 79.

present situation of fact as organized with respect to a purpose and the fact as evidenced in the end as an object, the fact is a function; thus, the function of the automobile plant is to manufacture automobiles.

All three of these concepts--purposed fact, ended fact, and fact as function--are included within Professor Jordan's concept of growth-process. It is within this growth-process, and in terms of these concepts as implicit therein, that he saw in fact a tendency to become ordered.

Not only did Professor Jordan see the growth-process as the basis of the objectivity required for a social philosophy; he also thought that the failure to recognize and deal adequately with this growth-process had given rise to many of the dichotomies that have plagued both philosophy and science. Thus,

the distinction of means and end, internal and external, "subjective" and objective, all imply and are conditioned upon the synthesis which represents the continuity and permanence of the growth relation, and are relative to that synthesis.<sup>22</sup>

Failure to synthesize permanence and change (and he believed that growth-process furnished the only adequate principle wherein the synthesis could be effected) could not but leave philosophy in a muddled confusion. To illustrate the synthesis by the obvious example of biological growth, the "end"

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<sup>22</sup>Ibid., p. 354.

--the potential of the individual conceived as a biological organism--is inherent within the genetic, etc., structure of the organism, but the "means" to the realization of this end --nourishment, etc.--are external; the two are synthesized in the growth-process, wherein content is incorporated into a form to attain an end.

To illustrate with an example nearer the concerns of political science, assume that a city council decides to create a public utility to provide some service, as, e.g., electric power. It creates an organization to accomplish this purpose; the end--the provision of electric power--is inherent in the organization, but before it can be realized new content--lines, generators, transformers, etc.--must be brought under the organizational structure and ordered to the end of providing the service. Thus the end and the means are synthesized within the growth-process of the organization.

In this latter example an organization was created to embody a purpose to be realized as an end. In the ordinary course of life, however, purposes often emerge without such conscious activity on the part of those who are instrumental to their embodiment in fact. In such cases the problem becomes one of identifying the purpose. A manufacturing plant is begun, for example. What is the purpose of this organization? To manufacture commodities? To make a profit?

To control the market for a particular line of commodities? These are practical questions, since it is not only conceivable but probable that an institution organized to make a profit, or to control the market, would differ from one that is organized for the purpose of manufacturing commodities.

The process of identifying purposes is the problem of objectifying the purposes--that is, of stating them as ends to be realized. As such, its comprehension requires an understanding of the status and function of ends in the processes of life.

#### The End as Constituent of the Real

As the final form of a system of fact in which form and content are synthesized in an object--the public utility providing power service in the previous example--the end is constituent of the real, which means that life always consists of facts arranged in some degree of order. Viewed from present detail of fact, however, the end is present only in purpose as the organizing principle of a system of fact. As purpose only, the end is constitutive of the real, which means that it is engaged in the creation of the order of life.

Viewed subjectively, from within the system of fact of which it is the organizing principle, purpose is unconscious life process or "the urgency of fact toward objectification, the effective or positive inertia of structure and



arrangement or distribution of parts which tends automatically to order and form. . . ."23 A subjective conception of purpose does not deal adequately with the facts, however, because purpose always involves facts that are objective to the organization itself. The organization of fact seeks an end which is yet to be realized, and seeks this end through the incorporation of content as yet external to the organization. A purpose, then, "is not an abstract mental form but a complex of environmental fact."24

The subjective treatment of purpose is frequently expressed in terms of values and value-problems, a source of no small embarrassment to political science where the field is divided between those who feel that values must and those who feel they must not be treated within the discipline. Professor Jordan's approach attempts to abolish the type of philosophy which, he feels, gave rise to the value problem.<sup>25</sup> His contention is not that values are meaningless, but rather that the attempt to deal with them in terms of abstract

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<sup>23</sup>Jordan, Theory of Legislation, op. cit., p. 59.

<sup>24</sup>Jordan, Forms of Individuality, op. cit., p. 201.

<sup>25</sup>As a separate field of study, axiology, or general theory of value, dates only from the 1890's, stemming from the debate between A. Meinong and C. Ehrenfels; its roots go back only to Hobbes, Bentham, Hume, etc., with mere forebodings of the problem in the early Hedonists. Cf. Stephen C. Pepper, "A Brief History of the General Theory of Value," A History of Philosophical Systems, ed. by Virgilius Ferm (New York: Philosophical Library, 1950), p. 493.

subjectivity results in a mere enumeration of preferences.

Value statements, he thought,

are magic until the facts they are supposed to indicate are seen in their objective relations within the structure of experience. . . . Right . . . is an order of fact . . . effective as a determinant of ends independently of and indifferent to any subjective considerations.<sup>26</sup>

Thus, "the alternative 'values' or 'facts' is itself a misleading one; values that are real are also facts; and facts that are valid are also values."<sup>27</sup>

Professor Jordan thought that the error of the subjectivists which led to the distinction between facts and values was just the distinction between the mind and the objects of the mind; his own view was that

the reality is the idea-fact situation as individuated through its mutuality. The state of mind as such is nothing until it invests itself with its end in the community of nature. It must carry itself out outwardly in the overt fact. . . .<sup>28</sup>

He rejected "as vigorously as possible the distinction between it [mind] and the things that influence it and act upon it."<sup>29</sup> The fact of the matter is that "idea and its object are . . . mutually organic to the meaning of present experience."<sup>30</sup>

<sup>26</sup>Jordan, Theory of Legislation, op. cit., p. 120.

<sup>27</sup>Ibid., p. 261.

<sup>28</sup>Jordan, Forms of Individuality, op. cit., p. 160.

<sup>29</sup>Ibid., p. 225. See infra, pp. 119-27.

<sup>30</sup>Jordan, Forms of Individuality, op. cit., p. 155.

This conception does not deny the creative intelligence which furnishes man with his idealizing capacity. On the contrary, the ability to see,

within the actualities of the present, necessities of a wider world relation . . . is precisely what differentiates man as rational from other beings and renders him capable of culture.<sup>31</sup>

When idealizing, however, which means when he is speculating as to the nature of ends, man does so in terms of the objects upon which their realization depends; that is, the active intelligence attempts to order these objects in such a way as to effectuate the end.<sup>32</sup>

Since, as has been suggested,<sup>33</sup> the end that is sought is a determinant of the organization of fact through which it will be realized, ends are important to an understanding of the ordering of life, which is to say in politics.<sup>34</sup> But this conception of end as a determinant of the order of life emphatically is not a conception of "teleologi-

<sup>31</sup>Jordan, Theory of Legislation, op. cit., p. 145.

<sup>32</sup>Professor Jordan attributes the formulation of "mind" as "active contemplation" to Fichte, who saw that "its own 'action patterns,' as ideal anticipation but not as organic precipitates, stand ready in the mental structure to incorporate or embody details of fact as they appear." Ibid., p. 145. Kant's formulation, of course, was a plurality of fixed categories innate to the mind.

<sup>33</sup>Supra, p. 37.

<sup>34</sup>Professor Jordan maintains that politics is the ordering of life, deriving its content from life itself in its economic, religious, ethical, etc., manifestations. See infra, pp. 192-202.

cal causality," wherein the end leads inexorably to its own realization. Professor Jordan states that the

end . . . is no mystical final cause which makes so much trouble for the scientist, but merely and simply the fact that the system of structures, as organized fact, tends uniformly to completion in a more comprehensive system of fact.<sup>35</sup>

Present systems of fact, of course, may be viewed as the purposed end of history, but such a formulation is of no consequence for two reasons: (1) ends are ideal formulations, and are never realized in perfection--"the real contains all the defects of the actual";<sup>36</sup> and (2) new purposes, demanding different and more comprehensive forms of order, emerge continually during the evolution of life.

The problem for practical philosophy, which is concerned with the needs of futurity as these are grounded in the organization of present fact, is one of the relation between the present collocation of fact and the purposed end of fact. Practical philosophy, therefore, in the necessity to provide a theoretical basis for human activity, cannot rest at the point where it reaches an understanding of end as inherent--although often hidden--within a present organization of fact; it must also be concerned with "the metaphysical status of action as the ground for the practical life."<sup>37</sup>

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<sup>35</sup>Jordan, Forms of Individuality, op. cit., p. 316.

<sup>36</sup>Ibid., p. 130.

<sup>37</sup>Jordan, Theory of Legislation, op. cit., p. 173.

Action as Means to End

The central element of the philosophic principle of growth-process is action, wherein "action" is used to denote any behavior that leads to the realization of ends. Action, that is, is purposed movement in the Aristotelian sense. Given a situation of fact--e.g., the electric utility corporation--which is organized with respect to a purpose objectified as an end--e.g., the provision of electric power--action is the means through which the end is realized. Exclusive concern with present fact is, in Professor Jordan's theory, abstract materialism in that it ignores the question of "Why?" Concern only with ends, on the other hand, is equally abstract purposiveness in that it ignores the equally vital question of "How?"

The relation between present fact and the end that is to be realized is, therefore, for practical philosophy, the action of the present organization of fact toward the end. "An act is the assumption that a relation, created by and existing only in the contemplation, can be realized as a fixed objective bond between the agent and his world."<sup>38</sup> Thus, the function of the corporation in the previous example, the provision of electric power, may be performed only through action; the service provided is the function of the

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<sup>38</sup>Elijah Jordan, The Good Life (Chicago: University of Chicago Press, 1949), p. 17.

institution that binds it to the world of fact of which it is a constituent part. That the relation exists in contemplation, in an intention to provide power service, is per se of no consequence; "it is only when the relation is made an element within an assumption upon which action is made to depend that its objective status is determined. . . ."39

Action is then the means to the actualization of the real, "the integrity of fact which contains its own end and ends in itself."<sup>40</sup> What is needed in practical philosophy is therefore a logic of action; the lack of such a logic precludes the creation, at present, of a science of social reality. Without such a logic, the outcome of an act is never sure, never wholly predictable, for "the objective difference which an act makes in the world does not exist until after the act has taken place. . . ."41 Even if the intelligence could speculatively determine the ends with precision, the lack of such a logic implies that there must always be an element of adventure and risk in the active life.

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<sup>39</sup>Jordan, Theory of Legislation, op. cit., p. 179.

<sup>40</sup>Jordan, Forms of Individuality, op. cit., p. 148.

<sup>41</sup>Jordan, The Good Life, op. cit., p. 43. Like many others, Professor Jordan attributes to science an "exactness" to which it does not pretend, especially in some phases of contemporary physics. He demands of science, seemingly, the kind of exactitude possible only in logical systems--as, e.g., mathematics. Except for his failure to clarify this one point, his works contain, passim, a thought-provoking critique of science after the manner of Whitehead, Cassirer, and Langer.

This element of risk is the aspect of life which the existentialists, religious and non-religious, have erected into a metaphysic. Caught in the dichotomy of an intelligence unable to make contact with the real world and a world thus incomprehensible to the intelligence, they deny the essential importance of both and "encounter existence" through action.

Professor Jordan's act, qua act, is fully as irrational as that of the existentialists, if by the term "irrational" one understands that an act is not subject to the canons of rationality--the laws of deductive logic. He attempts, however, to move to a larger, synoptic view which includes not only action but also the ground of action and the end of action within a whole which he posits as ordered or rational. No act is rational from the point of view of the agent, because rationality presumes a whole within which the agent is an individuated element. Action can become intelligible only, if at all, in terms of the whole within which it occurs; this is the reason for his constant demand for objectivity.

Even in this larger, synoptic view, however, action is intelligible only through inference; that is, given the ground of action in a present arrangement of fact, and a speculatively determined end which is to be achieved through this arrangement of fact, we can infer that to get from here to there we must do thus-and-such. Intelligibility through

inference means, again, that there must always be risk, and this element of risk is the meaning of the act of choice-- "the consciousness of chance."<sup>42</sup>

Because of this element of risk which action necessarily involves, ethics and subjects such as economics, politics, sociology, etc., which involve ethics cannot presently be sciences. This is so because action cannot be comprehended within the categories of science. Professor Jordan means to imply neither that knowledge achieved through science is without ethical implication nor that ethics and its related subjects must be given over to irrationalism. He does mean that the maxims of human activity are infinitely more complex than often has been supposed, and that a high degree of certainty cannot be expected in the study of active phenomena.

But while action, qua action, is irrational in that it does not conform to the present categories of logic and science, Professor Jordan does argue that it can be dealt with from the point of view of the external world--the ordered universe, or cosmos. From this point of view, "the three universal facts of action [i.e., facts which can be stated in the terms of logic] . . . are (1) the world as stage for action, (2) the world as instrument of action, and (3) the world as corporate whole or the end of action."<sup>43</sup>

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<sup>42</sup>Jordan, The Good Life, op. cit., p. 47.

<sup>43</sup>Ibid., p. 34.



Action is grounded, that is, in natural-cultural fact,<sup>44</sup> the collocation of fact which, in its present detail, is rational in the sense that it is a proper object of rational inquiry. Secondly, action requires that the instruments of action be arranged in such a manner as to allow the active agents to have access to the appropriate instruments. Finally, action tends to issue in some result--an object that can be identified, described, or, as is more important, imaged as an end.

The latter two aspects of action--its dependence upon instruments and its issue in an end--may be examined a priori to the act only through speculative inquiry; "proof applies only to the circumstances of action"<sup>45</sup> considered as its present detail of fact. The present collocation of fact systematized--i.e., organized with respect to its purpose--is the logical ground of action; it is also Professor Jordan's definition of will.

#### Will as the Logical Ground of Action

Since action cannot be dealt with in terms of logic, practical philosophy must seek the most direct approach possible. One such indirect method, necessary to a thorough

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<sup>44</sup>"Natural-cultural" is used to express Professor Jordan's contention that there should be no distinction between nature and culture. Cultural fact results from the same evolutionary process that yields natural fact; the world is a natural-cultural world, rather than a world of culture imposed upon a world of nature. See infra, pp. 66-74.

<sup>45</sup>Jordan, The Good Life, op. cit., p. 34.

consideration of action, is through the understanding of the ground of action--that is, the present system of fact from which action issues. The ground of action, in Professor Jordan's formulation, is will:

From the traditional mode of approach to the [political, moral and social] problems one would infer that the most direct method of description begins with a discussion of will. And the two types of theoretical interpretation with respect to will assume, first, that all executive functions in human life originate in the metaphysical will of the natural person and get final expression through the institutions of social life in the form of a perfected individual will; that is, that the end of all human action is the abstract subjective perfection of the will of the natural person; secondly, that executive functions originate in an equally metaphysical general will and issue through expression in natural persons in a perfected state or ultimate harmony of the "natural wills" with each other in the state. Each of the types of thought represent truth in a very large and important way. . . .<sup>46</sup>

As neither of these explanations of will can be adopted without damage to the truth represented by the other, the answer must lie, not in the rejection of will, but in the discovery of the principle of will which can account for both. This is the method of synoptic comprehension which Professor Jordan believed essential to any adequate social philosophy.

Of one thing, however, Professor Jordan is certain:

"The essence of practical philosophy is a theory of will,"<sup>47</sup>

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<sup>46</sup>Jordan, Forms of Individuality, op. cit., p. 235. Many political scientists of behaviorist leanings assume the fact of "general will" under the more or less static concept of "consensus." It is at least an open question whether they are not assuming the critical fact that most needs explanation.

<sup>47</sup>Jordan, Theory of Legislation, op. cit., p. 45.

since practical philosophy is concerned with action and "the fact of action cannot be given definite locus in experience or thought except on the acceptance of the will. . . ."48

Subjective individualism had described the will as an innate capacity of the "mind," primarily in terms of its freedom--that is, the "freedom of the will." Psychology, as the science of the "mind" and ultimate issue of subjectivism, disposed of this by reporting that no such capacity as will could be located within the "mind." This makes it possible to ignore the space which Professor Jordan devoted to the divorcement of his theory of will from the fact that individual persons are sometimes conscious of volitional thought, and turn instead to his constructive formulation of the theory.<sup>49</sup>

Will, as used by Professor Jordan, is a logical con-

<sup>48</sup>Jordan, The Good Life, op. cit., p. 67.

<sup>49</sup>"[T]he fact that the 'capacity' cannot be 'found' means that the doctrine has the wrong conception of the nature of will, insisting that it must be a natural fact when it is rather a cultural and specifically a logical fact. That is, the 'will' can be found neither as a capacity of body or mind; it is not a describable quality or adjunct of either. But as the idea of the substantial ground of the relation between body and mind, as made obvious to experience in the fact of action, that is, as a logical order, the will is there. . . ." Ibid., p. 66.

It is true that Professor Jordan did not consent entirely to this summary dismissal of will as a special capacity by the psychologists. As a "reference to the elemental urgency of life . . . as controlled in its direction of expression by the equally primitive perceptual consciousness," he felt that the concept of will had a special utility that other categories used by psychologists adequately could not subsume. Ibid.

struction of fact that serves to make intelligible the action that issues out of one order of fact to become incorporated into the order of fact that results when the act is completed. With mind viewed as the order of fact,<sup>50</sup> the act is the relation between mind, as order, and body, as the material or cultural fact contained within that order.

[A]n act in the concrete instance is intelligible as an expression of the relation between mind and body, and on no other basis. In general, and as a matter of principle, an act is intelligible only as an expression of the relation between mind-body on the one side and the nature-culture world on the other. Will is, then, as fact, this mind-world relation taken as a whole, mind-body being an instance in concrete fact.<sup>51</sup>

His conception of will, therefore, is as "an order of fact . . . organized as an element within another order of fact, and the spontaneity of will refers to the growth relations between the two orders."<sup>52</sup> The larger "order of fact" is the whole as completed in the end following action; growth-relation, of course, refers to the progressive action through which the end is attained. The capacity for growth is inherent within the organization of fact; thus, "will is the effectiveness which accrues to organized fact by virtue of the organization of the fact."<sup>53</sup>

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<sup>50</sup>This conception of mind is discussed more fully infra, pp. 119-27. For now, we simply make the assertion; he views consciousness, and all that consciousness implies, as physiological attributes of the human organism.

<sup>51</sup>Jordan, The Good Life, op. cit., p. 67.

<sup>52</sup>Jordan, Forms of Individuality, op. cit., p. 401.

<sup>53</sup>Jordan, Theory of Legislation, op. cit., p. 237.

In active terms, will is "the principle of action with the creative and dynamic aspects of order,"<sup>54</sup> and "its essence as spontaneity lies in the fact that it constitutes related fact systems into orders."<sup>55</sup> It is as an order of fact that will becomes objectified and therefore intelligible; this intelligibility is manifested in the fact of control, wherein control is understood to mean the intelligent direction of the forces inherent in life--i.e., the evolution of natural-cultural fact. Intelligent direction means that the direction cannot be arbitrary, but must be grounded in an understanding of will, the life force as organized in fact. Will, then, as the ground of action, is also directive --although not determinative--of the course of action. This is to say that the course of action is not an arbitrary choice, but a choice within the limits imposed by will as the ground of action in the organization of fact. The speculative determination of ends, the initial phase of the legislative process, is then always limited by the possible, and this is the reason why information is so vital to the legislator: only through an adequate understanding of the present can policies for the future be determined.

Most important of all, will is effective; it is final over time and force, and will attain expression.

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<sup>54</sup>Jordan, Forms of Individuality, op. cit., p. 381.

<sup>55</sup>Jordan, Theory of Legislation, op. cit., p. 235.

It will attain proper expression, or "good," if it can utilize intelligence in the adaptation of means to ends; inappropriate or improper expression, or "evil," if its vision is clouded by passion or the primacy of interest, which is the subjective or conscious form of force, or if directed from its natural object by force.<sup>56</sup>

Will--a system of fact organized with a propulsive tendency toward an end--will attain some kind of expression. A system of fact organized with a propulsion toward the production of a commodity, for example, will have some result. If intelligence can be utilized in the process, the result will be the production of commodities, the performance of its public function and the realization of the end. But if, as Veblen pointed out, intelligence is not allowed to direct the productive process because of the interference of other factors--in Veblen, the businessman with his profit and control motives interfering with the production-oriented engineers and technologists--the result will be something less.<sup>57</sup> Will per se is merely a system of fact incorporating within its organization a propulsive tendency; only through intelligent control can its propulsive tendency, or purpose, be objectified as an end and the organization of the fact perfected in such a manner as will lead to the realization of the end.

The direction of will by intelligence is then essen-

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<sup>56</sup>Jordan, Forms of Individuality, op. cit., p. 427.

<sup>57</sup>Thorstein Veblen, The Engineers and the Price System (New York: Viking Press, 1933). Professor Jordan's heavy debt to Veblen, unacknowledged, is obvious throughout, but especially so in Business Be Damned (New York: Henry Schuman, 1952).

tial if will is to be anything more than merely effective-- that is, if will is to be effective in the effectuation of ends. But even when utilizing intelligence to objectify the purpose as end, there can be no assurance as to the actual nature of the end prior to its realization in fact. Hypothetically, manifold possibilities of end can be formulated by the creative intelligence, but there can be no certainty that action will lead to their fulfillment. This is why the ends that are formulated must be grounded in present fact, while "the human individual struggles indefinitely and incessantly between the obligations of his vision and the necessities of his existence."<sup>58</sup>

The natural-cultural ends of action, therefore, can be no more than probable when the end is present prior to the act as its directive ideal. When access to intelligence is impossible, because of the intervention of passion, interest, or other irrational factors, the degree of probability is reduced accordingly. Good is not guaranteed. It is, in fact, not realizable in present fact, because life is growth-process, and new purposes emerge continually, leading to the need for ever more comprehensive order in life. "The tendency of life itself is to further and more complex organization, and will is both the law of organization and organizations, . . . of inner and outer orders,"<sup>59</sup>

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<sup>58</sup>Jordan, Theory of Legislation, op. cit., p. 240.

<sup>59</sup>Jordan, Forms of Individuality, op. cit., p. 382.

As ends are always to be realized, life can become rational only in the dynamic ordering of fact toward these ends. This ordering of fact toward ends is the function of politics, and the crucial importance of politics in practical philosophy may be seen in the fact that the means through which the realization of the ends must be accomplished may be so inappropriate as to preclude their realization. This is to say that the order of life may become so irrational as to prevent the fulfillment of human purposes. Thus,

the real contains all the defects of the actual. And so far as historic evolution is concerned, the defective elements of a real form may become the constitutive and directive force within the whole.<sup>60</sup>

Aside from the obvious examples in biological life, this also would apply, for example, to a society wherein the component individuals become so interest-dominated that the order of the whole, within which only the "good life" can be realized, is lost from sight. It would apply also to a society which, dominated by "national interest," loses sight of the larger world of which it, too, is only a constituent fact and within which its "good" ultimately must be realized.

As for the "individual will" versus the "general will" controversy, Professor Jordan believed that it disappeared when will is described in terms of principle--when it "is remembered that all will, as well as all other forms of

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<sup>60</sup>Ibid., p. 130.



reality, is individual."<sup>61</sup> Will, that is, is a concept denoting a system of fact incorporating within its organization a propulsive tendency; any system of fact which meets this description is then a will--i.e., an individual case.

The essential controversy here concerns the subjectivists who would deny the existence of a general will because of their view that consciousness is an essential aspect of will. To these theorists Professor Jordan poses the question,

does the fact that will-energy or will-influence is felt, or becomes a matter of self-consciousness, constitute it a class by itself; or does the fact that the effectiveness of order is upon occasion conscious distinguish it from all other efficacious relations? This amounts to the question whether consciousness is a principle of distinction among facts or a principle of order of or within facts.<sup>62</sup>

Is will, he would ask, present in the natural individual only when that individual is conscious of volitional thought? Consciousness, in relation to will, is, to Professor Jordan, merely a difference of detail that does not affect the applicability of the principle to situations of fact where it is not present. Thus the human will, or the volitional activity of the natural person, is "simply a describable system of principled fact identical as system, but not necessarily in details, . . . with the system of principled fact which

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<sup>61</sup>Jordan, Theory of Legislation, op. cit., p. 237.

<sup>62</sup>Ibid., p. 236.

makes up a community. . . ."<sup>63</sup> The general definition applies to both.

The concept of will, then, gains in comprehensiveness what it loses in specificity; in its larger meaning, as "principle," there is no "individual will" versus "general will" problem.

The will of the individual is thus a "general will," in the sense that it is a capacity which corresponds to an organization of fact within the individual, which organization of fact is continuous with the organization of fact outside the individual. And the difference between the individual will and the general will is then a difference in the degree of individuality involved.<sup>64</sup>

<sup>63</sup>Ibid., p. 237.

<sup>64</sup>Jordan, Forms of Individuality, op. cit., p. 241. This concept of will is quite similar to that used in "General Behavior Systems Theory." James G. Miller, "Toward a General Theory for the Behavioral Sciences," The State of the Social Sciences, ed. by Leonard D. White (Chicago: University of Chicago Press, 1956), pp. 29-65.

In this latter formulation the concept is termed equifinality. Ibid., p. 40. Equifinality is explained in the theory as an equilibrium concept which asserts that an "equifinal result is determined by the nature of the constituents of the system." Ibid. "So the 'goals' which 'impel' the rat to run the maze, the woman to marry, and the candidate to file for public office can be interpreted as internal strains which elicit efforts to achieve inputs of energy and information that will reduce the strains toward an equilibrium point." Ibid., p. 41.

Equifinality does not account, it seems, for the emergence of the "internal strains," which to Professor Jordan would be inherent in the evolution of life. The "internal strains," to Professor Jordan, would be the discrepancy between the present system of fact and the order of fact that is to be realized as end. The "inputs of energy and information" would be the content internalized by the form as it strives ("output") toward the order of fact as ended in itself ("equilibrium point.")

There seems to be no reason why the system of fact which "general behavior systems theory" describes as equi-

In terms of principle and without reference to particular instances in fact, will is an order of fact incorporating a tendency to growth--an urge to incorporate more and more content into the form, or order, to attain a growth-end in which form and content become conterminous or identical.

Each specific instance of will, then, is potentially an instance of individuality, but not in the sense that it stands alone as an isolated and independent entity. Will is the logical ground of action, wherein action is considered as a function that relates a present system of fact organized with respect to a purpose to an end or realized purpose. The purpose is public or objective in that it can be attained only through action, which is objective in that it involves the external world of fact as the stage for action, as furnishing the instruments of action, and as the whole in which action issues. Each will, as a logical ground of action, becomes an individuality when it is individuated in terms of its function within the whole of which it is a constituent part. Any particular will, that is, is individuated by being distinguished within the whole of fact in terms of its function within this whole.

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finality and Professor Jordan as will should require a unique concept in the case of the natural human being if it can be usefully applied in the analysis of other levels of "behavior systems" (general behavior systems theory) or "forms of individuality" (Professor Jordan). The application of the same concept to all of these is, of course, the basis of their attraction to their respective concepts.

As Rousseau noted, each will is general to the wills that are included--Professor Jordan would say individuated--within it as part of its constituent fact.<sup>65</sup> Each individuality, which to Professor Jordan means each will the purpose of which is brought to full objectivity, possesses an order which operates upon the human and material fact that is organized within the individuality. As politics is concerned with the ordering of life, an understanding of this fact is essential to an understanding of politics. The principle which designates the order of fact that is a form of individuality he terms corporeity.

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<sup>65</sup>Jean-Jacques Rousseau, The Social Contract, trans. by G. D. H. Cole (London: J. M. Dent & Sons, 1913), p. 23.

### CHAPTER III

#### CORPOREITY AS PURPOSED FACT

Professor Jordan's reformulation of the concepts of traditional philosophy<sup>1</sup> was not merely an attempt to muddy the semantic waters with unusual meanings. He saw the emergence of new actors on the socio-political scene which were incomprehensible within the framework of "conventional wisdom." Organized bodies of men and property had become the dominant actors in modern society, and his effort was to formulate a social philosophy that could account for these corporate institutions and give them a status within the order of life based upon their function within that order. Only in this way could the natural persons organized therein acquire a meaningful status and function within life.

Thus, will, as the logical ground of action, had to be a formulation that could explain not only the volitional aspects of the life of the human individual; it also had to account for other kinds of efficacious orders of fact. Ac-

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<sup>1</sup>We would not go so far as Professor Mitchell, who states that "Jordan discards all of the traditional characterizations of will." E. T. Mitchell, "Jordan's Theory of Corporate Will," Philosophical Review, LV (1946), p. 65.

tion had to be a concept that could include the acts of corporate groups as well as individuals. Another basic concept of his approach, looking at fact from the point of view of its order, is corporeity--purposed fact as completed in an end.<sup>2</sup>

The concept of corporeity was designed to apply to all orders of fact, including the natural individual, the state, and the corporate groups that are found between these extremities.

#### Corporate Groups in Social Theory

In the contemporary socio-political panorama, commentators ranging from serious scholars to casual observers to active participants, acknowledge that corporate groups are important if not the dominant political actors. The studies of Bentley,<sup>3</sup> Herring,<sup>4</sup> Truman,<sup>5</sup> and a host of others have

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<sup>2</sup>The phrase, "completed in an end," is misleading in so far as it suggests the static condition of a utopia. The phrase must be understood in terms of the political purpose, which is to order the facts of life toward emergent purposes objectified as ends. Corporeity, as will become apparent, is then a dynamic ordering of fact which looks to the realization of the purposes which are emergent in the evolution of natural-cultural life.

<sup>3</sup>Arthur F. Bentley, The Process of Government (Chicago: University of Chicago Press, 1908).

<sup>4</sup>E. Pendleton Herring, Group Representation Before Congress (Washington: The Brookings Institution, 1929).

<sup>5</sup>David B. Truman, The Governmental Process (New York; Alfred A. Knopf, 1951).

attempted to deal with these corporate groups as political actors, but their efforts have been primarily descriptive. There seems to have been no significant attempts by political scientists to deal with them systematically, as including their emergence, nature, and relation to the individual on the one hand and the whole of society on the other. Certainly there has been no attempt to use their existence, as Professor Jordan does, to expound a "principle" of society that points toward a procedure of politics of sufficient scope to include and account for such goals as social harmony, justice, and good.

Other students of social phenomena within a framework of scientific method have dealt with the group from a variety of perspectives, but few of these show promise of becoming a systematic theory in the sense just mentioned.<sup>6</sup>

In the study of politics, as a result, the group usually has been treated as a mere collection of individuals, despite avowed recognition that it is something more. This stems, one suspects, from what Professor Jordan regarded as

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<sup>6</sup>But see Muzafer and Carolyn W. Sherif, Groups in Harmony and Tension (New York: Harper & Brothers, 1953); and An Outline of Social Psychology, rev. ed. (New York: Harper & Brothers, 1956). Mention should be made of the work referred to in the last chapter: James G. Miller, "Toward a General Theory for the Behavioral Sciences," The State of the Social Sciences, ed. by Leonard D. White (Chicago: University of Chicago Press, 1956). A recent and interesting attempt by an anthropologist is Laura Thompson, Toward a Science of Mankind (New York: McGraw-Hill, 1961).

the basic error of individualist philosophy, which was that it posited the autonomous individual as the "real" with which philosophic analysis had to deal. "To the philosophy of the seventeenth century," Professor Sabine has written, "relations always appeared thinner than substances; man was the substance, society the relation."<sup>7</sup> The fallacy of trying to understand analytically the social whole in terms of its particulars taken as ultimate and exclusive was seen by Hume,<sup>8</sup> but only partly grasped by his readers, who were more concerned with his related attacks upon the concept of causality and the "truths" of religion.<sup>9</sup>

The "natural rights" distortion of the theory of natural law was, of course, responsible for individualist philosophy. Professor Jordan writes that

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<sup>7</sup>George H. Sabine, A History of Political Theory, rev. ed. (New York: Henry Holt & Co., 1950), p. 433.

<sup>8</sup>David Hume, An Essay Concerning the Human Understanding, ed. by L. A. Selby-Bigge (Oxford: The Clarendon Press, 1894).

<sup>9</sup>The summary critique of individualist philosophy that begins here and continues through the following two pages is largely our own, drawn from our reading of Professor Jordan. It is consistent with Professor Jordan's own critique; only the emphasis has been changed the better to prepare the ground for and illustrate the importance of his attempt to formulate an adequate social theory.

There has been, so far as we know, no significant attempt to weed out the "conventional wisdom," based largely upon individualist philosophy, from contemporary social theory. We suspect, and Professor Jordan asserts, that this heritage has constituted an unrecognized limitation upon contemporary social science.



the "natural law" theory, in its historical form, is right in motive; that is, ends have a real status in nature which political theory must discover and define, but it is wrong as to all of its content.<sup>10</sup>

The nature in which ends had a status, furthermore, was, for the Early Stoa at least, the whole of nature. Early natural law, that is, posited a rational cosmos for a man with a rational capacity--a capacity to reason. This rational capacity could be used to discover and understand the order of the universe. In ethics, which was the primary concern of the Early Stoa, man was to use his capacity to reason to bring his behavior into conformity with the order inherent in the universe.

Individualist philosophy, then, "stood on its head" the logic which demands that particulars be explained by reference to universals. These philosophers, and especially Hobbes and Locke, assumed not only a man with a capacity to reason, but also a rational man. That is, the nature which was assumed to be rational, and thus understandable through reason, was not nature as a whole but human nature, the nature of the individual man considered as an isolated entity. The presumed "knowledge" of "human nature" was then used to construct a society, which means that the whole was to be explained in terms of its particulars.

The original natural law, as a method to be applied

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<sup>10</sup>Elijah Jordan, Business Be Damned (New York: Henry Schuman, 1952), p. 234.

to the analysis of society, would have required the assumption of order in society, through which the individual, as a component of society, would be understood as particular. Logically, the individual human being can constitute the "real"--the unit of analysis--only for biology, and then only in limited degree since the species is there the universal to which the individual as particular must be related.<sup>11</sup> Even in psychology, which purports to be concerned with the "mind" of the individual man, there is growing recognition that "in an important sense, the individual has no consistent or clear-cut identity apart from his ties with other persons, groups, and institutions."<sup>12</sup>

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<sup>11</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Company, 1927), pp. 188-227.

<sup>12</sup>Sherif and Sherif, Groups in Harmony and Tension, op. cit., p. 37.

Professor Jordan maintains that psychology is the ultimate issue of the individualist approach. His argument seems to run as follows: individualism was concerned with understanding human nature, postulated as rational in the sense that it was taken to be a legitimate object of analytic inquiry. The locus for this human nature was the "mind," as the center of all the motives of human activity. Psychology is the science that has assumed that the mind can be dealt with in terms of general laws.

If he is correct, and the argument not only seems logical but also has historical support, it is interesting to notice the division in contemporary psychology, where one group is growing closer to physiology and another is more concerned with data that is basically sociological in nature. Professor Osgood states that "as the science of behavior--particularly human behavior--it claims and maintains active interest in much of what is equally the domain of neurology and physiology and in much of what is equally the domain of sociology and anthropology." Charles E. Osgood, "Behavior Theory and the Social Sciences," Approaches to the Study of Politics, ed. by Roland Young (Evanston: Northwestern Uni-

Rationality, as attributed to a whole, implies that the whole can be dealt with in the terms of logic, existent or to be formulated, under categories used as hypothetical formulations--the synthetic a priori judgments of Kant and the postulational systems of the logical positivists. Within such a framework, individuals can be individuated through their relations to the whole and to the other parts. Rationality, as opposed to a capacity to reason, is meaningless for social theory when it is attributed to the individual as a particular. Social theory requires a concept similar, in principle, to the Gestalt of psychology. The lack of such a concept, a theoretical formulation of the nature of the whole, has precluded the attempt to deal in a meaningful way with corporate groups.

Professor Jordan attempts to remedy this situation, asserting that in actual human relations, or social theory, the individual acquires logical status only in relation to the whole. "It is the whole then that is the ultimate party at interest in all human relations, in the same sense that no

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versity Press, 1958), p. 217. He indicates that this is the result, primarily, of specialization, rather than universal concerns on the part of all psychologists.

It may be, then, that the psychological study of "human nature" ultimately will result in two sets of "laws": one that deals with the physiological and neurological structure of the human organism (the individualists' pre-cultural "state of nature"?) and another that deals with the effect upon personality of sociological and anthropological phenomena. This, seemingly, would be a complete validation of Professor Jordan's basic contention in this regard.

rationality can be given to any human relations except through their reference to the whole."<sup>13</sup> In Professor Jordan's view, therefore, life embodies itself in institutions as a result of the operation of the same forces that cause life to become embodied in the human individual. The forces, in either case, are the same; the former is only a more comprehensive form than the latter.

### Life as Embodied in Institutions

Implicit in the foregoing critique, as in Professor Jordan's own critique, is the objection that the individualist philosophy, and to a lesser extent the sciences based thereon, did not deal adequately with the fact of human culture. In the attempt to understand the nature of the individual human, basic to its approach, the human being was (supposedly) deprived of the culture which gives him distinction as a human being. The remainder, in Professor Jordan's phrase, was taken to be "the soul's ultimate simple."<sup>14</sup> Modern social psychology, on the other hand, supports the view that "man is a creature of culture as well as a learner of culture."<sup>15</sup> An anthropologist has stated this view even more explicitly: "In the absence of cultural stimulation the

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<sup>13</sup>Jordan, Forms of Individuality, op. cit., p. 55.

<sup>14</sup>Cf. his critique of Giddings' sociology, in Forms of Individuality, op. cit., pp. 42-7.

<sup>15</sup>Sherif and Sherif, An Outline of Social Psychology, op. cit., p. 8.

organism Homo sapiens simply fails to express any nature at all--apart from the phenomena of purely physical functioning. . . ."16 In social philosophy, from Hegel onward,17 the cultural aspect of man's existence has demanded and received increasing attention, to the point that one might charge that cultural philosophy has sometimes been guilty of minimizing unduly the biological facts of life.18

Professor Jordan's work aptly could be described as an attempt to deal with both the natural and the cultural phases of life within a single framework. Indeed, this dichotomy falsifies his view to the extent that it suggests a juxtaposition or integration of two disparate aspects of life, for his position is that life is a continuous whole,

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<sup>16</sup>Ashley Montagu, The Biosocial Nature of Man (New York: Grove Press, 1956), p. 79.

<sup>17</sup>This movement actually begins with Rousseau, in that he was not opposing culture per se as much as he was opposing particular aspects of it--those which he saw emanating from the ideology of individualism. Cf. A Discourse on the Moral Effects of the Arts and Sciences with A Dissertation on the Origin and Foundation of the Inequality of Mankind, in Jean-Jacques Rousseau, The Social Contract--Discourses, trans. and ed. by G. D. H. Cole (London: J. W. Dent & Sons, 1913).

One may point also to Robert Owen, who believed that "heredity played no part whatever in the formation of human character, what a man was being entirely caused by his environment and education. . . ." Margaret Cole, Robert Owen of New Lanark (New York: Oxford University Press, 1953), p. 4.

<sup>18</sup>This criticism possibly could be justified of the magnificent work of Ernst Cassirer, The Philosophy of Symbolic Forms, 3 vols., trans. by R. Mannheim (New Haven: Yale University Press, 1953-7); and An Essay on Man (Garden City: Doubleday & Co., 1954).

and that both natural and cultural facts are integral elements of that whole. Thus, "human nature is continuous with the process of its own interpretation, and is itself consequently in large part an interpretation."<sup>19</sup> Pascal expressed the same thought many years ago, writing "J'ai grand peur que cette nature ne soit elle-même qu'une première coutume, comme la coutume est une seconde nature."<sup>20</sup>

In terms of Professor Jordan's cosmology, life is only a part of the cosmic energy of the universe, and the same force which compels the growth-reproduction pattern of the amoeba proteus must also account for the cultural factors of technology, ideology, art, etc.<sup>21</sup> This force, viewed subjectively, appears as life-urge or will. Will is then the principle which accounts for the dynamic aspect of the fact-system, amoeba proteus; it is also the principle which accounts for the embodiment of life in institutions that are cultural, as contrasted with life-forms that are biological. Institutional life is life that has evolved from the merely

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<sup>19</sup>Jordan, Forms of Individuality, op. cit., p. 55.

<sup>20</sup>Blaise Pascal, Pensees, quoted in A. P. d'Entreves, Natural Law (London: Hutchinson University Library, 1951), p. 11.

<sup>21</sup>His view of culture is similar to the classic definition by the anthropologist, E. B. Tylor: "Culture is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities acquired by man as a member of society." E. B. Tylor, Primitive Culture, 7th ed. (New York: Brentano's, 1924), p. 1. The form, at least, of social organizations are also cultural.

natural into life that is natural-cultural; social institutions are the embodiment of life as nature-culture.

[F]or better or for worse, modern life is the life of institutions, of institutions with a material basis, and hence the object of all social or political inquiry is as to the nature and function of institutions.<sup>22</sup>

Culture evolved as man evolved; life is cultural in its human manifestation, and institution is "the body in which life incorporates itself."<sup>23</sup>

The recognition of the importance of corporate institutions in contemporary society has become commonplace. This can be illustrated by citing only a few authors, from widely varied fields, all of whom look upon the group, or corporate institution, as something more than a collection of individuals.

(1) Professor Emmette S. Redford, political scientist:

The existence of group interests has long been recognized. . . . [R]ecently, however, and particularly within the last half-century, interests have become structurally integrated in associations and unions, and these have become centers of power and influence in society.<sup>24</sup>

(2) Muzafer and Carolyn W. Sherif, social psychologists:

During the last three decades the fact that group effects arise which are understandable only in terms of the interdependence of individuals and norms peculiar

<sup>22</sup>Jordan, Forms of Individuality, op. cit., p. 295.

<sup>23</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 310.

<sup>24</sup>Emmette S. Redford, The Administration of National Economic Control (New York: The Macmillan Co., 1952), p. 221.

to the group has become established in psychology.<sup>25</sup>

- (3) Leo Bromwich, labor economist:

[T]he American labor movement forms a political society. It has its constitutions, its rules for the election of officers, and for the making of policy.<sup>26</sup>

- (4) William H. Whyte, Jr., editor, Fortune magazine:

If there is one thing that characterizes him [the executive], it is a fierce desire to control his own destiny, and, deep down, he resents yielding that control to The Organization. . . . But he cannot act that way. He must not only accept control, he must accept it as if he liked it.<sup>27</sup>

[A]ll the new emphases call for a closer spiritual union between the individual and the Organization.<sup>28</sup>

- (5) Roger Blough, Chairman of the Board, U. S. Steel:

Now it is a notable characteristic of a free society that men will voluntarily join forces for their common welfare--material or spiritual--and that, of the many ways to improve human welfare, by all odds the voluntary route of group cooperation of like-minded individuals has proved to be the most effective.<sup>29</sup>

- (6) Walter Goldschmitt, cultural anthropologist:

Society is the organization of men into functioning groups, the patterned and established on-going relations among people who view themselves as forming an entity.<sup>30</sup>

<sup>25</sup>Sherif and Sherif, An Outline of Social Psychology, op. cit., p. 176.

<sup>26</sup>Leo Bromwich, Union Constitutions (New York: The Fund for the Republic, 1958), pp. 3-4.

<sup>27</sup>William H. Whyte, Jr., The Organization Man (New York: Simon & Schuster, 1956), p. 31.

<sup>28</sup>Ibid., p. 52.

<sup>29</sup>Roger Blough, Free Man and the Corporation (New York: McGraw-Hill, 1959), pp. 4-5. The Franklin Henry Giddings sociology here is, of course, dated.

<sup>30</sup>Walter Goldschmitt, Exploring the Ways of Mankind



We do not suggest that the theories of all of these parallel in every detail the institutional theory of Professor Jordan; this certainly is not the case. But these conceptions of the importance of groups or corporate institutions, as only a few of the multitude of available examples, emphasize the validity of his institutional approach. They seem, furthermore, essentially compatible with Professor Jordan's theory of institutions and provide many points of reference.

It may be, then, that many recognize dimly what Professor Jordan says plainly: that institutions, as every other form of life, are emergent within the life process, as this process demonstrates growth. They arise, in the first instance, out of the active tendency which results from the embodiment of life within the form, man, for even the individual human being, for practical philosophy, cannot be considered apart from the tools, or instruments, through which he acts. This, it will be recalled, helps explain why "an end is per se public. I can perform no act which does not involve accessories in other persons and things."<sup>31</sup>

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(New York: Holt, Rinehart & Winston, 1960), p. 9.

<sup>31</sup>Jordan, Forms of Individuality, op. cit., p. 278. This theory leads Professor Jordan to explain the contemporary malaise in public life--the "miserable facts" of life--in terms of the lack of access by individual persons to the instruments to action, the means to ends: "The older idea of equality contemplated the abstract political relation between the individual and the individual, or individual and the equally abstract sovereignty which limited him in his freedom of action. . . . It was equality before the law, and it meant

The use of tools, as has long been recognized, is a cultural phenomenon; functionally, which is to say practically, the tool is only an extension of the man. The man and the hoe may be perceived separately, but the proper formulation from a functional point of view is man-hoe, since it is the two together that is meaningful in the production of food--the end that is sought. Life, as active, embodies itself in the fact-system represented by man-hoe. This embodiment is, furthermore, not final, for

the man and the hoe represent, as isolated, perhaps an elementary perceptive experience, but it is not intelligible, since the situation cannot be conceived in the absence of relations which extend beyond the situation.<sup>32</sup>

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that the incidence of the law upon the individual was the same in all cases, regardless of the peculiarities of the individual's position or capacity. This type of political democracy has had many important results. But it has turned out that with a new type of organization arising spontaneously within the economic activities of men, which involved a redistribution of the political forms of society, the individual's political freedom, or freedom before the law, meant little as long as it left most of his relations of immediate dependence upon the political body outside the control of political agencies. That is, many of the individual's political activities came under the control of economic forces. Administratively, that is, his affairs fell under the influence of new relations within the economic matter of public life, and while he was theoretically free to act within the wide limits set for him by the public law, he found the instruments to action no longer accessible. He still had the [legal] right to act, but the possibility was denied him. The law guaranteeing the right to act, that is, was formulated at a time when the instruments to action were primarily natural phenomena available to all who cared to appropriate them; it contemplated therefore a wide freedom of method and process, since the material means to action were a common factor and could thus be taken for granted." Jordan, Theory of Legislation, op. cit., p. 278.

<sup>32</sup>Ibid., p. 72.

The man-hoe situation, or fact-system, or institution, can be intelligible only in terms of the other instruments which it requires to be productive, and the end which is to be produced--food, the maintenance of life, the pleasure of creative activity, etc.<sup>33</sup>

This cultural aspect of life, Professor Jordan maintains, has shown the greatest change and variety during the recorded life of man, yet the attempt to understand practical life still is couched largely in terms of the individual man, who, "as a biological individual, is a less comprehensive form of cultural organization"<sup>34</sup> than is institution. When the group or institutional factor is noted, it is too frequently expressed in terms of an organization of men, with emphasis upon the latter term.<sup>35</sup> Professor Jordan, on the other hand, maintains that "the concept of organization must be expanded so as to embrace the scientific and factual aspects of life together with the value systems in a single

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<sup>33</sup>In his critique of modern society, then, in the preceding note but one, Professor Jordan is saying that man, with a legal right to act toward the end of producing food, etc., was denied access to the hoes, land, etc.--the instruments of production--necessary to action toward the end.

<sup>34</sup>Robert D. Mack, "Introduction," Essays in Criticism, by Elijah Jordan (Chicago: University of Chicago Press, 1952), p. 7.

<sup>35</sup>There are exceptions, as, e.g., the work of the Sherifs, who emphasize "common norms" and "status and role relationships" as characteristics of groups. Cf. Sherif and Sherif, Groups in Harmony and Tension, op. cit.

synoptic constitutional principle."<sup>36</sup> His corporeity is such a concept.

He was arguing, in effect, that a theory of institutions must be more than a mere description of the influence of institutions upon the behavior of its human fact-content. Such an approach is perhaps valid for the limited concerns of psychology, which attempts to study the individual "mind." As a socio-political philosophy, however, a theory of institutions must deal with all of the fact-content of institutions: human, material, and cultural.

It is the totality of this content, as ordered, that is the institution; the rationality of the institution varies with the degree of order, first, of the institution within the whole of reality, and, secondly, within the institution itself. The content is ordered, however, dynamically; that is, it is ordered toward the accomplishment of ends.

This order of fact, in institutions, is Professor Jordan's concept of corporeity, but the concept also applies, as principle, to the order of fact that is the individual person. As a prelude to the discussion of the principle of corporeity per se, it is helpful to understand the manner in which the life which embodies in the natural person also comes to be embodied in institutions.

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<sup>36</sup>Jordan, Forms of Individuality, op. cit., p. 86.

The Embodiment of Life in Institutions

The institution most characteristic of modern life, in that it has been the dominant institution and thus able to characterize modern life, is the corporation, which is virtually identified in the popular mind today with its species, the private business corporation.<sup>37</sup> The classic American legal definition of the corporation was given by Chief Justice John Marshall: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."<sup>38</sup> To this Professor Berle has retorted:

Clearly it is not the law, with its fiction of juristic personality, that supplies the life blood and beating heart of these vast mechanisms. If the law . . . declared that they did not exist, the entities would be found to be not fictitious, but factual.<sup>39</sup>

Professor Jordan's verdict is that "the most monstrous fiction of the law is the theory of legal fictions,"<sup>40</sup> includ-

<sup>37</sup>Drucker writes: "What we look for in analyzing American society is therefore the institution which sets the standards for the way of life and the mode of living of our citizens; which leads, molds, and directs; which determines our perspective on our own society; around which crystallize our social problems and to which we look for their solution. What is essential in society is, in other words, not the static mass but the dynamic element; not the multitude of facts but the symbol through which the facts are organized in a social pattern; not, in other words, the average but the representative. And this, in our society today, is the large corporation." Peter F. Drucker, The Concept of the Corporation (New York: John Day Co., 1946), p. 11.

<sup>38</sup>Dartmouth College Case, 4 Wheat. 518 (1819).

<sup>39</sup>Adolf A. Berle, Jr., The 20th Century Capitalist Revolution (New York: Harcourt, Brace & Co., 1954), p. 20.

<sup>40</sup>Jordan, Forms of Individuality, op. cit., p. 309.

ing the fictitious corporation. Such a theory causes blindness to the actual facts, which support the view that

the synthesis of the world of things with the world of persons, is effected as fact immediately observable in the corporate or public body, and this body becomes therefore the datum and presupposition of practical philosophy.<sup>41</sup>

The Marshall definition can explain the corporation only for those who have been trained to think in these terms, and is accurate "in no sense but the most literal and formal and positivist."<sup>42</sup> Such a definition, to Professor Jordan, could never provide a basis for either an adequate law or an adequate social theory. It is a matter of record that many social scientists are coming to agree, in principle at least, with his conclusion that "the fact that will be found typical and the key of our forms of organization and order will be the corporation as embodied social will."<sup>43</sup>

Since the corporation, in Professor Jordan's view, simply emerges during the life process, the legalistic act of incorporation can be no more than the recognition that the corporation exists; it does not and cannot account for its emergence.

The vexatious question of the origin of corporations, of how corporations are formed, whether by act of law or by

<sup>41</sup>Jordan, Theory of Legislation, op. cit., p. 300.

<sup>42</sup>Jordan, Forms of Individuality, op. cit., p. 273.

<sup>43</sup>Ibid., p. 318.

private initiative, is therefore settled by saying they are formed in neither way; the corporation, like the state and the individual, is natural; it has no origin. And this means that it is not made at all, but grows.<sup>44</sup>

Illustrating this with an example taken from the everyday world of economic relations, he finds that

it is the "opening" or opportunity of fact that leads five men to organize a bank, the need created in the complex of objective processes involved in the flow of goods and money, and not some individual's or some group's "greed" for profit. And the "opening" or the need are nobody's creation; they are the fact that relations are displayed with reference to each other as they are. . . .<sup>45</sup>

Such a corporation is then a social institution, although the adjective "social" is redundant since institutions are always social, or public.

Subjectively, from the point of view of its human fact-content, the institution is "the embodiment, ideal or material, of the ways in which thought and feeling proceed to their ends."<sup>46</sup> From the viewpoint of its effect upon its human fact-content, which is to say subjectively to the institution, "an institution is . . . a way people have of thinking and acting that has become the thing about which, and from the point of view of which, they think."<sup>47</sup>

Objectively, however, or in terms of the relations

<sup>44</sup>Ibid.

<sup>45</sup>Ibid., p. 319.

<sup>46</sup>Jordan, Business Be Damned, op. cit., p. 53.

<sup>47</sup>Ibid., p. 54. Cf. Drucker's remarks, supra, p. 74n.

which the institution has with the whole of which it is an emergent part, Professor Jordan maintains that the institution is "a form which represents both the permanence of realized or objectified purpose and the creativeness of purposive process."<sup>48</sup>

That there does develop within any group of persons which may come into association in any way, however accidental, or "causal," a propulsive tendency toward ends which become ends for the separate individuals only because the individuals assume the relations to each other that they as a matter of fact do assume, is beyond question. And this propulsive tendency is what is meant by a general will.<sup>49</sup>

As in the case of the individual human being, then, the institution obtains to reality for practical philosophy by virtue of its being a system of fact, organized with reference to a purpose which, although inherent in the organization of the fact, yet lies beyond it as an end and may be achieved only through outward action which results in the progressive comprehension of new content.

Will, according to Professor Jordan, is then identical in principle whether in the individual human being or the individual institution.<sup>50</sup> It is in this sense that both

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<sup>48</sup>Jordan, Forms of Individuality, op. cit., p. 433.

<sup>49</sup>Ibid., p. 241.

<sup>50</sup>It is important to emphasize that the individual human can act only through instruments external to himself; as active, the individual human is a fact within a system of fact, so the active will--i.e., the will that is the logical ground of action--is always an institutional will. The will of the individual human per se is an intelligent will, in



institutions and human individuals may be viewed as corporate entities; viz., that both are characterized for practical philosophy by will. Will is not some mystical volitional force operating in an unknown and unknowable manner in the "mind" of the individual human; it is simply the fact-system as incorporating within its organization, as the principle of that organization, a propulsive tendency toward ends that are objective to the corporate entity itself.

To explain the emergence of these wills that become embodied in institutions, Professor Jordan relies upon the concept of contract, although his account bears little resemblance to either the usual legal interpretation or past attempts to explain the origin of the state in terms of a contract; this latter he characterizes as a "sorry collection of half-truths."<sup>51</sup> He does view the contract as an integral part of any political theory, and regrets that it was discredited by its use as an arbitrary act of volition on

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that its characteristic issue is thought. Thus it is that the individual human can see, but cannot act; the institution can act, but cannot see. A rational social order is then to be achieved through the synthesis of institutional and individual wills, the one realizing through action the ends envisioned by the other in thought.

It seems that Professor Mitchell fails to make this distinction re Professor Jordan's theory. He writes, "will is the expenditure of energy in the choice of ends, the formulation of rules consistent with these ends, the adjustment of means to ends and ends to means, and the creation of conditions under which life assumes value." E. T. Mitchell, "A Theory of Corporate Will," Ethics, LVI (1946), p. 97.

<sup>51</sup>Jordan, Forms of Individuality, op. cit., p. 65.

the part of isolated human individuals, which is to say by the individualists. It could be disregarded only by the same individualists, or their intellectual heirs, who, viewing the individual and the state as the dichotomous "realities" of the political process, could accept the existence of both as given without need to account for the emergence of new political agents such as the corporate groups which have become prime actors in contemporary politics.

As the act of incorporation does no more than recognize the existence of the corporation, so the formal charter, or contract, is but the legal document acknowledging the fact. Viewed in the sense of "social compact," however, a contract may be said to have occurred whenever a purpose has become objective; that is, when the purpose has served as a goal around which divergent fact-systems become unified.

The breaking up of the end into a number of separate impulses and the identification of these with separate natural persons each of whom stands to his corresponding impulse as a specific or technical instrument is just the coming together of will which we call consent or contract.<sup>52</sup>

Thus, in the earlier example of men forming a bank,<sup>53</sup> the social need for a certain type of service leads to the unification of the individuals involved, in which unification each becomes functionally identified with a role within the

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<sup>52</sup>Jordan, Forms of Individuality, op. cit., p. 317.

<sup>53</sup>Supra, pp. 76-7.

whole. It is this unification of individuals around a particular purpose, and the resulting appropriation of roles--in short, the formation of the corporate group<sup>54</sup>--that is the "contract." Professor Jordan believes that this concept of contract, once grasped, makes it apparent that "institutions as corporate bodies are not invented or manufactured by men. . . . They evolve with the purpose of which they are the appropriate embodiment."<sup>55</sup> This is to say that the crucial factor, in the formation of the corporate institution, is the purpose; the purpose is the organizing principle which gives to the institution its unique status in the objective world of fact.

Contracts, then, are acts of will, as the older theory assumed, but not of will posited as an arbitrary mental force existing only within the "mind" of the human individual.

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<sup>54</sup>This conception is essentially the same as that of Professor Muzafer Sherif, wherein the group is considered to consist of individuals who come into functional interaction, with the emergence of status and role relationships among the members, along with common norms in matters of concern to the group. Cf. Muzafer Sherif, et al., Intergroup Conflict and Cooperation: The Robbers Cave Experiment (Norman: Institute of Intergroup Relations, University of Oklahoma, 1961).

<sup>55</sup>Jordan, Theory of Legislation, op. cit., pp. 303-4. In Professor Sherif's formulation, the functional interaction of individuals brings about the formation of the group, although he recognizes that the group may persist long after the functional relations that brought the group into existence cease to have relevance to their actual situation.

Professor Jordan would say that, in the latter case, intelligence has failed--because of the dominance of interest, etc.--to direct life's urgency toward ends.

Will is a situation of fact incorporating within its organization a purpose to be objectified as an end. As a corporate institution, it is the objective evidence of the contract. Contract is thus a natural process--a "fusion of two or more fact orders through growth into an order of fact which is their common end."<sup>56</sup> Nowhere is Professor Jordan's attempt to objectify the contract stated more succinctly than in the following:

Contract . . . is the natural process of interests of different persons converging upon common ends. It is therefore "free" in the sense that it represents the tendencies inherent in interests to synthesize with each other and thus become purposes in intending ends.<sup>57</sup>

In the establishment of the bank, in other words, the provision of the service in question offers an end to the individuals who "incorporate" the bank, in the fulfillment of which they are able to satisfy their "interests."

As incorporated into public law, contract was a positive social instrument, but in the course of interpretation by interests considered as private and exclusive--that is, by persons whose intelligence was clouded by the dominance of interests--it has become a negative check upon social progress. Thus, the contract,

in spite of our good intentions in creating it the central conception in a system of law which had for its end the general good as mediated by the efforts of individ-

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<sup>56</sup>Jordan, Forms of Individuality, op. cit., p. 420.

<sup>57</sup>Ibid., p. 402.

uals, has become a hindrance to the good and a limitation to the very individual initiative it was supposed to cultivate. The principle of contract has become the tool by which unsocial forces slacken the pace of civilization and arrest progress until private greed is satisfied. The individual capacity which contract has protected and nurtured is the capacity to acquire without reference to ends. It is therefore negative and destructive in tendency.<sup>58</sup>

Under conditions where the human intelligence is limited by the demands of interest, therefore, the instrument of contract becomes an end within itself, and as such it is an obstacle to social progress. Public officials, under the domination of interest, allow private interests to be satisfied at the expense of, rather than in the fulfillment of, public ends.<sup>59</sup>

Contract, however, remains for Professor Jordan a true account of social reality in both the analytic and the historical senses, despite the abuse of the legal formulation of the principle under the domination of interests considered as private and exclusive. Its truth is derived, not from an overt act on the part of discrete individuals which might be termed the "drawing up" of a contract, but from the fact that new systems of fact, organized with respect to

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<sup>58</sup>Ibid., p. 415.

<sup>59</sup>The similarity of this view with Professor Galbraith's attack upon "public poverty" in the midst of "private affluence" is obvious. Cf. John Kenneth Galbraith, The Affluent Society (Boston: Houghton-Mifflin, 1958), pp. 251-61.

See also Adlai Stevenson, "Extend Our Vision . . . to All Mankind," Life, IIL (May 30, 1960), p. 87ff.

purposes, do appear in the evolution of natural-cultural life.

The legalistic conception of contract is the corollary of the idea that there is no corporation until it is "created" by enacted law; both are expressions of "the age of socialized symbolism and superstitious mummary where the form is taken for the substance."<sup>60</sup> A practical philosophy cannot be limited to a study of legal doctrines, but must focus its attention upon the reality it hopes to understand and interpret. Attention to presented fact, then, suggests that

a body of persons organized with respect to a purpose, or even organized by accident with respect to a possible function, is not a mere collection, or a "group". . . . It is a question whether a number of persons can come together in however chance a way without assuming some degree of corporate form representing a degree of purpose.<sup>61</sup>

When the new organization appears, it may be said that life, as including both its natural and cultural aspects, has become embodied in a new form. This form was present as potential in the prior collocation of fact, but receives its objectification through the fusion of wills, or fact-systems, termed contract. The fact-system that results may consist of human individuals, together with the material and cultural fact necessary to action toward ends, or it may

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<sup>60</sup>Ibid., p. 433.

<sup>61</sup>Ibid., p. 297.

consist of a series of extant corporate institutions merging into a larger and more inclusive system of fact. In any case, the result is a corporate institution, and the order of fact inherent therein is the meaning of the principle of corporeity.

The Corporate Institution as a Form of Individuality:  
The Concept of Corporeity

Plato wrote that the state, as a corporate entity, is merely the individual writ large, but it should be remembered that he was using the state to explain the nature of justice in the human individual, not vice versa. The modern individualists overlooked this latter point and tried to construct a state, in theory, upon the model of the human individual, with the result that each variation in the introspective reports resulted in a different theory of the state.

Professor Jordan thought that this attempt to use the individual human as the unit of social theory always "results in an abstract infinity of individuals. . . ." <sup>62</sup> Since, in his view, the individual human as a datum for social (as opposed, e.g., to biological) theory is a creature of culture, and thus the synthesis of his institutions, the real problem is to explain not the basis of the union of these individuals into a society, but rather the manner in

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<sup>62</sup> Jordan, Theory of Legislation, op. cit., p. 283.

which they acquire distinction within the social whole. The problem, that is, is how the individual becomes recognizable as an individual rather than merely as a component of the herd. His answer, which he terms the principle of individuation, is that the individual attains distinction within the whole through the objective relations which bind him to that whole; the individual, in other words, acquires meaning for social theory in terms of his function within society.

The conceptualization involved here is drawn directly from the logic texts. Thus, the genus is individuality, the species of which he describes as the forms of individuality. The term individuality is used in its usual dictionary meaning as the condition of existing as an individual, and the forms of individuality are then those organizations of fact which can be distinguished within the whole of life. There are at least three such forms: (1) the natural person, as the least comprehensive form of individuality in the realm of social theory; (2) the state, as the most comprehensive form of individuality; and (3) the corporate institutions that fall between these extremities.

The various species, of course, have particular instances in fact, each of which, "in whatever form or degree, is a corporate entity, which means that it always involves an . . . organization of fact in accordance with a definitely



determinable principle."<sup>63</sup> This means, as was seen earlier,<sup>64</sup> that each corporate entity is a will, since he defines will as a system of fact organized in accordance with a principle --its purpose. Each corporate entity has a purpose, then, which is public in the sense discussed above,<sup>65</sup> and the realization of this purpose is the function of the corporate entity which embodies the purpose. The performance of this function distinguishes the particular corporate entity within the social whole, making it a form of individuality.

The corporate will as a personality is the individuated will, not the individualized will. It is the will which as the order inherent in a state of fact effectuates itself through growth effort into objective existence.<sup>66</sup>

The will is individuated--that is, brought to full objectivity as an individuality--through the performance of its function.

It should be noted that the corporate institution has no preferred status in Professor Jordan's theory other than being a more comprehensive form of life; it simply embodies natural-cultural fact more comprehensively. This is to say that he does not simply elevate the corporate institution to the status occupied by the discrete individual hu-

<sup>63</sup>Jordan, Forms of Individuality, op. cit., p. 275.

<sup>64</sup>Supra, pp. 47-58.

<sup>65</sup>Supra, Chapter III, pp. 27-58.

<sup>66</sup>Jordan, Forms of Individuality, op. cit., p. 260.

man in individualist theory. His view is not that the corporate institution is somehow "better" than either the state or the natural person;<sup>67</sup> he merely asserts that life has become embodied in these forms, and demands that theory deal with them. The recognition of the corporate institution, then, is no panacea; there still remains the task of its individuation--that is, of bringing it to the performance of its function within the whole of life, in the realization of public ends. His primary criticism of the prevailing theory was that it does not give the corporate institution a status in life commensurate with its role, with the result that it wastes its energies in the vain attempt to satisfy subjective interests.

As the corporate institution becomes individuated, or as it becomes functionally ordered toward the attainment of a public end, it approaches corporeity. The concept of corporeity, as a logical category,

assumes life-facts as principled, thus giving opportunity for scientific description, and then hypothecates [sic] them as ordered, giving them thereby a status for metaphysics and law.<sup>68</sup>

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<sup>67</sup>There is a strong suggestion of this in much of what could be termed "corporatist" thought. Cf., for example, Otto von Gierke, Political Theories of the Middle Age, trans. and with an Introduction by F. W. Maitland (Cambridge: University Press, 1927). See also John D. Lewis, The Genossenschaft-theorie of Otto von Gierke (Madison: University of Wisconsin Press, 1935).

<sup>68</sup>Jordan, Theory of Legislation, op. cit., p. 50.

The "life-facts assumed as principled" is the purposive or goal-directed behavior of systems of fact; the "hypothecation as ordered" is the attempt to discover the ends or goals toward which life, in whatever form, strives. This latter provides a criterion by which life may be progressively and rationally ordered toward the attainment of ends. In the speculative phase of the legislative process, for example, wherein the legislators speculate upon possible ends,<sup>69</sup> the assumption of life-facts as principled implies an acceptance of the facts of life as given as having meaning, meaning that can be discovered through rational inquiry. Reasoning from these facts, the speculative intelligence can image ends that are emergent in the life process, toward which the creative energies of life may be directed.

The concept of corporeity is then a postulate of order in human affairs, but in the sense that fact becomes ordered toward the accomplishment of ends. It is, in other words, a dynamic ordering of fact rather than a condition of stability without change.<sup>70</sup>

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<sup>69</sup>Infra, Chapter VII, pp. 224-266.

<sup>70</sup>Although he nowhere, as far as we can determine, says as much, Professor Jordan seemingly would view a "condition of stability without change" as contradictory and therefore impossible. Life forces are real; new purposes, and therefore new wills, do emerge. The question then becomes whether these forces will receive rational expression in the pursuit of public ends. He would agree, probably, with Newman that conservatism is a "futilitarian" approach. The latter states that conservatism "is a search for a soci-

The concept of corporeity further assumes a qualitative distinction among the goals toward which behavior can be directed. The most heinous of crimes can serve as the goal toward which behavior is directed for the social psychologists; the question still remains, however, whether there can be discrimination among goals that is not based upon Protagorean public opinion. If we grant, in other words, that culture determines values--the assertion of the value relativists--can we go behind this fact to discover why certain cultures embody certain values, and a la fois ascertain criteria as to which of all possible values the culture ought to embody? If so, and Professor Jordan would maintain that practical philosophy must assume a positive answer to this question, these values should be objectified as public ends and offered to the various kinds of individuality as opportunities for action. The positive answer which Professor Jordan gives is the concept of corporeity, as the dynamic ordering of fact toward ends, which he regards as "the ultimate ground and principle of law, the essence of the active

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ety in which innovation will have come to an end, so that what exists may continue to exist; a society in which there will be no problems and no danger because no one will be allowed to repudiate the past and venture into the unknown; a society in which rational, scientific, inquiring man will be replaced by traditional, obedient, and placid man. . . .

"The search itself, impossible though it may be, can do much damage to a nation that has brutal problems to face and must meet them with intelligence and innovation--and freedom." William J. Newman, The Futillitarian Society (New York: George Braziller, 1961), pp. 48-9.

life of the world, and the basic category of practical philosophy."<sup>71</sup>

The concept of corporeity functions, in social analysis, as a principle of explanation;<sup>72</sup> for practical philosophy it is a directive ideal. Since it is a general category, however, it makes no reference to any specific content, and may therefore be applied to all bodies of ordered fact. Thus, while the ultimate instance of corporeity is the cosmos, or ordered universe, the same concept also applies to all sub-units, sub-sub-units, etc., of that cosmos. But as the order of the whole must include the order that exists within all of its parts--that is, since order is of one piece and without distinction--the less comprehensive forms of individuality must be ordered as parts of the whole. Thus, a world of nation-states is, to Professor Jordan, quite definitely a disordered world.

This, as we shall see, sets the problem for the creative intelligence in the legislative process, for the order that comes to prevail will depend upon the degree to which the purposes that are embodied in systems of fact can utilize this intelligence in becoming fully objectified, as public ends, and the instruments of action appropriated to the fulfillment of these ends.

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<sup>71</sup>Jordan, Theory of Legislation, op. cit., p. 311.

<sup>72</sup>Ibid., p. 50.

## CHAPTER IV

### THE FORMS OF INDIVIDUALITY

In the preceding chapter it was shown that individuality, for Professor Jordan, is the logical genus for the type of fact-orders which he designates by the concept of corporeity. Will is brought to individuality and the fact-order attains to corporeity as purpose becomes objectified as an end for the body of fact in which it inheres, and this body of fact becomes ordered to the attainment of the end. The various forms of individuality are thus the species of the genus, and it is into the particulars of these species that natural-cultural life has embodied or incorporated itself. A particular instance of individuality is specified--that is, identified with its species--by the characteristics of its fact-content and its purpose. It is, in other words, the detail of the fact content, and the uniqueness of the purpose inherent therein, that gives distinction to any particular instance of individuality. "The individuality is the universal whose concreteness is precisely the content of fact which constitutes its own environmental conditions."<sup>1</sup>

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<sup>1</sup>Elijah Jordan, Forms of Individuality (Indianapolis:

Natural Person, Corporation, and State

The argument that "natural and [in law] artificial persons are then different stages of individuality, and are identical in principle,"<sup>2</sup> already has been presented. Among these "artificial" persons is the form of individuality which is most inclusive--the state. But the state

is an institution of precisely the same constitution as any other personality, is an entity individuated by the same principle as the natural person or any individuality within the series whose limits are the natural person and the state.<sup>3</sup>

When the state "grows," as in a merger of two or more existing states, the result is still the state; the former entities, if they retain any status within the whole, are reduced to forms of individuality within the series. In a rational order, furthermore, states can and do grow, for "in an individuality like the State there is a limit neither to the physical size of the State nor to the complexity of order in its constitution."<sup>4</sup>

Maitland, it may be recalled, reached a conclusion somewhat similar to Professor Jordan's concept of the state as one form of individuality when he asked, commenting upon von Gierke's theory,

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Progress Publishing Co., 1927), p. 227.

<sup>2</sup>Ibid., p. 276.

<sup>3</sup>Ibid., p. 287.

<sup>4</sup>Ibid., p. 193.

whether we ourselves are not the slave of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no questions about the origin of the species.<sup>5</sup>

Questions of the origin of the species are just what Professor Jordan attempts to ask; his answer is that the species has its origin in the evolution of natural-cultural life wherein life becomes embodied in these various forms of individuality.

This embodiment takes place, as we have seen him demonstrate, through contract as "the principle of the use and distribution of . . . persons into higher personalities,"<sup>6</sup> or the allocation and appropriation of functions within a larger social unit. Under this functional arrangement of persons and things,

the same content may not only be common to any number of individuals [as, e.g., in access to the instruments of action when these can be used in common], but a low degree of individuality may itself be content for a higher form.<sup>7</sup>

Thus, intelligence is a fact in the system of purposed fact that constitutes the individuality of the human being, while the intelligent human being is a fact in the system of purposed fact that constitutes the individuality of the corpor-

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<sup>5</sup>F. W. Maitland, "Introduction," Political Theories of the Middle Age, by Otto von Gierke, trans. by F. W. Maitland (Cambridge: The University Press, 1927), p. ix.

<sup>6</sup>Jordan, Forms of Individuality, op. cit., p. 328.

<sup>7</sup>Ibid., p. 192.



ation. Any given corporation may be content for a higher (more comprehensive) corporate institution, up to the highest form of individuality, the state, which is without limit as to either size or complexity.

Such a formulation modifies the classic Kantian dictum of individualist ethics, since

one individuality may therefore use another; and the famous Kantian dictum has meaning only on the assumption of the type of individuality which we have rejected as answering to none of the facts. . . . Moral obligation then becomes the question of how one individuality is used by another, that is, a question as to the relations between individualities as such.<sup>8</sup>

In a society conceived as the abstract infinity of self-contained individual humans, the Kantian dictum perhaps would have meaning, but such a society is never encountered in actual fact. When faced with the fact that individuals are distributed in actual societies in status and role relationships, or functions, and in corporate institutions, one must recognize that the corporate institutions of society use or employ natural persons.<sup>9</sup>

The Kantian dictum, then, was based upon the seventeenth century's conception of society as the intangible re-

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<sup>8</sup>Ibid., p. 193.

<sup>9</sup>Ethically, an irrational use of a form of individuality cannot be compensated by a larger paycheck. The dictum at best would have meaning only within a given level of individuality. Since this is all that was ever claimed for it, under the assumption of a single level, corporations and states have been free to use humans without ethical responsibility.

lation among individuals considered as substances; Professor Jordan, on the contrary, accepts both society and the individual as substances, a view in support of which he thought modern life offers overwhelming evidence. The logical form of the argument remains one of the relations among substances, but Professor Jordan seeks to provide a background of wholeness within which to make the relations intelligible. This view of the whole is summarized in his statement that "the logical ground of the individual person is the system of institutions with reference to which as universal he is determined as particular."<sup>10</sup>

Within the social whole in modern life, Professor Jordan believed the corporate institution to be the critical form of individuality for practical philosophy, because the instruments of action have become embodied in this form;

if therefore we are properly to understand the will trends of our time it is the nature and activity of technical processes which we must understand. For our will has become implemented in technical processes that are out of our power.<sup>11</sup>

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<sup>10</sup>Jordan, Forms of Individuality, op. cit., p. 80.

<sup>11</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 219.

Cf. this with Newman's critique of the businessman as a conservative: "In order to preserve himself and the society that he dominates he must prevent change from taking place; he must strive to establish a fixed society.

"The attempt to establish such a society fails and must fail by the logic of the situation. But the consequences of the attempt and its failure are enormous. They serve essentially to make for a society that is out of control because the businessman as the dominant force in that society

These processes have gotten out of control because "private interest . . . has assumed the function of law-giver."<sup>12</sup>

Interests have become equated with welfare, in that each interest generalizes itself into a version of the "public welfare," and the result has been what one social critic recently described as "a 'pressure group' state in which each organized group jostles for its own interests at the expense of the weak, the isolated or the unorganized."<sup>13</sup> More basic, Professor Jordan felt, the private interests are pursued at the expense of the public welfare--the welfare of the whole which gives "interests" whatever status they possess.

The dominant interest, of course, is the economic, and the right to speak for this interest has been usurped by

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refuses to face the facts of change. Hence they help create the irrational society of which the businessman and the conservative ideologists complain so bitterly. Who has created the mass society of today? Was it modern liberalism with its rather starry-eyed visions of the 'better life'? So one would think to read how the conservatives have interpreted George Orwell's 1984. Or was it the businessman with his technology and advertising, his thrust toward change and his refusal to contemplate new ways of controlling and ordering change? The conservative and the businessman when he is acting as a conservative find the irrationality of the mass society repugnant. Yet what is its irrationality but the irrationality of technology gone mad? And why has that technology gone mad except for the fact that the makers of technology today refuse to contemplate those innovations that would lead to the control of technology?" William J. Newman, The Futilitarian Society (New York: George Braziller, 1961), pp. 298-9.

<sup>12</sup>Jordan, Theory of Legislation, op. cit., p. 371.

<sup>13</sup>Adlai Stevenson, "Extend Our Vision . . . to All Mankind," Life, IIL (May 30, 1960), p. 94.

the "businessman," by which term Professor Jordan refers to a certain type of motive on the social scene--the motive to control for the sake of control. "The businessman is, therefore, the only functioning anarchist. He does not believe in government. He believes in business."<sup>14</sup> The dominance of this motive in social affairs precludes the objectification of purposes or their fulfillment by the appropriate forms of individuality.

This is the situation which Professor Jordan thinks must be rectified. Theories of individualism poorly serve their adherents if they function only as a cloak for tyranny.

[I]ndividual liberty and social absolutism . . . may be only different names for the same fact; the absolutism of tyranny is nothing more than a full and consistent recognition of the logic of individualism.<sup>15</sup>

Individualist theory operating in an industrial society has led to a slavery to definitions. Government is not merely what is done by the set of institutions we choose to call government. The making of economic decisions, which is being done by businessmen for the entire society, is no less governing by virtue of the fact that we choose to call it business.

What is required to alter the situation is a recognition of the actual status and function of these corporate

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<sup>14</sup>Elijah Jordan, Business Be Damned (New York: Henry Schuman, 1952), p. 177.

<sup>15</sup>Jordan, Theory of Legislation, op. cit., pp. 30-1.

institutions within the order of life. Professor Jordan felt that the dominance of interest as a motive has prevented the rational embodiment of life in the "natural" corporate form. Before these institutions will be able to maximize their contribution as the wills which they are, they must be brought to full individuality--i.e., properly individuated--within the whole of reality. Only then can the active energy of these corporate institutions be appropriated to the accomplishment of human purposes. Until then, their energies will be wasted in the ultimately futile, because self-defeating, pursuit of "interests."

### The Problem of Property

The central concept around which these (business) corporate institutions are organized is that of property; any attempt to make them "rational" requires, therefore, a consideration of the nature and function of property. The prevailing notions of property and ownership are those of individualist philosophy, Professor Jordan thought, and on no other point was he more assertive in his critique:

There is obviously no way out of the maze of construction and reconstruction and side-buttressing and propping characteristic of the law of property, so long as no fundamental effort is made toward a reconstruction on a basis of real principle. No intelligent person who has given an adequate degree of thought to the question can, it would seem, avoid the conclusion that the property system rests upon principles that are essentially wrong, and contradictory with the principles of other large spheres of human relations, however adept he may be in refusing the conclusion clear and straightforward expression. The destiny of property (and property is

the embodied life of human culture) rests at the present time in the hands of those who fear, and who fear for reasons which long ago rendered them incapable of thought. Thus does human destiny rest upon the instability and accident of a passion so low that in other relations of life than property it has been pretty well bred out of human nature. But the symptoms of the disease do not indicate the destruction or abolition of property, nor the denial of the right of private property; but it does indicate the rethinking of property until it is principled anew upon the ground of a better understanding of human nature.<sup>16</sup>

Individualist theory, then, regarded property as the exclusive possession of the individual considered as the natural person. This confused its functional nature, its use to achieve ends mistakenly defined by the individualists as interests. With the concentration of property under the corporate institution, "ownership" and "use" are divorced,<sup>17</sup> and the fact that "use [is] the essential functional relation of property"<sup>18</sup> is lost in the confusion of the rights of ownership and the necessary exceptions thereto. And the exceptions are necessary, as is evidenced in the fact that "there never has been nor can there be, in human society, a system of strictly private property, for the ideal is contradictory to the necessities of human nature."<sup>19</sup>

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<sup>16</sup>Jordan, Forms of Individuality, op. cit., pp. 359-60.

<sup>17</sup>Cf. Adolf A. Berle, Jr., Economic Power and the Free Society (New York: The Fund for the Republic, 1957). Especially, "the 'passive receptive' [ownership] side of the corporation, in short, is functionless." Ibid., p. 7.

<sup>18</sup>Jordan, Forms of Individuality, op. cit., p. 335.

<sup>19</sup>Jordan, Business Be Damned, op. cit., pp. 206-7.

Professor Jordan maintains that both property and its correlative doctrine of contract should serve to implement ends. Both, however,

as used in the legal sense are . . . outworn instruments of purpose that has been superseded, and as such hinder the integration of social relations into the higher forms of order in the one case, and prevent the flow of material goods to the point where they become ends in the other.<sup>20</sup>

In the simpler conditions of the primitive agricultural economy of early American history, it is true, the irrational formulation of "property" had not prevented its use to accomplish ends. In the contemporary, complex, industrialized and highly organized society, however, he contends that

property referred to an individualized "owner" who has complete and exclusive dominion over it; that property as the criterion or embodiment of a metaphysically individualized "subject of right"; that property as the necessary specialized instrument of the isolated will which gets expression primarily against or in opposition to personalized beings; that the whole individualistic conception of property is, under modern conditions, more or less meaningless.<sup>21</sup>

And yet, despite the fact that

ownership and owner are mere shadowy vestiges of a primitive superstition, . . . they rule the material proces-

<sup>20</sup>Jordan, Forms of Individuality, op. cit., p. 308.

<sup>21</sup>Ibid., p. 333. Works which, in varying degrees, offer support for Professor Jordan's conclusion, although not from the same perspective, include: Adolf A. Berle, Jr., and Gardiner C. Means, The Modern Corporation and Private Property (New York: The Macmillan Co., 1933); Adolf A. Berle, Jr., The 20th Century Capitalist Revolution (New York: Harcourt, Brace & Co., 1954); Peter F. Drucker, The Concept of the Corporation (New York: John Day Co., 1946); and John K. Galbraith, American Capitalism (Boston: Houghton-Mifflin, 1952). These could be multiplied, seemingly ad infinitum, and the list grows daily.

ses of modern culture with as rigid an absolutism as any fetish ever imposed upon a primitive savage.<sup>22</sup>

To be adequate in terms of contemporary social needs, a concept of property must be one that defines property in terms of use. "Property means the capacity to execute willed ends."<sup>23</sup> Property, therefore, must be considered as the designation of the instruments necessary to action. As the act is always public in that it extends beyond the individual, involving other persons and things, the public function of property is to implement such action. Thus,

what is often now regarded as a private property is a public function objectified in and organized about the agency of some individual or corporation. But the function remains public still.<sup>24</sup>

Where the individualist theory of property had left only "states of mind" as the basis of social solidarity, Professor Jordan's view is that the "states of mind" reflect or are actually "made up" of the system of objective fact within which they exist. Thus an adequate social theory must look beyond the state of mind to this objective reality to find the ultimate foundation of the social relation;

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<sup>22</sup>Jordan, Theory of Legislation, op. cit., p. 434.

<sup>23</sup>Jordan, Forms of Individuality, op. cit., p. 268.

<sup>24</sup>Jordan, Theory of Legislation, op. cit., p. 342. Cf. this with Cohen's comment that "the significant thing is not whether you are for or against private property, but rather where you will draw the line between public and private things and affairs." Morris R. Cohen, Reason and Law (Glencoe, Ill.: The Free Press, 1950), p. 186.



in its simplest terms this foundation is the property system, and this means that property must be regarded as a public function not only in theory, but that it also must be made a public instrument in political practice.<sup>25</sup>

Property, then, is to Professor Jordan the name for the instruments by means of which public ends may be achieved. As such, property is public, but not in the sense of "collective ownership"; public "does not refer to 'individuals' in any sense, singly, collectively, or otherwise. . . . Public means objective. . . ."<sup>26</sup> The idea of public property does not, in fact, refer to "ownership" in any form, but rather to the functional nature of property--that is, its use to achieve public ends. In the usual meaning of ownership, "property . . . cannot be owned at all."<sup>27</sup>

Professor Jordan, along with several European thinkers,<sup>28</sup> thought that "the collective idea is a logical necessity of the atomism from which the doctrine of private property comes."<sup>29</sup> He further concluded that "the emphasis upon

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<sup>25</sup>Jordan, Theory of Legislation, op. cit., p. 343.

<sup>26</sup>Jordan, Business Be Damned, op. cit., pp. 214-5.

<sup>27</sup>Ibid., p. 214.

<sup>28</sup>Cf. Bowen's statement that "conservative and moderate groups tended . . . to identify [Marxian socialism] as a legitimate step-child of the individualist tradition. They proceeded to develop doctrines of social solidarity that . . . transferred emphasis from individuals and classes to the 'functional' subdivisions of the organic national community." Ralph H. Bowen, German Theories of the Corporative State (New York: McGraw-Hill, 1947), p. 213.

<sup>29</sup>Jordan, Forms of Individuality, op. cit., p. 390.

the collective or 'social' aspect of property abstracts from the real nature of property the character of utility."<sup>30</sup> Viewed from the standpoint of his own conception--corporeity, collective ownership of property contributes little to an understanding of the functional nature of property, and appears primarily to be an attempt to replace existent society with a more perfect approximation of the "state of nature" posited as the basis of the individualist theory of property. It looks, that is, to a condition in which all would have equal access to property. Such an attempt is doomed to failure in advance, since under the conditions of modern industrial society "equal" access is patently impossible.

#### Property as a Form of Individuality

Professor Jordan admits, then, that in so far as notions of private property supported access to the instruments and objects by and from which man could fashion and achieve ends, it contributed to growth and progress.<sup>31</sup> But under modern conditions, he argues, these notions of property as private have become inadequate, and so need reformulation. The collectivist attempt at reformulation, on the other hand,

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<sup>30</sup>Ibid.

<sup>31</sup>This view is not peculiar to Professor Jordan; no one has paid the economic system of which private property was part greater tribute than its most determined critics--Marx and Engels. Cf. Karl Marx and Friedrich Engels, The Communist Manifesto, in Marx and Engels: Selected Works (Moscow: Foreign Languages Publishing House, 1951), I, pp. 36-9.

is also inadequate, since it merely generalizes the error; "the real complement of private property is not public (in the collectivist sense) but corporate property."<sup>32</sup>

Under the conception of property as corporate, property . . . becomes the most obvious criterion by which the various real stages of individuality in the full personal form are distinguished. The principle of property states that a given type of instrument is appropriate to a given form of person as a means to the embodiment of a given purpose. There is then a form of property private to each of the fully personated forms of individuality, and the vexatious political and economic question of the limits of property rights is just this question as to what form of instrument is appropriate to the full performance of functions or fulfillment of purposes by each degree of individuality.<sup>33</sup>

Thus, the idea that a single individual, or a group of "stockholders," may "own" a factory is to Professor Jordan absurd. As the corporate institution is made up of its human and material fact-content, as ordered, the material fact-content is merely an attribute of the corporate institution.

In the series that is bounded by the individual human and the state, any of the forms of individuality may "own," or at least have access to such property as it can use in the performance of its public function. Beyond this point, the rights claimed under the name of property lose their social significance and thus the raison d'etre of their recognition; "the rights which inhere in the nature of property

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<sup>32</sup>Jordan, Forms of Individuality, op. cit., p. 367.

<sup>33</sup>Ibid., p. 365.

lose their claim to recognition merely upon the question of how much property is involved."<sup>34</sup>

It should be noted, however, that Professor Jordan does not deny the partial applicability of the usual notions of property as private--i.e., as "owned" by the individual.

[I]nasmuch as many forms of property are by nature specifically appropriate to the uses of human beings taken individually, what is called "private" property has a status in the nature of things, and the principle of its relation to the other forms of property must in the interest of social harmony be worked out.<sup>35</sup>

This, together with the implications of his theory, indicates that his view of property are perhaps not as revolutionary as at first appears, when viewed against the actual facts of the present arrangement rather than its mythical interpretation. Thus, the fact that professional managers rather than owners make the economic decisions for the society has become commonplace.<sup>36</sup> Not even the capital which the "owners" invest has today any great significance; of the 150 billion dollars spent in the United States on capital expenditures from 1946 to 1953, only 6 per cent, or 9 billion dollars, was financed through sale of stock; the rest was "self-generated."<sup>37</sup>

<sup>34</sup>Ibid., p. 385.

<sup>35</sup>Ibid., p. 330.

<sup>36</sup>This was documented almost thirty years ago by Berle and Means, op. cit.; cf. also James G. Burnham, The Managerial Revolution (New York: John Day Co., 1941); and Adolf A. Berle, Jr., Power Without Property (New York: Harcourt, Brace & Co., 1960).

<sup>37</sup>Reported in Berle, The 20th Century Capitalist

The concept of ownership, it is true, lingers on in the operation of corporate enterprise. One economist has written that

the profit margin--the yield to ownership--remains the ruling discipline of corporate management. And it is also true that operation under this discipline chronically fails to realize the full potential of industrial technology.<sup>38</sup>

Professor Jordan refuses the "businessmen" who actually control the economic processes even this degree of "rationality"; the businessman's "interest is in abstract control as a technical process."<sup>39</sup> "Even the subjective motive of profit is merely a phase or adjunct of his instinct to control."<sup>40</sup> Own-

Revolution, op. cit., pp. 37-9, from data compiled by the National City Bank of New York City.

Thus the owner actually has become functionless, as Professor Berle maintains, even as a source of capital. The implication of this development has been stated most explicitly by Cohen: "modern ownership of capital really amounts to a right to tax those who wish to use certain tools." Cohen, op. cit., p. 186. Thus, the stockholder in a corporate institution, as e.g., United Fruit, is in effect exacting a tribute from those who wish to use the products purveyed by that institution. This, of course, assumes that the corporation does in fact pay dividends.

<sup>38</sup>Gerard Piel, Consumers of Abundance (New York: The Fund for the Republic, 1961), p. 4.

<sup>39</sup>Jordan, Business Be Damned, op. cit., p. 4.

<sup>40</sup>Ibid. He would agree then with another economist who writes that the corporation is primarily interested in power, which can be used to "seek a variety of goals: 'satisfactory' profits, an 'adequate' rate of growth, a 'safe' share of the market, 'good' public relations, and so forth. . . ." Carl Kaysen, "The Corporation: How Much Power? What Scope?" The Corporation in Modern Society, ed. by Edward S. Mason (Cambridge: Harvard University Press, 1960), pp. 90-1.

Cf. also the statement by an apologist for modern business, that "the decision process in the large corpora-

ership is merely the didge behind which the businessman attempts to justify his purposeless control; "business has no ends, no concerns, no purposes."<sup>41</sup>

Following Veblen,<sup>42</sup> Professor Jordan would "free" corporate enterprise from this tyranny, transferring control from the businessman, who seeks control for the sake of control, to the industrialist, (Veblen's engineers and technologists), whom he considers production-oriented.<sup>43</sup> Freeing corporations from the domination of the businessmen would make it possible to orient these institutions toward the accomplishment of public ends.<sup>44</sup>

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tion cannot be comprehensively understood without assuming that power is a major goal-value." Richard Eells, The Meaning of Modern Business (New York: Columbia University Press, 1960), p. 133.

This concept of the corporation as a seeker after power would seem to lend credence to Professor Jordan's view of the automaticity and spontaneity of the growth of corporate institutions, especially when considered with the facts as to the sources of corporate capital and in view of the oft-stated "intentions" of the businessmen themselves to maintain or restore "competition."

<sup>41</sup>Jordan, Business Be Damned, op. cit., p. 5.

<sup>42</sup>Cf. Thorstein Veblen, The Theory of Business Enterprise (New York: Charles Scribner's Sons, 1904).

<sup>43</sup>Jordan, Business Be Damned, op. cit., pp. 1-10.

<sup>44</sup>Myrdal argues with unsupported optimism that this already is beginning: "the purpose and accomplishment of planning in the Welfare State is, in fact, constantly to simplify, and largely to liquidate, old and new [governmental] intervention: to substitute a few, mostly overall state policies for a growing mesh of detailed and direct ones, and, in particular, to recondition the national community in such a way that for the most part it can be left to the

In his view, this can be accomplished only through a modification of the theory of property and "ownership." Such a modification no longer seems revolutionary, since a well-documented "revolution" relative to ownership has been occurring for some time. Thus, according to Professor Berle, ownership no longer is a right to determine how property is used, but merely a claim to a return on an investment.<sup>45</sup> In its latest phase, this "revolution" is tied to the investment of employee pension trust monies in corporate securities. Thus, "the Sears Roebuck pension trust fund undertook to buy Sears Roebuck stock and now presumably has a controlling interest in the company."<sup>46</sup> The company is "socializing" itself, although the new "owners," the employees as beneficiaries of the fund, derive no "rights" from this "ownership."

Professor Jordan objects, however, to policies which attempt to guarantee and perpetuate "competition"; such policies, in his view, are negative, and serve no constructive social purpose. Such policies have not prevented the growth of corporate institutions, and, furthermore, they have served

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cooperation and collective bargaining of the people themselves, in all sorts of communities and organizations beneath the formal state level, to settle the norms for their living together." Gunnar Myrdal, Beyond the Welfare State (New Haven: Yale University Press, 1960), p. 102.

<sup>45</sup>In general, see Berle, The 20th Century Capitalist Revolution, op. cit.; more specifically, see his Economic Power and the Free Society, op. cit.

<sup>46</sup>Ibid., p. 11.

to conceal the necessity of directing their energies toward public ends. The only way in which these energies can be so directed, and human wants thereby satisfied, is through the "socialization" of property.

The only means of effecting an adequate control over the corporate form is through eliminating interest as privacy, and this can be done only by "socializing" or "communizing" property, which merely means changing the principle of corporate organization.<sup>48</sup>

But by "socialization" he does not mean the collectivization of property in the usual statist sense; he wants property allocated on the basis of the capacity of a given form of individuality to use it in the accomplishment of public ends, and to this end he feels that it will be necessary to eliminate ownership as a motive force behind corporate activity.

In such an allocation or appropriation of property, and viewed subjectively from the level of any one of the forms of individuality, an object of property must be recognized as

a part of the life of the one who owns it or may own it, because it and it alone appears as the objective and complementary aspect of his will, as the only object on which his interests and feelings may be poured and thus crystallized into permanent value form.<sup>49</sup>

Thus, "private" property, or the forms of property appropriate as means to the embodiment of the purposes of the natural person, must be viewed as "the sum of embodiments of the pur-

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<sup>48</sup>Jordan, Theory of Legislation, op. cit., p. 245.

<sup>49</sup>Jordan, Forms of Individuality, op. cit., p. 268.



poses which are specifically representative of the organization of the natural person."<sup>50</sup> This principle applies, of course, to the other forms of individuality as well.

Viewed objectively, however, property in its proper formulation becomes a question of the relations of persons--that is, relations within and among the specific instances of individuality. And

when we consider property in terms of the relations of persons, the complexity of such relations constitutes the ultimate person as the whole. Personal property is real estate and real estate is commonwealth.<sup>51</sup>

The ultimate holder of all property is therefore the social whole, as property ultimately is the material fact-content of the order of the whole. The fact, that is, is "held" within the order of the whole. As the ultimate order of fact, the whole is therefore responsible for the quality of the relations maintained among its constituent fact. This is given recognition, he feels, in the common assumption that

the land is the body of the state. . . . The attack upon the land is invariably felt to be a thrust at the common or whole life; the land is recognized as the objectified form of the life of the political whole.<sup>52</sup>

Professor Jordan would then abolish the legal basis of property in the "rights" of "ownership," and reconstitute

<sup>50</sup>Ibid., p. 386.

<sup>51</sup>Ibid., p. 352.

<sup>52</sup>Ibid., p. 347.

property upon the foundation of use, considered as a function in relation to a public end.<sup>53</sup> The status of property, and its possession, is then to be determined by its function within the whole of which it is a constituent fact. Property

as ordered fact performs functions, and . . . these functions as objectified uses or usages constitute the subjective elements of principle which destine it for an end which is carried within its present self. Nothing more than these statements, or expansive interpretations of them, can be said of individuality in any of its degrees, and, like any other individuality, the essence of property is to be determined by the position and function which it represents within the completely objectified person which is the whole.<sup>54</sup>

As reconstituted, then, property falls into the logical category of individuality, in which it receives its meaning for social theory as "one of the forms in which human life as a whole is 'set up'. . . ." <sup>55</sup>

Property as incorporate can sue and be sued, is liable or responsible, can perhaps be "guilty" of crime or tort, in any case can be punished, in fact, can in perhaps all the fundamental juridical relations qualify for full personal competency.<sup>56</sup>

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<sup>53</sup>Professor Jordan is, in general, skeptical as to exclusive use under any circumstances. He finds that access to property is the crucial factor. Thus, "the object of art . . . cannot be owned by or be the property of the rich huckster who is able to pay for it; it is the proprium of the person with whom it effects natural relations as the embodiment of the outward reach of the person's esthetic nature. [It is] the concrete objectification of the unity of all persons to whose nature the object is the appropriate and adequate expression." Ibid., p. 369. Capacity for use determines access; the manner in which the property is usable determines the exclusiveness of the access.

<sup>54</sup>Ibid., p. 343.

<sup>55</sup>Ibid.

<sup>56</sup>Ibid. In this instance, Professor Jordan was giv-

As is true of all forms of individuality, its meaning is to be derived from the relations which bind it to the whole of which it is part--the relations through which it is individuated as an individuality.

These are the principles, then, upon which a law of property which is adequate to the conditions of modern life must be based. The purposes implicit in all human activity have become embodied in forms of individuality so much more comprehensive than the natural person that it may no longer be assumed that these purposes are being satisfied when the material fact upon which their satisfaction depends is regarded as the "private" property of individuals--either singly or in groups. Property must be recognized as simply the material fact in a system of fact--human and material--that is organized with respect to a potential purpose. When objectified, and brought to full individuality, it will be the material fact in which human purposes are embodied and through which they will be implemented.

As is true of all of Professor Jordan's philosophy, this theory of property does not pretend to offer final and complete answers, but merely suggests the form in which the questions must be cast before they can be made intelligible.

The real question of private property, viz., how much or

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ing his interpretation of present legal practice rather than a proposed legal doctrine.

what degree and extent of property is to be appropriated to a given form of degree of personality, has not yet been met by the comprehensive intelligence which alone can solve it. The purposes that are thus made merely to feed the tendency to infinite process, as e.g., the public "wants" artificially created by advertising, are artificial and mechanical and abstract after the necessities of the process which creates them, and they have been and are the cause of the maladaptation of law to life which is showing itself so dangerous of late.<sup>57</sup>

Who, that is, shall decide the balance between the public energy devoted to the making of automobiles and the expansion and improvement of the highway system? Professor Jordan thus anticipates by several years Professor Galbraith's concern over the imbalance between the public and "private" sectors of the economy,<sup>58</sup> Vance Packard's bemoaning of "hidden persuaders"<sup>59</sup> and "waste-makers,"<sup>60</sup> and all of those who are troubled about the "legitimacy" of corporate power.<sup>61</sup>

<sup>57</sup>Ibid., pp. 365-6.

<sup>58</sup>John K. Galbraith, The Affluent Society (Boston: Houghton-Mifflin, 1958).

<sup>59</sup>Vance Packard, The Hidden Persuaders (New York: David McKay Co., 1957).

<sup>60</sup>Vance Packard, The Waste-Makers (New York: David McKay Co., 1960).

<sup>61</sup>The number is so great that even a partial list would be prohibitive. With due recognition to Professor Berle, whose work in this field already has been noted, we quote from another author to illustrate the concern: "The management--that is, the control--of these corporations is in the hands of, at the most, a few thousand men. Who selected these men, if not to rule over us, at least to exercise vast authority, and to whom are they responsible? The answer to the first problem is quite clearly: they selected themselves. The answer to the second is, at best, nebulous. This, in a nutshell, constitutes the problem of legitimacy." Edward S. Mason, "Introduction," The Corporation in Modern

The solution to these problems, Professor Jordan maintains, must begin with the speculative determination of the purposes to which property should be appropriated, for the problems themselves are intimately bound up with the fact that property is now being used to satisfy private interests rather than to contribute to the public good. Speculation as to purpose, however, must be followed by experimentation, as purposes can be realized only through action and all action is experimental. The resulting order of human and material fact functioning together in the realization of human purposes is the law of the corporate whole, and order, as was suggested earlier,<sup>62</sup> is mind.

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Society, op. cit., p. 5.

<sup>62</sup>Supra, p. 50.

## CHAPTER V

### LAW AS OBJECTIVE MIND

Professor Jordan's theory of law can be treated without reference to his conception of law as "objective mind." Professor Duncan, for example, has successfully located it within the best of the natural law tradition,<sup>1</sup> "firmly within the democratic legal tradition and yet . . . [based] upon developing cultural fact."<sup>2</sup> Another student of Professor Jordan's philosophy has examined his theory of law in institutional terms, in comparison with the theory developed by the French jurist, Hauriou.<sup>3</sup>

Because of the scope of the present analysis, however, it seems desirable to emphasize the comprehensive consistency of his principle of corporeity as applying to the ordered fact in all the forms of individuality. To include the natural person as one of these forms, it is necessary to

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<sup>1</sup>John Paul Duncan, "Natural Law as Corporate Purpose," 13 Oklahoma Law Review 274 (1960).

<sup>2</sup>Ibid., p. 287.

<sup>3</sup>Thomas M. Haynes, "Institutional Theories of Law: Hauriou and Jordan" (Urbana: University of Illinois, unpublished Ph.D. dissertation, 1949).

deal with his related conception of mind as objective.

Professor Jordan was concerned with the mind as "the medium and substance of human culture,"<sup>4</sup> rather than as a "thing" within the human individual that could be "found" through investigation. He rejected the psychology of the period because

the psychologists do not take advantage of the results attained within their field to produce a constructive theory of human nature; and it begins to appear that the false method of psychology has produced its appropriate or apposite type of mind in the psychologist, and has left him hunting indefatigably for the ultimate atom in the form of a "complex" or an "instinct" which by magic is to be the root of the mind.<sup>5</sup>

His was not a total rejection of psychology, since there are "facts of modern psychological investigation which are vastly better than the psychology which usurps the name,"<sup>6</sup> and in so far as his attack was critical of elementalism in psychology, few contemporary psychologists would disagree with him, in

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<sup>4</sup>Elijah Jordan, The Life of Mind (Indianapolis: Charles W. Laut & Co., 1924), p. iv. There are close parallels between Professor Jordan and Wilhelm Dilthey; e.g., "In understanding we start from the system as a whole, which is given to us as a living reality, to make the particular intelligible in terms of it." Quoted in H. A. Hodges, Wilhelm Dilthey: An Introduction (London: Routledge & Kegan Paul, 1949), p. 136. They also had the same views on the relation of mind and culture. Dilthey, who wrote several years before Professor Jordan, never overcame the Kantian mind-body dichotomy as well as the latter. There are no references to Dilthey in any of Professor Jordan's texts or bibliographies, which means nothing.

<sup>5</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 139.

<sup>6</sup>Ibid.

principle. Few would agree, on the other hand, with his desire to reconstitute psychology as "a paragraph of logic."<sup>7</sup>

The theory of mind with which he wished to replace psychology is--for the novice in psychology, at least--difficult to comprehend; more understandable are his reasons for objecting to the latter. He thought, with a great deal of justification, that most of the philosophy and practically all of the legal and ethical theory of the day was under the domination of erroneous theories based originally upon a faulty psychology.

Descartes, for the modern era, had divided the object of philosophic inquiry into the dualism of body and mind.<sup>8</sup> For Plato, on the other hand and by way of contrast,

the philosophic issue was what sorts of things are mind, man, and his concerns from the point of view of the world of which man and his concerns are a minor, perhaps, but an integral part. The assumption of Plato is therefore that men and things human have their being and their meaning in the relations that constitute them parts of the greater world; their meaning, as an aspect of their being, does not lie in the specialized relation that contemplates the world as a mere aspect of the concern of human beings.<sup>9</sup>

Descartes destroyed this basic unity of the cosmos, and Pro-

<sup>7</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 50.

<sup>8</sup>Elijah Jordan, Metaphysics, ed. by Max H. Fisch (Evanston: Principia Press of Illinois, 1956), pp. 1-4. He saw the origin of this development in the Hellenistic period, but thought the Church had overcome it. Supra, p. 17.

<sup>9</sup>Jordan, Metaphysics, op. cit., p. 3.



fessor Jordan saw a direct development from Cartesian dualism to the individualist theories of the 17th and 18th centuries, the skepticism of Hume and the development of positivism, and the reaction therefrom to an esoteric metaphysics. Concerning the latter, he was doubtful that Hegel had been able

to go beyond Kant in the effort to extricate thought from the privacy of individual mental processes and to make it a function of a total world in which mental processes are a mere detail.<sup>10</sup>

Since the error fundamental to this entire development was a fallacious conception of mind--a conception which, among other things, virtually ignored the environmental (including the cultural in the anthropological sense) factor--he wished to see psychology rectify philosophy's mistake.

But our concern is not with a full development of Professor Jordan's theory of mind--which would be an interesting study in itself; we need merely to describe the theory as it furnishes a basis for law.

#### The Concept of Mind as Objective

On the basis of his theory of mind, most philosophers would regard Professor Jordan as a thorough-going naturalist. To illustrate from the introduction to the text he wrote for the psychology course he taught at Butler University:

Since the majority of college students, who do not "major"

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<sup>10</sup>Ibid., p. 1.

in professional subjects, but whose interests, when they have any, are governed by ideas of general culture, are not prepared to deal with the highly technical details of physiology, it has seemed to me advisable to abandon the regular text in "psychology." I have believed that there is something real in and about the life of the mind that can hardly be done justice by a mere narrative of the life-history of neurons; and, while it may be justifiable, on scientific grounds, to pursue this method to the point where denial of the existence of mind becomes inevitable; yet it seems to me that there are obligations of scientific candor involved in recognizing that the non-existence of mind, while justifiable as a scientific hypothesis, has as yet no status as a scientific judgment. It is, of course, true that, after restricting the field to physiological physics, the concept of mind is not "needed," but it becomes at least quite convenient the moment it is undertaken to make physical theory consistent with the facts of life.<sup>11</sup>

In so far as this approach concerns the problem of consciousness, the psychologists would call it "reductionism," meaning thereby an attempt to explain consciousness in terms of physiology.<sup>12</sup>

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<sup>11</sup>Jordan, The Life of Mind, op. cit., p. iii. Italics added to emphasize the naturalism. The "mind" of which he was defending the existence is somewhat different from the usual formulation of the psychologists, as will become apparent.

<sup>12</sup>Due to a somewhat confusing use of the term "mind" --in the traditional sense, upon occasion, as well as in the special meaning which he gives to it--Professor Jordan's theory of mind appears at first to be a "holistic" one, after the manner of Kurt Goldstein, who "deals with the organism as a whole and considers both physiological and psychological functions as functions of the same organism. He does not put consciousness under the category of physiology but presents it as one of the functions of the organism." Benjamin B. Wolman, Contemporary Theories and Systems in Psychology (New York: Harper & Brothers, 1960), p. 190.

It seems that Professor Jordan does put consciousness under the category of physiology; thus, "in a rather crude and materialistic form the proof has pretty well been established that what we have called mind is connected through organic and evolutionary relations with the body. . . ." Jor-

Professor Jordan does not deny the physiological fact of consciousness, but emphasizes that it is only one fact in a system of fact.

[C]onsciousness is no more isolable than is thing [i.e., a material part of the body], and is just as relative to the system of things as the thing is relative to the order of consciousness. Thus is the reality of consciousness demonstrated in the relativity of orders.<sup>13</sup>

But the "system of things" which is important here is not merely the physiological elements of the human individual, as including the physio-chemical roots of "mental" behavior; it also includes the fact-content of the natural-cultural environment, and, in fact, "'states of mind' can be known only by their outward and universalized connection with things."<sup>14</sup> Or, again,

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dan, Theory of Legislation, op. cit., p. 318.

This reductionist interpretation is supported by the fact that he had been a student of James R. Angell at the University of Chicago. Angell wrote, concerning his approach to psychology: "We shall adopt the biological point of view. . . . We shall regard all the operations of consciousness--all our sensations, all our emotions, and all our acts of will--as so many expressions of organic adaptations to our environment, an environment which we must remember is social as well as physical. . . ." James R. Angell, Psychology: An Introductory Study of the Structure and Function of Human Consciousness (New York: Henry Holt & Co., 1904), p. 7.

Professor Jordan concludes "that the mind that can be recognized as fact has no substance except what it has from its status in the logical system in terms of which the relations between mind and body are alone statable." Jordan, Theory of Legislation, op. cit., p. 318. *Italics added.* The full implications of this will become apparent; here we point out merely that "logical system" is a cultural phenomenon, and as such is--or was--external to the individual himself; that is, logic is an objective cultural fact.

<sup>13</sup>Jordan, Theory of Legislation, op. cit., p. 299.

<sup>14</sup>Jordan, Forms of Individuality, op. cit., p. 136.

all we know about our minds, and their modes of procedure in perception or elsewhere, we have learned from objects that are known and known to be real before we discover our minds or their methods.<sup>15</sup>

Thus, the "system of things" in which mind becomes meaningful is the system of objective fact which includes the self as perceiver, etc., and the objects perceived, etc.

The mind then is objective in its meaningful stages, understanding by that that when it has thrown off its particularity through growth into overt form it identifies with the objects which were "other" to itself when representing the stage of inner consciousness.<sup>16</sup>

Consciousness becomes meaningful, then, not in the attempt to understand its "inner nature" or its physiological bases, but in relation to the content that it is conscious of.

The relation of the totality of these objects, including the individual, is a system of order; "mind is the order of a state of fact. . . ." <sup>17</sup> Mind is then "made up" of the totality of these objects--the individual himself, his physical environment, and the corporate and cultural institutions in and through which he lives, thinks, and acts--as ordered. Thus it is that

the human mind is then the unity of order in the institutions of life. And the degree and worth of that inner order of mind will depend upon the type and quality of

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<sup>15</sup>Jordan, Metaphysics, op. cit., p. 120. And thus would Professor Jordan dispose of Bishop Berkeley and subjective idealism.

<sup>16</sup>Jordan, Forms of Individuality, op. cit., p. 169.

<sup>17</sup>Ibid., p. 178.

order that can be set up in the complex of those institutions.<sup>18</sup>

Formulated in this manner, mind is objective to the individual in the same way and to the same extent that its content is external to the individual and the order of this content that of the whole.

To the advocates of the "open society"<sup>19</sup> such a formulation would seem one of stark monotony; it is given relief and a dynamism through the concept of evolution, which operates in two distinguishable ways to provide this relief.

First of all, the order that prevails must be an order that incorporates growth. Order, that is, must be defined in temporal as well as spatial terms.<sup>20</sup> As will be a

<sup>18</sup>Ibid., p. 180. This, it would seem, is an accurate interpretation of the Platonic theory of the relation of man to society; that is, if the state is the individual writ large, it is because the individual reflects the order of the state, and not, as Hobbes and Locke assumed, because the state reflects the order of the individual's "nature."

<sup>19</sup>As, e.g., Karl R. Popper, The Open Society and Its Enemies (Princeton: Princeton University Press, 1950).

<sup>20</sup>In his last work, incomplete at the time of his death, Professor Jordan was attempting to move beyond the space-time (relation) category to an "analogical synthesis" of relation-quality, in which quality is represented by the qualitative equivalent of the quantitative "space-time" category--"color-tone." Order, then, as a category would include not only space-time but also color-tone (quality), and would have been so defined. For our purposes we have been content to leave quality a matter for reflective judgment, and do not, therefore, attempt an explanation of quality as a logical category. Cf. Jordan, Metaphysics, op. cit., passim. The main arguments of this latter work have been ignored in the present study.

system of fact organized with respect to a purpose,<sup>21</sup> so the order of the system is toward an end. Mind, therefore, is the dynamic order of fact toward ends.

During the course of evolution, secondly, life embodied itself in the form, "man." This is the point where the biologists end the evolutionary process, but for Professor Jordan, as a social philosopher, it is only the beginning. The "speculative and reflective consciousness [which] is the distinguishing characteristic of the . . . human being"<sup>22</sup> enables man to be a culture-building animal of a different degree than the lower organisms.<sup>23</sup> Through the use of this consciousness man is able to develop such cultural institutions as language, art, technology, etc., to the point where, as Cassirer said, man lives "in a new dimension of reality."<sup>24</sup> These cultural institutions become incorporated with the human consciousness, which is then able to use them in the ordering of life.<sup>25</sup>

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<sup>21</sup>Supra, pp. 47-58.

<sup>22</sup>Jordan, Theory of Legislation, op. cit., p. 250.

<sup>23</sup>As we have seen, Professor Jordan refused to draw a dividing line between nature and culture, preferring to view it as a continuum (nature-culture). Supra, pp. 66-74.

<sup>24</sup>Ernst Cassirer, An Essay on Man (Garden City: Doubleday & Co., 1954), p. 43.

<sup>25</sup>"[T]he mind through its activity constitutes itself, makes itself up, with reference to the final stage of its completion in overt fact, the ordinary name for which is object. Then mind or thought contains within itself its ob-

Paralleling his view of nature-culture as a continuum, Professor Jordan thought that the human organism was not the most comprehensive and most complex form into which life had evolved. Life becomes incorporate in such forms as the family, the city, the corporation, and the state. These forms of individuality also are characterized by mind.

Then a group of relations ordered eccentrically in respect of objective content and with reference to an end recognized as principle within content as ordered, is a mind, and there are as many varieties of mind or forms of individuality as there are qualitatively specifiable kinds of such groups. It is this order of content which embodies the mind or clothes it with corporeity. It may then be called the corporate mind.<sup>26</sup>

There is, in other words, an order of fact peculiar in some respects to every individuality within the whole, and this order is the mind of the individuality. In so far as this involves the question of "group mind" vs. "individual mind" which has been posed as a problem for social thought (as, e.g., in "public opinion"), "the argument . . . loses its conclusiveness when it is recognized that the individual does not himself possess a mind of the type assumed."<sup>27</sup> The individual, qua individual, possesses only consciousness; its content is the order of objective fact, and all instances of corporeity are characterized by an order of fact.

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ject at every stage of its organization, and the stages are distinguishable as the various degrees of integrity or wholeness or organization which the object manifests at different views." Jordan, Forms of Individuality, op. cit., p. 154.

<sup>26</sup>Ibid., p. 234.

<sup>27</sup>Jordan, Theory of Legislation, op. cit., p. 319.

The peculiar powers of man through which he orders reality do not operate automatically. Growth-urge is automatic; the will is there. Whether the growth-urge, or will, will result in a high degree of order depends upon the degree to which it receives the guidance of human intelligence. The same powers which, potentially, can order life can contribute to its disorder; order can be created only through the ordering of fact toward ends, which are always external to the individuality.<sup>28</sup> Since ends are external to the system of fact termed will, their formulation or objectification requires an intelligence that is not limited by that system of fact--one that is free.<sup>29</sup> One could hypothesize for Professor Jordan that the degree and quality of the order of life will vary with the access to free intelligence in the formulation of ends, the totality of which, plus the arrangement of the instruments to their realization, is the order which he calls "mind."

The degree of order achieved in the "inner" mind of the individual will depend, in any case, upon the degree of

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<sup>28</sup>Supra, pp. 35-42.

<sup>29</sup>"Free intelligence" means, of course, intelligence that is not limited by irrational "forces" such as interest, passion, etc. He thought that Hobbes had shown, in his formulation of the "state of nature," the logical form of the interest state. To the extent that men's minds are "made up" of their own subjective interests, etc., their intelligence is not free. The same, of course, applies to the intelligence of humans organized within corporate institutions.



order prevailing among the objects which make up the content of that mind. An ordered "mind" in a disordered society is an impossibility.<sup>30</sup>

### Law as Corporate Mind

Professor Jordan maintains that the order of the individuality called "state" is not different in principle from that of any other form of individuality. Its order is a mind, which is to say that it is

just the synthetic purposiveness of institutionalized life, an organism in overt form. Mind is the constitutional law of reality embodied in the various forms of purposes as purpose becomes organized, i.e., assumes organs; and thus becomes effective. As law, it is the synthesis of just these purposes in stable and permanent objective forms. The study of these characteristic forms in their universal aspects of will then gives us the genius of the law of life as mind. These forms as known in experience are the materialized form of purpose as objectified in the common-ends of politico-moral life--corporate associations.<sup>31</sup>

The law of the whole is then the order of the parts which comprise the whole--the mind of the corporate body. Giving the name "state" to the largest composite of institutions should not be disturbing; some symbol must be used to designate any "whole." Likewise, giving the name "law" to the order of the state is merely the designation of the most comprehensive kind of order.

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<sup>30</sup>Cf., among others, Erich Fromm, The Sane Society (New York: Rinehart & Co., 1955); and Karen Horney, Neurosis and Human Growth (New York: W. W. Norton, 1950).

<sup>31</sup>Jordan, Forms of Individuality, op. cit., p. 226.

Law is, then, simply the synthesis of purposes of life as these purposes are embodied in effective, objective fact. This, it will be recalled,<sup>32</sup> is the essence of the concept of corporeity, which hypothesizes life-facts "as ordered, giving them thereby a status for . . . law."<sup>33</sup> Law as corporate mind is the element of order in corporeity."<sup>34</sup>

As opposed to theories which define law in terms of its sources or the nature of its sanctions, Professor Jordan --thus following Plato and Aristotle--defines it in terms of its function. To define law in terms of its sources or sanctions makes the error of defining reality in terms of its formal variables rather than its functional unities. Thus he maintains that "the question as to the origin of law is one as to its functional nature."<sup>35</sup>

So defined, the erroneous Austinian distinction between government, or sovereignty, as the source of law, and society and its members as the subjects of law, dissipates into the pseudo-problem it is. Viewed in this manner, law

carries no peculiar reference to established government but becomes rather an elementary category of order from the point of view of which . . . a total and comprehen-

<sup>32</sup>Supra, pp. 84-91.

<sup>33</sup>Jordan, Theory of Legislation, op. cit., p. 50.

<sup>34</sup>A later discussion will give the factual basis of law in the fact-arrangement called will. Infra, pp. 137-46.

<sup>35</sup>Jordan, Theory of Legislation, op. cit., p. 143.

sive survey of all the facts of life . . . may be attained.<sup>36</sup>

Not all of the "order" in life results from the enactments or promulgations of the official agents of the corporate whole--the state.

The idea that law is created by the fiat of authority or is the command of an agent having power vested by contract, divine right, wont, custom, etc., puts the cart before the horse. The fact is that authority or whatever commands respect, as well as the agent through which law is expressed, custom, contract, each of these is itself a character derived from law, or discoverable as a character in the nature of law.<sup>37</sup>

Defined as the order or mind of the corporate body, the law "represents that 'implicit' logic which is the core of human history and which gives it its point of value to human civilization."<sup>38</sup> To the charge that the logic may be faulty, the only possible answer is that it must suffice until a better one is evolved. Any other answer renders human history meaningless and reduces life as a whole to irrationalism and anarchy.

This was his fundamental objection to the law of the individualist theory: its logic--or more specifically the categories of that logic--left as a basis for order in human

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<sup>36</sup>Ibid., p. 107. This quotation actually referred to legislation as the law-making process, but, as edited, it applies equally to law per se.

<sup>37</sup>Ibid., p. 143.

<sup>38</sup>Jordan, Forms of Individuality, op. cit., p. 125.

affairs only the agreement of isolated "minds," or force. This followed from their initial assumption of the natural person as metaphysically ultimate, and as motivated by interests which are "rational." Law was to "regulate" the conflicts which resulted.

Subjective interest thus reduces itself to absurdity when it poses as a legal or practical concept. Interests are thus fitted into each other by mutual reduction, hence the process of life thus mediated implies negation and loss as elementary conditions, and this implies that in no case can harmony be effected except by the political agents mutually "giving up" something. But this means dissatisfaction subjectively, which, of course, means collapse for the theory, since satisfaction is the end of the interest theory, and harmony is merely discord suppressed by power or force.<sup>39</sup>

The result is an anarchical situation in which superior force is used by the parts at the expense of the corporate whole. Thus does force come to be accepted as an integral part of the law, whereas in actuality the use of force is a demonstration of the absence of law. Logically and practically, the assumption "that every man may do what he will with his own, subject only to the like right of another, is contradictory and cannot be made law, but itself necessitates utter lawlessness."<sup>40</sup>

Corporate institutions grew up within the framework of this naive formulation of the nature of law. Without direction toward public ends--precluded by the theory--these

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<sup>39</sup>Jordan, Theory of Legislation, op. cit., p. 126.

<sup>40</sup>Jordan, Forms of Individuality, op. cit., p. 387n.

public institutions have come to waste their originally creative energy on their own "private" interests, leading to a struggle for the control of life by "private" agencies wherein control becomes the prize of the struggle. In our day, victory has been with business.

Under domination by business and business practices, the law, Professor Jordan felt, had "failed to establish and maintain the type of objective or public order most favorable to a developing life in a world of continuous change."<sup>41</sup> Thus the actual legal system becomes a hindrance to life rather than the order which is the condition of its fulfillment.

[L]aw in any positive sense is inconceivable except as the constructive and synthetic influence which tends to unity, while struggle presupposes a plurality of agents who by virtue of their very nature cannot be brought into harmony.<sup>42</sup>

Rather than "the fundamental universal feeling of the fitness of things made conscious as both the ground and the guide to human endeavor,"<sup>43</sup> which is the essence of real law, the prevailing legal system has become "a description of the past considered as an inflexible regulator of the present."<sup>44</sup> Morality, as the condition of the development of human life, demands more of law than this.

<sup>41</sup>Jordan, Business Be Damned, op. cit., p. 185.

<sup>42</sup>Jordan, Theory of Legislation, op. cit., p. 307.

<sup>43</sup>Jordan, Forms of Individuality, op. cit., p. 125.

<sup>44</sup>Ibid., p. 398.

Professor Jordan concludes, therefore, that the "problem of control in human affairs must be worked over from the ground up."<sup>45</sup> The proper place to begin this re-working--the "ground" of control in human affairs--is with the question of purpose: control for what? Only in the answer to this question, he felt, can the law be given moral status or value, and

the designation of a value by a rule purporting to derive from the entire system of worth as organized in human culture is one of the elementary grounds upon which the respect for law rests, and it is from this respect, considering the matter psychologically, that whatever power or authority the law has is derived.<sup>46</sup>

Law must be changed from an instrument of oppression and restraint to an opportunity for fulfillment and freedom; "a degree of order which affords to the individual a significant opportunity represents the essential minimal condition which law as such must fulfill."<sup>47</sup>

The opportunity that must be afforded is an opportunity to act; action, as opposed to mere movement, requires an end as its object. In the example of the man acting to obtain bread, the opportunity to act is contingent upon the degree of order prevailing among the various objects--man, hoe, seed, land, etc.--as embodied in corporeity. A law

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<sup>45</sup>Ibid., p. 274.

<sup>46</sup>Jordan, Theory of Legislation, op. cit., p. 135.

<sup>47</sup>Jordan, Forms of Individuality, op. cit., p. 412.

which would provide an opportunity to act is one that orders the various parts of this corporate whole in relation to the end of obtaining bread, so that action becomes possible.

Regardless of how reasonable the tenets of individualism may have seemed in the hypothesized "state of nature," characterized by a total absence of organization,

the characteristic fact of modern industrial life is that tendencies to types of order which individualism cannot even understand are now apparently becoming the chief factors in social organization, i.e., the tendency to "group" action in corporations.<sup>48</sup>

The prevailing law was forced to define these corporations as persons, and while such a definition recognizes the essential unity of the corporation, the failure of individualist theory to recognize the public nature of the person has prevented them from attaining a moral status in the order of life.

The prevailing law also ignores, in theory, the obvious fact that corporations are individualities of a different degree of comprehensiveness than natural persons. As Professor Berle has pointed out, "Corporations are organizations of human beings."<sup>49</sup> Their emergence is more adequately explained through the concept of natural-cultural evolution, wherein life has become embodied in forms for which

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<sup>48</sup>Ibid., p. 239.

<sup>49</sup>Adolf A. Berle, Jr., The 20th Century Capitalist Revolution (New York: Harcourt, Brace & Co., 1954), p. 17. Professor Jordan would emphasize that the organization also includes material objects.

the legal precepts of individualist theory are totally inadequate.<sup>50</sup>

The basis of morality, and so of the law, is no longer natural, no longer bound up with the physical and psychological facts which determine the actions of the individual; but social, cultural, corporate, political, integrated within the functions of corporate organizations of men as the organizations of men are skeletoned by masses of organized property.<sup>51</sup>

Thus the individual becomes, will we nill we, only one fact within the collocation of fact which is the corporate institution. The meaningfulness and satisfactoriness of his acts within that corporate framework become contingent upon the acts of the whole, which is in turn contingent upon the validity of the ends embodied in the order, or mind, of the whole and reflected in the arrangement of the instruments to their accomplishment.

These instruments, of course, include the human in-

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<sup>50</sup>So is its economic theory inadequate. Berle writes: "[Adam] Smith said that this strange animal 'the corporation' could never be a major factor in economics because in it man worked for other men, and obviously no man would ever pay as much attention to other men's affairs as he would to his own. Therefore, such a collective enterprise could never play a major role in society. Its inefficiency would always be such that the workings of the market would eliminate it. Thus, the corporation was merely an agency of the state for specialized purposes, and those suspect.

"At the convention which met to draw up the Constitution of the United States the proposal was made that the Federal government be given power to incorporate. According to Madison's notes the answer was: No, a corporation prevented men from getting into action and this is a dangerous power." Adolf A. Berle, Jr., Economic Power and the Free Society (New York: The Fund for the Republic, 1957), p. 4.

<sup>51</sup>Jordan, Business Be Damned, op. cit., p. 202.



dividuals within the institution. The last and greatest effort to formulate a meaningful ethic within the erroneous framework of individualist theory resulted in the Kantian dictum, "So act as to treat humanity whether in thine own person or that of any other, in every case as an end withal, never as means only."<sup>52</sup> While noble in conception, and perhaps even valid as among natural individuals, this formulation just does not square with the facts of life. Natural individuals are used as means by higher forms of individuality, and the Kantian dictum becomes merely a screen behind which moral responsibility can be evaded when they are used irrationally or in the pursuit of irrational "interests." The great need is to see, therefore, that the higher forms of natural-cultural life are pursuing ends of the "good life."

Again, the quality of order of the "inner" mind of the individual depends upon the quality of order that prevails in the institutional framework within which he lives, moves, and has his being. The order within the institution, on the other hand, must be an ordering toward the ends of the corporate whole. In the absence of ends toward which the energy of the institution may be directed, the corporate mind properly may be called "disordered."

What remains to be done, then, is the determination

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<sup>52</sup>Immanuel Kant, Fundamental Principles of the Metaphysics of Morals, trans. by T. K. Abbott (London: Longmans, Green & Co., 1927), p. 46.

of ends for these institutions, which is by the nature of things impossible from within the institution itself. Once determined and imposed upon the institution, the law within the institution--the order which prevails therein--will become ordered toward the accomplishment of these corporate ends. The individual qua individual will then be able to find opportunities for significant action within the ended order of his institutional life.

As presently constituted, however, Professor Jordan finds that much so-called "public" law--statutes, judgments, etc.--is oriented to the prevention rather than the accomplishment of order in life. Thus a law based upon an erroneous view of human nature has tried to guarantee competition, while some attention to the facts of life would show that "it is the purpose of all law to overcome conflict and 'competition,' and not to generate it or guarantee it or perpetuate it."<sup>53</sup>

What is called competition [in business] is the inherent tendency to wholeness, with the uncertainty as to just what content will become center to the whole. It is not conflict, but the tendency to "monopoly". . . . [S]truggle is a proper description of fact only in so far as the fact is looked at as a plurality of distributive particulars; and this in fact it never is. . . . Struggle, survival, origin, difference, and all the concepts of evolution imply either an active synthetic principle which is ultimate, or an equally ultimate destructive principle which makes of the fact of nature an illusion

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<sup>53</sup>Jordan, Forms of Individuality, op. cit., p. 279.

--there could, granting the reality of time, have been no nature if struggle were its law.<sup>54</sup>

Thus it is that present corporation law, based upon the ultimacy of conflict,

is mainly devoted to the restriction and prevention of the efforts toward the natural ends which the corporate tendency seeks to embody and does embody as public ends when left free.<sup>55</sup>

What is needed in these circumstances is a reworking of legal precepts with some attention to the facts of life and law as viewed through the framework of a synoptic theory.

#### The Factual Basis of Law in Will

On the basis of the discussion up to this point, law may be defined as the order of ends of the society, with the appropriate arrangement of the instruments for their attainment, synthesized as the End. This definition, while accurate, assumes the basis of law in fact.

One of the key statements in Professor Jordan's theory of law is that "law has its origin in the processes of life,"<sup>56</sup> which is reiterated many times throughout his work and is implicit in the theory of emergent contractualism.<sup>57</sup> The apparent contradiction between this and his conception

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<sup>54</sup>Jordan, Theory of Legislation, op. cit., pp. 275-6.

<sup>55</sup>Jordan, Forms of Individuality, op. cit., p. 321.

<sup>56</sup>Jordan, Theory of Legislation, op. cit., p. 305.

<sup>57</sup>Supra, pp. 74-84.

of law as the logically derived order of ends is resolved by the concept of evolution.

Life, as natural-cultural, is presented fact; logic is an outgrowth of the evolution of that fact, and is therefore a part of presented fact. Logic, then, is as much a part of life as any other cultural fact, and is one of the means whereby the growth-process will continue, if continue it does. Its contribution to the process lies in the formulation of ends and the ordering of the instruments to their accomplishment. Thus, logic, as a part of nature-culture, has its particular importance in assisting in the direction of natural-cultural evolution.

The success of logic, the cultural instrument of the human intelligence, in the formulation of the ends of life can be no greater than its comprehension of the life-growth-process. All of natural-cultural life, Professor Jordan believed, is based upon the necessary assumption of order in the cosmos, and is itself the evidence of that order. The function of logic is to discover the order and to formulate it as law. A faulty logic leads to a faulty law, and thus hinders rather than assists the life-growth-process. The logic of individualism was faulty in that the law based thereon violates at every turn the theory itself; when attempts have been made to formulate legal rules upon the basis of the theory, as in the case of corporation law, life proves the

law and thus the theory erroneous. The answer in such an instance is not a despairing cry that life is irrational, but a re-examination of the logic, including its categories, to improve it to the point where it offers a better, more reliable, interpretation of the life-process.

The law, then, is the logical system of values emergent within the culture and set forth as the ends toward which human striving aims in its efforts to improve the conditions of life to make possible its continued growth. These ends, together with their instruments, constitutes the state. Law is both the representation and the condition of will finding its completion in a higher, better, and more comprehensive form of order.

Life is never without some kind of law, for this would imply the negation of life itself.

The idea that by the application of intelligence and reason a constitution could be imposed upon a people made the serious mistake of neglecting the fact that a people always has a constitution, a corporate organization by nature, one determined by the necessities of the institutions through which the people attains its purposes. Constitutional law is then declaratory of the conditions of order that exist, and not the interpretation of a theory of a purely rational order.<sup>58</sup>

The question then becomes one of the degree of worth of the prevailing order--that is, the degree to which the prevailing legal system contributes to the continued growth of life in both its natural and its cultural manifestations.

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<sup>58</sup>Jordan, Forms of Individuality, op. cit., p. 253.

The proper place to begin the study of law is then the physical life, which "constitutes, through its process, the material origin of law. . . ."59 The law is always to be sought in the facts, through the speculative determination of purposes, and never imposed upon the facts.

[T]he structure of life as given in experience in biological and psychological organization, automatically determines the direction in which the inertia or weight of fact is to be exerted,<sup>60</sup> and to some extent and as conditioned by circumstances as environing condition, also determines the extent to which the exertion is to affect the organization of the structure of life itself on the one side and the order of circumstance on the other.<sup>61</sup>

<sup>59</sup>Jordan, Business Be Damned, op. cit., p. 250.

<sup>60</sup>Professor Jordan uses the term "feeling-mass" to signify the undifferentiated mass of fact regarded as dynamic in potential--i.e., as living fact. Jordan, Theory of Legislation, op. cit., p. 111. Operationally, the concept is used as one of many attempts to bridge the gap between an objective reality and a subjective knower, and becomes an extremely complex (if not specious) argument. Aside from its complexity, we feel that it contributes nothing not implicit in the concept that life is composed of a nature-culture continuum. Indeed, it may be that the latter concept, which we are using far more in interpretation than he used it in presentation, was intended to replace "feeling-mass," since it, and not "feeling-mass," appears in the latter book: Elijah Jordan, The Good Life (Chicago: University of Chicago Press, 1949). Of feeling mass he writes: "We say feeling mass in order to distinguish the original stuff of experience from its specialized character as realized in experience later, since as experience complicates in circumstantiation through its objects the original feeling-mass acquires distinctions of quality within itself." Jordan, Theory of Legislation, op. cit., p. 112.

"Feeling" does become important per se in his attempt to derive, in his last work, a logical category of color-tone quality equivalent to space-time relation. As indicated above (supra, p. 123n), we have chosen to eliminate this incomplete effort here. Cf. Jordan, Metaphysics, op. cit., passim.

<sup>61</sup>Jordan, Theory of Legislation, op. cit., pp. 107-8.

This is why, in the law-making process, the speculative determination of ends is always followed by experimentation to verify the ends decided upon. It is also the reason, if there is to be any hope of success in the experiment, the logical formulae to be used in speculation must be taken from the life of experience. This means a primary attention to material things, for

the basis of life and of the law which represents its process and growth movement is and remains the world of tangible material things, the hard facts of the immediate experience of the common man. These things in their immediacy are the conditions of life in its simplest possibility; and in their cultural complication and order as property they are the substance and body of the forms which represent the highest embodiment of law. They are therefore the point of beginning for all thought upon the process of law-making. . . .<sup>62</sup>

In its final and highest form, moreover, the law should consist basically in the procedural determination of the arrangement of property than can be used most effectively in the satisfaction of purposes made objective as public ends. This is the process known to the economists as the "allocation of resources,"<sup>63</sup> but for Professor Jordan it is a political problem rather than the result of the workings of the "market." It is a political problem because material things--property--are the instruments through which purposes

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<sup>62</sup>Ibid., p. 289.

<sup>63</sup>An interesting discussion of the recent trends in this area is found in Gunnar Myrdal, Beyond the Welfare State (New Haven: Yale University Press, 1960), pp. 1-118. Cf. also John K. Galbraith, The Affluent Society (Boston: Houghton-Mifflin, 1958).

may be realized as ends in the order of life.

Material things become important, then, by becoming components of a system of fact with a tendency to order--a potential of fulfilling purposes when these purposes have been objectified as ends. The law, as the order of fact, has its origin in the basic life-functions as these life-functions are embodied in the instruments necessary to their satisfaction. "The roots of the life-functions which through culture are made into law appear therefore to lie in the substratum of will."<sup>64</sup>

The contract may be taken as a case in point. In a contract various fact-systems--men, property, etc.--converge upon a purpose which intelligence has objectified for each of the fact-systems taken separately. The convergence, or contract, is

a growth in mutuality of recognition of common ends. Its process is natural and can only be asserted or declared by the law. . . .<sup>65</sup>

The order that results is created, as compared to ideated, by the active agencies involved. This is not to deny the necessity of intelligence--the will of the human individual; its role in objectifying the purpose and suggesting the arrangement of instruments that will lead to its realization is vital. It is not, however, effective.

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<sup>64</sup>Jordan, Theory of Legislation, op. cit., p. 113.

<sup>65</sup>Jordan, Forms of Individuality, op. cit., p. 427.



Thus, in the creation of the law of the state--the whole of which the various corporate individualities are the constituent fact--it must be said that

it is the corporate individuality which creates the law. It is the total of such corporate agencies which constitutes the real and actual governments of the world, compared with which the puny pretence of the "constituted authorities" becomes shallow mockery.<sup>66</sup>

The "force" which creates law is then the will, the system of fact organized with respect to a purpose, and a theory of law adequate to explain the order of life must be grounded in an understanding of will. Concerning the relation of will to law, Professor Jordan writes that

will . . . means the incorporation of institutional tendencies with respect to a single objective, and is fundamentally a subjective force. The incorporation of ends, on the other hand, into a final synthesis, an End, is the function of law.<sup>67</sup>

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<sup>66</sup>Ibid., pp. 433-4. If we may accept the word of the economists (and Professor Jordan) as to the relative importance of things economic in this "best of all possible worlds," and the word of Professor Berle, et al., as to the nature of the economic structure, a proper study of American government would begin with an analysis of the patterns of power within and between AT&T, General Motors, DuPont, etc. This approach would find support in the verdict of the Committee on Political Parties as to the nature and effectiveness of the party system--Toward a More Responsible Two-Party System (New York: Rinehart & Co., 1950)--and studies of the role of groups in formal government by scholars such as David B. Truman, The Governmental Process (New York: Alfred A. Knopf, 1951); E. Pendleton Herring, Group Representation Before Congress (Washington: The Brookings Institution, 1929); and, a study of group and corporate influence in the administrative process, Samuel P. Huntington, Clientalism in Administrative Politics (Cambridge: Harvard University, unpublished Ph.D. dissertation, 1951).

<sup>67</sup>Jordan, Theory of Legislation, op. cit., p. 74. If it is true, as Professor Kaysen maintains, that present cor-

Ends, of course, are imaged and synthesized by intelligence, so law, in the final analysis, rests upon the mutuality of institutional will--as active--and individual will--as intelligent.

As systems of fact--men and property--converge upon a purpose which is their common end, they create not only new law but also a new form of individuality--that is, a new legal and therefore moral person. Once created, this individuality must be supplied continually with ends by intelligence. Professor Jordan's criticism of modern law is, therefore, a criticism of the failure of intelligence--a failure of will on the part of human individuals. The creative forces have been present in our time, but intelligence has failed to keep them oriented toward public ends. Thus,

we allowed the corporation to grow up without care or attention, in whatever way the circumstances might determine. Indeed, the extravagant variety of capacities with which we invested them in their charters seems to indicate that they were intended to be as irresponsible as possible. For the evils that attended the growth of a given corporation we attempted to find a cause in the wicked will of some person, and we found no way of controlling corporate activity except through the holding of individual men responsible. The corporate person thus grew up without moral discipline while we were chastizing its most outstanding natural person for the sins of the corporate body. . . . While we were engaged in

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porations seek to maximize their power in order to be able to choose among a variety of goals, Professor Jordan would assert that this is a blatant usurpation by the corporation of the political function. See Carl Kaysen, "The Corporation: How Much Power? What Scope?" The Corporation in Modern Society, ed. by Edward S. Mason (Cambridge: Harvard University Press, 1960), pp. 90-1. Quoted supra, p. 107n.

delivering moral instruction and reproof to the natural persons connected with corporations, the real moral person was following the bent of its cruder instincts.<sup>68</sup>

The failure of intelligence to recognize the moral nature of the corporate person led to a failure to keep it endowed with opportunities for significant action. These opportunities, of course, should have been incorporated as ends into the law of the corporate whole, the state. In actual fact, however, the "order and direction . . . potentially . . . inherent in the life-process"<sup>69</sup> were not objectified by intelligence--the only means whereby it could have become objectified and therefore effective. In Professor Jordan's view, this failure of intelligence was largely the result of blind obedience to a theory of property that had ceased to have any relevance to the actual facts of life.

Without direction toward ends, these corporate wills turned their energies inward in the irrational pursuit of "interest," and eventually negated and subverted as well as usurped the opportunities for action. Thus the

respect of and obedience to the law has come to mean the standardizing of the mind to law as a fixed form, while it should mean the progressive adjustment of law to the changing purposes of men.<sup>70</sup>

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<sup>68</sup>Jordan, Forms of Individuality, op. cit., pp. 431-2.

<sup>69</sup>Jordan, Theory of Legislation, op. cit., p. 130.

<sup>70</sup>Jordan, Forms of Individuality, op. cit., p. 304. Law, of course, can only be determinative within the limits of will as directive. Supra, p. 51.

As end result of this development, in the realm of law, the fear of force ultimately has replaced respect as the basis for the authority of the law.

### The Authority of the Law

Nothing is more obvious than that Professor Jordan's whole approach precludes any conception of force as a valid basis for the authority of the law. Law should be its own authority, for

where struggle must be resorted to in order to maintain law it is law in the decrepit stage that has become the dead support of interest; and the corporate or public purpose of the struggle in this case is precisely to destroy the obsolete law and thus make way for growth.<sup>71</sup>

It would seem no exaggeration to say that the degree of force required to "enforce" the law is, in general terms, an inverse index to its validity.

Law more properly is viewed as the representation of growth in life, whereas struggle negates life in both its natural and--especially--its cultural aspects. In terms of its relation to the state, "it is the law which makes the state, and not the state which makes the law."<sup>72</sup> This dictum is in danger of being misinterpreted, however, unless viewed in the context of his total philosophy.

First, it should be remembered that Professor Jordan

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<sup>71</sup>Jordan, Theory of Legislation, op. cit., p. 306.

<sup>72</sup>Ibid., p. 40.

does not equate "state" with the formal governmental machinery. Distinctions between "state" and "society" also do not apply. "State" means a "state of fact" ordered into an End. Thus, in the same way that a people always has a constitution,<sup>73</sup> society at the maximum level of comprehension becomes the state society.<sup>74</sup> The view that the state imposes "its will" upon "its members" ignores the fact that there is a state only because there are certain relations existing among the components. These relations are law in any functional sense of the term.

This definition of law in terms of its function rather than in terms of its formal variables is the second point to be remembered. The question, then, of

how, in terms of general principles, it is that law is invested with power and authority . . . is a question of the distribution of functions between man as rational agent and institution as will agent.<sup>75</sup>

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<sup>73</sup>Supra, p. 139.

<sup>74</sup>Watkins' history of the "state-society-government" semanticism indicates that the distinction first gained force in the hands of the Church, which desired a sphere of authority equal to if not superior than civil government; the later distinction grew out of the strictures of individualism as an unnecessary buttress for the idea of limited government. Frederick M. Watkins, The State as a Concept in Political Science (New York: Harper & Brothers, 1934).

Our own research indicates that, in modern social theory, the distinction usually has been used in conjunction with a moral connotation. Either the nasty old state is doing something it shouldn't (the individualists and Marx) or it ought to be doing something it isn't (Hegel). Professor Jordan's concept of "natural-cultural evolutionary relativism" makes it possible to use the one term for ideal and actual.

<sup>75</sup>Jordan, Theory of Legislation, op. cit., p. 149.

In these terms, it is the institutional will that creates the law as man in his rational capacity attempts to articulate the law. The quality of the law that actually results will depend upon the degree to which the institutional forces can utilize man's rational capacity in the direction of their active tendencies.

Law, then, as the basis of faith and confidence in government, is a conceptualization or an hypothecation [sic] of the dependableness and stability of institutions, which gives to that stability as fact a momentum of weight which pre-determines the future; and law, as thus contemplated, in preconditioning the future, makes itself. It is then the spontaneous transformation of the life process into a relation of order, the spontaneity of the process implicating the substantiality of will, that constitutes the difference between a law and all other things, and at the same time accounts for its "origin." And in so far as the origin of law is to be objectified, it is necessary to refer it merely to the fact that institutions as bodies of fact become corporate orders through the weight of the natural and cultural conditions that give them existence and determines their directions of growth. The substantiation of these natural and cultural conditions within the order, the synthesis of whose specific relations is derived from ends operating purposively, is the spontaneity known in fact as will. It is corporate will that "makes" law.<sup>76</sup>

The authority of the law then rests upon the promise of the law itself to assist in the development of life. Just as one eats because one knows that eating satisfies hunger, one obeys the law because one knows through experience that adherence to the law leads to the fulfillment of the purposes of life. And without this assurance from experience, force cannot and will not compel obedience.

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<sup>76</sup>Ibid., pp. 37-8.

Professor Jordan did not envision a blind obedience, however, as in the customary popular dichotomy between absolute order and absolute anarchy. Life as a whole, in his view, always involves risks in the form of acts to attain ends.<sup>77</sup> The attitude of the individuality toward law is not then one of "assent."

[T]he proper meaning of assent is to be found in the primitive case where custom adapts the individual to his life conditions before he is aware of the fact at all. Strictly speaking, the practical significance of the individual generally lies in the fact that he never accepts or assents to the conditions of his life, and this maladaptation is the condition of his developing a will as an individual.<sup>78</sup>

This element of risk in life is why "law can never compel assent, and . . . no state of will or purpose can be induced by force."<sup>79</sup>

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<sup>77</sup>Supra, pp. 42-7.

<sup>78</sup>Jordan, Theory of Legislation, op. cit., pp. 53-4. Lindner writes, in answer to the question, "Must You Conform"?: "Man is a rebel. He is committed by his biology not to conform, and herein lies the paramount reason for the awful tension he experiences today in relation to Society. [M]an cannot submit, cannot surrender his birthright of protest, for rebellion is one of his essential dimensions. He cannot deny it and remain a man. In order to live he must rebel." Robert Lindner, Must You Conform? (New York: Rinehart & Co., 1956), p. 176.

The same approach, in less impassioned tone, is implicit in Cohen's criticism of the "reform" theory of criminal procedure, which attempts to "adjust" the individual to the social order. Morris R. Cohen, Reason and Law (Glencoe: The Free Press, 1950), pp. 44-56. "Crime is not the direct result of psychologic factors, but depends directly on social institutions." Ibid., pp. 55-6.

<sup>79</sup>Jordan, Forms of Individuality, op. cit., p. 278. He also question "whether the psychological methods differ in any fundamental way from ordinary methods of force." Jor-

The outcome of a real act can never be known in advance, so can never be made the content of a command. Thus without intelligibility it has no authority, and what does not possess authority in intelligibility is not law. The theory that will or law operates to correct specific evils and abuses, and to deliver precise pronouncements representing some hypothetical sovereign "authority," is a system of abstraction, and makes of positivism the peculiar instrument of autocracy and caprice in governments.<sup>80</sup>

As it is "social process that is made into law,"<sup>81</sup> the law must be such as to encourage the spontaneous action inherent in that process.

Professor Jordan believed that the validity of law is based upon the degree to which it provides "both for the harmony of individual purposes in the system of cultural values and also equally for their realization as individual purposes. . . ." <sup>82</sup> This led him to believe that the whole approach of contemporary law is erroneous. In an example peculiarly appropriate to the 1920's, he wrote, regarding miners' unions vs. employers' organization conflicts:

The fact that "fault" is so difficult to find in such cases is due to the inevitable tendency to look for it in the "wills" of natural persons; whereas the fault is a matter of maladjustment of institutionalized instruments to purposes, and such instruments, as objective, have no peculiar relations to specified types of persons but are objective in that they contribute to the determination of the law of persons. The word fault in

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dan, Theory of Legislation, op. cit., p. 435.

<sup>80</sup>Ibid., pp. 304-5.

<sup>81</sup>Ibid., p. 107.

<sup>82</sup>Jordan, The Good Life, op. cit., p. 9.



cases involving corporate relations has more nearly the meaning as used in geological discussion, since it indicates a break in the social "stratification" rather than a reference to individual wills.<sup>83</sup>

This follows from his interpretation of mind as objective. If the individual's mind is "made up" of the framework of corporate and cultural institutions in which he lives, then it follows that "fault" can be found only in the objective world--the world outside the natural person.<sup>84</sup>

The application of this view to criminal law seems truly revolutionary, since it runs counter to most of the operative theories of punishment and individual reform. Under Professor Jordan's approach, "a bad character is then a subjective representation of an inadequate institution."<sup>85</sup> More specifically, he states that

the whole mess of criminal law is an abomination to the sentiment of the ordinary mind. A "crime" must come to be recognized as a situation in which elements of means

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<sup>83</sup>Jordan, Forms of Individuality, op. cit., pp. 408-9.

<sup>84</sup>There may be an inconsistency here, since he blamed the present malaise on a failure of intelligence--i.e., the human will. Such a failure, however, would seem not to incur "fault" or "guilt" in the usual sense of moral turpitude. It results from the dominance of irrational elements in the make-up of mind--interest, passion, blind obedience to the symbols and shibboleths of the past, etc. A situation such as results from this condition may not be alleviated through the pointing of accusing fingers; in his bitter critique of business, for example, he is denouncing, not businessmen, but a particular "motive" that has blinded intelligence, and led to a control for the sake of control--i.e., purposeless control. Intelligence blinded by the "values" of the past is not free.

<sup>85</sup>Ibid., p. 169.

fail of the proper ending, and the cure or "punishment" for crime is the compensatory adaptation of means so that none of the active agencies "miss the mark". . . .<sup>86</sup>

Unfortunately, Professor Jordan did not elaborate this statement, which as it stands will be to many a gross oversimplification of an enormously complex problem. If one interprets his meaning correctly, it would seem that crime rates --as well as other social disorders--may be taken as inverse indices to the validity of the prevailing legal system and thus of the extent to which the purposes of life--its creative energies--have failed to be organized in such a way as to provide opportunities for significant action.

In any case, it seems that Professor Jordan's approach--in general, since his statement is quite general--is more consistent with much of the findings of social science than any of the theories of criminality embodied in the legal system.<sup>87</sup> Furthermore, to a society with an increasing crime problem<sup>88</sup>--which, incidentally, was ignored in all the

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<sup>86</sup>Ibid., p. 341.

<sup>87</sup>Montagu, the anthropologist, writes: "It is society, not the individual, that creates the conditions which encourage the development of criminal behavior. Our society is in many ways disorganized and disharmonious. And one of the root reasons for this has been the failure to understand the true nature of man, and to socialize and educate him accordingly. The disorganization and disharmony are not genetic but social in origin, and . . . it is not man's biological but his social disharmony and disorganization which largely determines who will and when he will become a committer of crimes." Ashley Montagu, The Biosocial Nature of Man (New York: Grove Press, 1956), pp. 99-100.

<sup>88</sup>Cf. Daniel P. Moynihan, "The Private Government of

discussion of national purpose--such an approach would seem at least to merit consideration. It is possible that Professor Cohen's statement that "the criminal law represents the pathology of civilization"<sup>89</sup> is a tautology with practical significance.

Crime, then, represents a failure of intelligence to order the facts of life in such a manner as to make possible significant action, which is a criterion for the validity of law. The problems of crime and other forms of social disorder cannot be "solved" through increased force, severer penalties, etc., but only through the ordering of the facts of life into instruments so that they can be used in the accomplishment of human purposes.

This ordering is impossible within the "mind" of the individual human being. As the mind of the individual is the order of the objective fact which includes individual, physical environment, and the corporate and cultural insti-

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Crime," The Reporter, XXV (July 6, 1961), pp. 14-21. He notes that, according to the Special Group on Organized Crime of the Department of Justice, an estimated \$47 billion, almost one-tenth of the gross national product, is spent annually on illegal gambling alone. At least half of this goes to politicians and law enforcement officials for protection. Ibid., p. 14. Also interesting is his observation that "for all its obvious importance, the subject of organized crime has rarely engaged the serious attention of American political scientists. In the decade of the 1950's . . . not a single item on crime appeared in the American Political Science Review." Ibid., p. 16.

<sup>89</sup>Cohen, op. cit., p. 60.

tutions of his world, so the order of that mind can be no better than the order which prevails among these facts. The individual can visualize, through his creative intelligence and to the extent that his intelligence can be freed from subjectivity of reference and other irrational factors, the appropriate order of fact; but the individual, qua individual, is powerless to realize this order in actuality. Therefore, "the rational attitude to an irrational world is a sneer of disdain."<sup>90</sup>

But the individual is not merely a "rational attitude"; the growth tendencies which are part of his biological nature compel him to attempt to organize his world in such a manner as to make action possible. Since, in the modern industrial world, the instruments to action are largely beyond his grasp, these growth tendencies issue in acts that must be termed irrational. The active energies of life can achieve fruition in the accomplishment of human purposes only within a system of fact that is ordered to facilitate the realization of these purposes as ends. This order is the mind of the corporate whole--the law of the state.

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<sup>90</sup>Jordan, The Life of Mind, op. cit., pp. 230-1.

## CHAPTER VI

### THE QUESTION OF FREEDOM

Despite attempts to recast Professor Jordan's philosophy into the individualist mold,<sup>1</sup> the primary reason for discussing his theory from the perspective of "freedom" is the pre-eminent place which the term, if not the substance, occupies in the American ideology. It is not denied that his philosophy retains some of the positive values promoted by individualism--as, e.g., freedom of expression; it also cannot be denied that his whole approach is characterized by a belief that, in his words, "the problems of our time will never be solved by talking about 'freedom.'"<sup>2</sup> As indicated earlier, Professor Jordan forthrightly recognized the implications of his approach, and made no attempt to "sell" his theories under a banner of "real" freedom, as this term was used by the individualists.

The attempt to interpret Professor Jordan in terms

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<sup>1</sup>Robert A. Cornett, "Individualism in the Ethics of Elijah Jordan," Ethics, LXVI (1955), pp. 61-6.

<sup>2</sup>Said in conversation with Professor John Paul Duncan; quoted by permission of Professor Duncan.

of individualism requires a re-working of the tenets of this body of doctrine. It seems impossible to deny, for example, that individualism (except Hobbes) viewed freedom--in both person and property--as per se desirable. That such a formulation is inadequate may be seen in the attempt of Professor Morgenthau to defend "freedom and equality" as the "purpose" of American politics, wherein he was driven to conclude that the achievement of freedom and equality

constitutes but one of the preconditions of man's self-fulfillment. To achieve that self-fulfillment itself freedom and equality must be directed toward a transcendent substantive goal, for the sake of which freedom and equality are sought. It is from such a goal that equality and freedom receive their order, their limits, and their purpose--that is, their meaning.<sup>4</sup>

This, in a nutshell, is Professor Jordan's position: freedom has meaning only in relation to purposes. As we have seen, however, he rejects the conception of purpose as an arbitrary "desire" on the part of the isolated individual; purpose, to Professor Jordan as to Professor Morgenthau, is a "transcendent substantive goal," but the former views them as public in nature. Practical philosophy must concern itself with the nature, status and function of these "goals" in relation to which freedom acquires meaning.

Because "freedom" is "the shibboleth of our age,"<sup>5</sup>

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<sup>4</sup>Hans J. Morgenthau, The Purpose of American Politics (New York: Alfred A. Knopf, 1960), p. 238.

<sup>5</sup>Elijah Jordan, Essays in Criticism (Chicago: University of Chicago Press, 1952), p. 248.

it seems no more than fair to examine the implications of his philosophy from this perspective.<sup>6</sup> To be fair, however, such an examination must be preceded by a critical evaluation of the usual notions of freedom.

### The Inadequacy of the Usual Formulation

Heilbroner writes that Marx' great contribution to thought was "his insistence that the economy was inextricably a part of the larger social totality. . . ."<sup>7</sup> In the same way it could be said that Professor Jordan places the (correlated?) question of freedom within the broad context of natural-cultural life, in lieu of the "individualistic formulae of liberty . . . [which] could be upheld only in the innocence of eighteenth-century rationalism, with ingenious self-evidences and unshakable truths."<sup>8</sup>

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<sup>6</sup>Professor Jordan dealt with this problem in "The False Principle of Liberalism," Ethics, IVL (1936), pp. 276-91, which was an attack upon the fundamental assumptions of liberalism. Otherwise, his comments relative to "freedom" were usually either (1) derogatory of the individualist conception, or (2) implicates of other points--as, e.g., action requires a freedom to act.

The treatment here is, then, largely by implication and inference, except where specific mention to the contrary is made. Direct quotation, of course, indicates such an exception. Rhetorically, the inferential nature of the material continually will be indicated.

<sup>7</sup>Robert L. Heilbroner, The Future as History (New York: Harper & Brothers, 1959), p. 42. Marx retained the economic determinism of the individualists, however, and it was left to Thorstein Veblen to complete the task, showing that culture, through the institutions in which it is embodied, can affect the economy as well as vice versa.

<sup>8</sup>Michael Polanyi, The Logic of Liberty (Chicago: Uni-

Individualism, as has been noted by Professor Hacker, "tends to see only government as the potential threat to a citizen's rights."<sup>9</sup> Mill and the later liberals, it is true, recognized "that even if men live under a free government they can still have to put up with a tyrannical society,"<sup>10</sup> but they were unable to construct "a theory of freedom . . . which will harmonize with the facts of power."<sup>11</sup> The individualist formulation of freedom as the absence of governmental restraint, coupled with the growth of power centers other than the formal agencies of government, leads to a paradoxical problem: How does one limit the power of government, to keep it from violating individual liberties, while endowing it with sufficient power to protect the individual against other power centers in society?

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versity of Chicago Press, 1951), p. vii. One finds increasing recognition of this fact not only in the more advanced social sciences but also in rather unexpected places. Thus, an apologist for the American business version of laissez-faire candidly writes that "what actually happens to the individual is ultimately determined not by the free play of a market, but by the administrative processes of an organization." Theodore V. Houser, Big Business and Human Values (New York: McGraw-Hill, 1957), p. 4. Studies of freedom by psychiatrists, who recognize the broader aspects of the problem, may be found in Erich Fromm, Escape From Freedom (New York: Rinehart & Co., 1941), and Robert Lindner, Must You Conform? (New York: Rinehart & Co., 1956). The latter asserts that "non-conformism is the major, perhaps the only, sin of our time." Ibid., p. 33.

<sup>9</sup>Andrew Hacker, Political Theory: Philosophy, Ideology, Science (New York: The Macmillan Co., 1961), p. 276.

<sup>10</sup>Ibid., p. 277.

<sup>11</sup>Ibid., p. 608.



This problem has been most acute in the realm of economics, where laissez-faire was supposed to have resulted in the maximum production of useful goods and services. Professor Jordan argues that the freedom to produce had been limited when production came under the control of the businessman, which he defines as that element in society--not necessarily any given individual--concerned with control for the sake of control. Under this control, corporate institutions lost sight of their public purpose--production, etc.--and without purpose these institutions have come to waste their energies in vain, directionless activity to maintain or reproduce themselves.

Abstract freedom--that is, freedom unrelated to purpose--yields disastrous results for the theory of freedom itself.

What we are learning in the political sphere, just now, or what we should be learning, is that the largest single factor in restricting the faculties of men in general and as individuals is precisely the unconstrained freedom of the individual to follow his own exclusive pursuits at the expense of the cultural whole. Our doctrine of freedom, taken with its corollary assumption of abstract individualism, as this latter notion is embodied in the institution of private property, is turning upon the freedom of men in general to destroy it in the interest of the unlimited license and power of the individual.<sup>12</sup>

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<sup>12</sup>Jordan, Essays in Criticism, op. cit., pp. 248-9. Cf. his conclusion with that of Professor Morgenthau: "Thus, paradoxically enough, equality and freedom, divorced from such a [transcendent substantive] goal, evolve into an egalitarianism and a libertarianism which first stunt both individual and social development and then put into jeopardy

It is not only the results of the individualist theory that makes it inadequate, although this in itself would be sufficient to discredit it. It also failed to deal adequately with the facts of life, especially as denoted by the term "culture." There would be, for example, no place in individualist theory for the findings of the anthropologists, as reported in the following summary by a behaviorist writing in the field of law:

The culture of a society is concerned with its conventional patterns of behaviour, with the manner of performance of its social institutions. It is concerned with conduct which is not determined by personality and individual initiative but is determined instead by the traditional or institutional patterns of behaviour.

Each individual, then, must learn, and channel his action in conformity with, the traditional cultural patterns of his society. He comes to accept its specific configuration of beliefs, attitudes, and values and to perform its traditional roles.<sup>13</sup>

"Governmental restraint" could be minimized, and still there be a complete subjection to the group. Thus, Professor Jordan maintains that

the mind intricately woven into the meshes of a practical organization is "made up" of the necessities of the life of that organization, and its spontaneity is little more than the automaticity which it has acquired from the inertia or momentum of the structure of the organization.<sup>14</sup>

He asserts, for example, that the "business mind" cannot be

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equality and freedom themselves." Morgenthau, op. cit., p. 238.

<sup>13</sup>Kenneth S. Carlston, Law and Structures of Social Action (New York: Columbia University Press, 1956), p. 96.

<sup>14</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), pp. 277-8.

free. Since it has no purpose, other than mere control,

it has no moral perspective. . . . [I]t readily adapts itself to the "necessities of business." Where there is necessity there is no room for intelligence; and where necessity is accepted there is no moral perspective.<sup>15</sup>

Where necessity governs, moreover, there can be no freedom, so the paradox is that the dominance of the control motive leads to control of the businessman by the organization.

"There is no more helpless being in the universe than a man 'extremely involved' in large business enterprise. . . ." <sup>16</sup>

Approached from the standpoint of the totality of the cultural institutions that emerge in the evolution of natural-cultural life, and not from the view of only government as limiting "freedom," the inadequacy of the individualist formulation becomes apparent. Since culture is an attribute of the whole, furthermore, there would seem to be little room for argument that the "liberties" possessed by individualities "originate in and are guaranteed by the public will,"<sup>17</sup> as this will operates through the cultural institutions of life. Natural-cultural life is then the source as well as the limit of freedom.

#### Public Function as the Ground of Freedom

In the larger context of life as natural-cultural,

<sup>15</sup>Elijah Jordan, Business Be Damned (New York: Henry Schuman, 1952), p. x.

<sup>16</sup>Jordan, Theory of Legislation, op. cit., p. 276.

<sup>17</sup>Ibid., p. 413.

the problem of freedom becomes the less theoretically simple but more realistic question of the function of the individual within the society. It was not a Platonic idealist but the behaviorist legal scholar quoted earlier who concluded that "individual freedom, in short, has significance primarily as freedom to carry out the various roles which the individual may assume in social life."<sup>18</sup> This, of course, is why Professor Jordan devoted so little attention to the question of freedom per se.

The proper formulation of freedom, placed in this broader context of life in both its natural and cultural phases, is that society and ultimately government as the agent of society must achieve and maintain freedom in those areas which are essential to the well-being of the society. It is, after all, upon the well-being of the social whole that the well-being of the parts ultimately depends. This formulation of the question means specifically that society must guarantee to each of its individualities freedom to enable it to perform the function which justifies the freedom.

As "function" is the relation of "purpose" to "end," Professor Jordan asserts that the primary means to "freedom" is the maintenance of clearly defined ends along with access to the instruments upon which their realization depends.

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<sup>18</sup>Carlston, op. cit., p. 72.

This ultimately is the function of government:

It is the function of the political state . . . continuously to organize the ends of life into a system of permanent but dynamic objects which shall be maintained as both instruments to action and objectives of action for all persons who are capable of making use of them.<sup>19</sup>

It thus follows that there are three functions of social significance: thinking, or the speculative determination of ends; action, or the experimental effort to accomplish ends; and property, or the material instrumentation of action. These are all involved in the question of individuality-- "the question as to the mode of reality, how the active real is realized as the perfect tense in the verb of life."<sup>20</sup>

Accepting Professor Jordan's argument, then, there are, in popular terminology, three "kinds" of "freedom." Each of these is correlative with one of the functions he defines: the freedom to think, the freedom to act, and the freedom to instrument action. Abstract freedom, or freedom per se, is meaningless; it is only as freedom is linked with a public function that it acquires social significance.

Action, however, "is the ultimate and substantive fact"<sup>21</sup> that gives significance to both thought and property. The act, according to Professor Jordan's analysis, is the

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<sup>19</sup>Elijah Jordan, The Good Life (Chicago: University of Chicago Press, 1949), p. 10.

<sup>20</sup>Jordan, Forms of Individuality, op. cit., p. 185.

<sup>21</sup>Jordan, The Good Life, op. cit., p. 41.

way in which thought makes contact, or is synthesized, with the objective world. Thus, it is only as thinking has the opportunity to lead to action that it acquires social significance.<sup>22</sup> Property, as the "mass of material instruments to ends,"<sup>23</sup> likewise acquires social significance only as it can be utilized to achieve ends.<sup>24</sup> It is the act, then, which "incorporates the person, as the synthesis of cultural values, into the sum of natural values."<sup>25</sup> Yet the individual human by himself, Professor Jordan maintains, cannot act; an act is always public, always objective, in that it involves persons and things external to the individual.

Professor Mitchell, in his critique of Professor Jordan's theory,<sup>26</sup> is most critical on this one point. Professor Mitchell, however, in his insistence that individuals

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<sup>22</sup>A negative recognition of this may be found in Justice Oliver Wendell Holmes' formulation of the "clear and present danger" doctrine. Schenck v United States, 249 U. S. 47 (1919).

<sup>23</sup>Jordan, Forms of Individuality, op. cit., p. 327.

<sup>24</sup>As indicated above, (supra, pp. 99-101), one of his criticisms of individualist theory was that it gave property a status in and of itself, without reference to ends. We have heard it argued that Adam Smith, at least, assumed that private property would result in greater public welfare. This may be true of Thomas Jefferson, also. Yet Professor Jordan's basic criticism is not materially affected; the ontological status in se seems to persist regardless of the presence or absence of function.

<sup>25</sup>Jordan, The Good Life, op. cit., p. 372.

<sup>26</sup>E. T. Mitchell, "Jordan's Theory of Corporate Will," Philosophical Review, LV (1946), pp. 65-76.

can act, confuses the above with Professor Jordan's further assertion that corporations (large bodies of men and property) are the dominant actors of the present day. Professor Mitchell's mistaken insistence upon the use of the term "corporation" as a simpler synonym for "corporate institution"<sup>27</sup> reveals his error.

To illustrate Professor Jordan's meaning of the assertion that man by himself cannot act: a man in a primitive agricultural economy intends to grow food. Assume the unlikely--that the acts to accomplish this end neither involve nor affect other persons. Even so, to be able to act to achieve the end--food--requires seed, a plow or other cultivating device (cultural in origin), land, etc., all of which are external to this given natural individual. In the act man becomes one fact in a system of fact--i.e., a corporate institution--that includes seed, plow, land, etc. The corporate institution, including both its material and human fact-content, acts. The corporate will--the system of fact organized with reference to the objectified purpose of growing food--completes itself in the end. The completed act in its aspect of wholeness is that to which Professor Jordan refers when he writes that "the work situation is in reality an aesthetic situation . . . because in it the consciousness

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<sup>27</sup>E. T. Mitchell, "Jordan's Theory of Corporate Will: Rejoinder," Philosophical Review, LVI (1947), p. 417.

of the worker is realized in the things about him."<sup>28</sup> He becomes embodied, as it were, in an object.

Only action, Professor Jordan implies, gives freedom social significance; action necessarily involves both an end and the instruments through which only the end may be realized. It is for this reason that he rejects the "freedom of will" postulated by the individualists, which gives an infinite series of separate individuals. Such is logically contradictory, in that it ignores the necessary extension of the individual through which and only through which freedom can become significant. "Individualized wills are not free, and that is the end of the matter. But wills individuated within individuality [i.e., differentiated in terms of their function within the whole] are the ground of freedom."<sup>29</sup>

#### Implications of this Approach to Freedom

In line with Professor Jordan's belief that "the world is intelligible only in terms of the theories with which we interpret it,"<sup>30</sup> the scope of freedom in society varies directly with the manner in which it is defined. The implications of Professor Jordan's approach are, to say the least, thought-provoking.

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<sup>28</sup>Jordan, Business Be Damned, op. cit., p. 152.

<sup>29</sup>Jordan, Forms of Individuality, op. cit., p. 428.

<sup>30</sup>Robert D. Mack, "Introduction," Essays in Criticism, by Jordan, op. cit., p. 5.



Under the individualist theory as this theory prevails in contemporary society, the individual, as we saw earlier, has a wide area of "legal" freedom in which to realize his ends. While legally free to act, however, the individual is denied access to the instruments through which he would be able to act. In Professor Jordan's view,

the individual is a free man so long as his access to objects out of which he may fashion his ends is open and uninterrupted. He is unfree or a "slave" when his access to objects which may serve as the content of his ends is cut off from any cause.<sup>31</sup>

This happened increasingly during the period of industrialization, with its necessarily concomitant rise of large-scale corporate enterprise. The fact that this development took place under the name of "freedom," and that the name has been preserved to describe the result, does not change the facts of the situation itself.

The facts of the situation, as viewed through Professor Jordan's theory, are that individuals working for "wages," though in the corporate enterprise, were not of it; that is, the individual lost his moral status, which comes through action (work) to achieve ends.

The whole matter of an individual working for wages, for ends other than those that complete and embody his own will, is an insult to modern intelligence. It is curious that modern politicians and statesmen have not perceived the utter impossibility of maintaining a civilization in which one man works for another. . . .<sup>32</sup>

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<sup>31</sup>Jordan, Theory of Legislation, op. cit., p. 86.

<sup>32</sup>Jordan, Forms of Individuality, op. cit., p. 323.

Labor unions were, of course, one result of this development; one labor economist has written that "the labor union still is the only effective means by which the workingman can express his individuality."<sup>33</sup> Professor Jordan would maintain, however, that it still must be recognized that the labor union affords the worker an imperfect means of expressing his individuality. The union, that is, does not give the worker a real share in the end produced. Given the division of labor in society, this can be accomplished only through the imposition of ends upon the corporate institutions--that is, through setting these institutions to the accomplishment of the purposes of life.

Since this new form of life was accommodated within the subjective theory of individualism, which minimized the public nature of purpose, the corporate institution, under the banner of "freedom," bogged down in directionless activity supposedly aimed at satisfying its own subjective interests, despite the fact that interests cannot be satisfied ultimately unless and until they are harmonized as purposes into a system of ends.<sup>34</sup>

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<sup>33</sup>Neal W. Chamberlain, Labor (New York: McGraw-Hill, 1958), p. 29.

<sup>34</sup>We should note that Professor Jordan did not regard the private business corporation as the result of a "conspiracy" of evil men. Such an analysis, despite his apparent attack on "business," is alien to his approach. He regarded the development of corporate institutions into larger degrees of comprehensiveness and complexity as the natural evolution

Thus does the error of the individualists, in postulating the "will" of the individual and his successor, the corporation, as "free," become critical in modern times. As against the theoretical background of a "state of nature," in which all had equal access to the instruments of action as they were able to make use of them,<sup>35</sup> its error was neither apparent nor practically too important. But as natural-cultural life has become embodied in more complex forms, and the lack of equal access to the material instruments to ends has become so apparent that a reference to the supposed original freedom and equality is no longer capable of spanning the gulf between theory and reality, reformulation has become necessary.

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of natural-cultural life. "Institutions as corporate bodies are not invented by men or manufactured by men. . . . They evolve with the purpose of which they are the appropriate embodiment." Jordan, Theory of Legislation, op. cit., pp. 303-4. A purpose that is apparent in the present system of fact, however, does not serve forever to orient the institution in which it is embodied toward public ends. Thus the malaise of contemporary life, as corporately embodied, is not the result of "evil intentions," but rather a result of "the faulty organization of the environment, a failure on the part of intelligence, that there is present to the will no real content of any kind." Ibid., p. 86. It was a failure of intelligence because intelligence, as the thinking function, not only failed to keep clearly defined ends before these corporate institutions, but also failed even to see the necessity of public ends.

<sup>35</sup>Cf. Locke's view, reported by Sabine: "[M]an has a natural right to that with which he has 'mixed' the labor of his body, as for example by enclosing and tilling land. . . . [T]he right to private property arises because by labor man extends, so to speak, his own personality into the objects produced." George H. Sabine, A History of Political Theory, rev. ed. (New York: Henry Holt & Co., 1950), p. 527.

Communist theory, of course, was such a reformulation, in which all men supposedly were to "own" the means of production, regardless of their capacity to utilize these as instruments in the accomplishment of public ends.<sup>36</sup> Professor Jordan's view is that

in primitive frontier conditions the assumptions of individualism will work. Where natural things are to be merely converted into social values, communism will work. But where the natural-social products are to be transformed into political ends which are moral and ideal, only the corporate political agent is competent.<sup>37</sup>

Ultimately, according to Professor Jordan, both communism and individualism make the same mistake of replacing the function of property with a status divorced from use.

If Professor Jordan discussed most extensively the effects of the individualist theory of "freedom" in the realm of economics, it was not because he was unconcerned with other areas of human activity. Rather, he felt that economic forces were the dominant ones in contemporary society, and that the structure of the corporate economy was having far-reaching effects in other areas of life. He felt,

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<sup>36</sup>"In communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another to-morrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd or critic." Karl Marx and Friedrich Engels, The German Ideology (New York: International Publishers, 1947), p. 22.

<sup>37</sup>Jordan, Business Be Damned, op. cit., pp. 242-3.

as Drucker feels,<sup>38</sup> that in analyzing a society you must look, not to legal "constitutions," but to the dominant institutions of the society. Professor Jordan found that the actual loss of freedom, under the banner of "freedom," that had occurred in the economic realm had been parallel in the other areas of life.

Education, for example, had received great emphasis by the individualists; as against the theoretical backdrop of a "state of nature," in which all men had free access to the instruments of action, the main task seemed to be one of educating individuals so that they could more adequately perceive their "interests" and the techniques necessary to their pursuit. In fact, however,

while we were preaching education in the interest of a higher type of social and civic life, what actually took place . . . was the organization and adaptation of the mechanisms of the educational system, not to the production of political or public virtues and capacities, but to the acquisition of those capacities and technical skills which have a peculiarly private purpose.<sup>39</sup>

Despite the dedication of what teachers remain in the educational system, "the fates in this case are the forces of business, from the outside, which dominate administration of the schools from top to bottom."<sup>40</sup> What business requires

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<sup>38</sup>Peter F. Drucker, The Concept of the Corporation (New York: John Day Co., 1946), p. 11. Quoted supra, p. 75.

<sup>39</sup>Jordan, Theory of Legislation, op. cit., p. 339.

<sup>40</sup>Jordan, Business Be Damned, op. cit., p. 84.

of the schools is training in the techniques of business, which, aside from the purposelessness of those techniques, ignores the fact that "technical capacity is not developed to the full until it is properly co-ordinated with all other capacities in a harmonious whole."<sup>41</sup>

Nor is the situation different in art. Here the individualist theory of freedom is manifested in the artist as "a license to go his own way without regard to anything except his own subjective whim. . . ."<sup>42</sup> Deprived of positive obligation, the source of his moral status in society, the artist becomes prey to the dominant force in society--business; the result is that

the "right" of the individual artist to adapt his aesthetic tastes to the requirements of modern business and to claim a respectable status for "commercial art" has done more than any "outside control" to degrade the standards of art and to lower the taste of the public mind almost to the vanishing point.<sup>43</sup>

The real claim of the artist to "freedom" is not, then, a freedom from obligation, but the

claim of the right to determine and maintain the conditions under which his activity is to be carried on; and the claim is justified by the fact that only the artist knows what these conditions are.<sup>44</sup>

This "freedom" is totally lacking in the world as organized

<sup>41</sup>Jordan, Theory of Legislation, op. cit., p. 423.

<sup>42</sup>Jordan, Essays in Criticism, op. cit., p. 249.

<sup>43</sup>Ibid.

<sup>44</sup>Ibid.

by business, so that the artists "were among the first victims of the forces that produced the businessman."<sup>45</sup>

And so it goes: in religion, where business society "transforms spiritual activities into commercial activities,"<sup>46</sup> and results "in the substitution for the prophet of the profiteer";<sup>47</sup> in law--"the effective source and agent of any rational order in the affairs of men"<sup>48</sup>--which has become "the blind instrument of a blind and irresponsible power";<sup>49</sup> and also in politics, where "the corruption of politics is . . . merely the application to it of the regular methods of business."<sup>50</sup>

Professor Jordan maintains that "freedom for the individual in the political sense means the unlimited array of opportunities to action that are designed in the structure of the society in which he lives."<sup>51</sup> The end result of the abstract "freedom" of individualist theory as a basis of law appears to be, on the other hand, not a freedom for individ-

<sup>45</sup>Jordan, Business Be Damned, op. cit., p. 163.

<sup>46</sup>Ibid., p. 76.

<sup>47</sup>Ibid., p. 79.

<sup>48</sup>Ibid., p. 131.

<sup>49</sup>Ibid., p. 134.

<sup>50</sup>Ibid., p. 119. This observation had been made before by Lincoln Steffens.

<sup>51</sup>Jordan, Essays in Criticism, op. cit., p. 112.

uals but the usurpation of the "political" function by concentrations of power engaged in the irrational pursuit of "interests." As property loses its claim to recognition merely on the issue of how much property is involved, so the power of corporate concentrations of men and property makes a mockery of the correlative concept of "freedom" when this power is not used in the accomplishment of public ends.

The primary efforts of government, in its attempts to direct these corporate concentrations, have been oriented to the restoration of "competition" through "trust-busting." In Professor Jordan's view, such efforts run counter to the grain of life-process, which continually seeks purposes in larger forms of individuality--i.e., to achieve ever-greater degrees of order in life. This view is given some support by the conclusion of one corporation lawyer, who wrote that

whatever else may be said of this great effort to preserve capitalism in its classic image, it must at least be pointed out that it has failed. It may have slowed down or in certain cases deflected the basic trend, and it certainly made a lot of lawyers rich; but after fifty years of this sort of thing our economy is more than ever dominated by big corporations. . . .

This liberal attitude is based as solidly on the atavistic myths--of free enterprise and private property--as any N.A.M. speech is. Each group is working a different side of a street that runs through a ghost town.<sup>52</sup>

The same author went on to say:

Not only do corporations regulate themselves through gov-

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<sup>52</sup>David T. Bazelon, "Facts and Fictions of U. S. Capitalism," The Reporter, XXI (September 17, 1959), p. 47.



ernment agencies and similar devices, but it is a fact--to be obscured only by conventional thinking--that the very existence of an A.T.&T. or a GM or an RCA is in itself a form of economic planning on a national scale; true, such planning has no broad or socially debated purpose, and is subject to no exterior responsibility other than the brute verdict of events. . . .<sup>53</sup>

And he concludes that

the issue is, first, to recognize the existence of this crucial power now held by corporate and other managers, and then to request them to justify it to us. Power must be legitimated, otherwise any talk of law itself, much less democratic citizenship, becomes absurdly irrelevant.<sup>54</sup>

These views are synonymous with those of Professor Jordan; the ultimate conclusion, with which one must deal, was phrased by Rousseau: "it may then be said that there are no longer as many votes as there are men, but only as many as there are associations."<sup>55</sup>

#### The Achievement of Freedom

The requisite legitimation of corporate power, in Professor Jordan's analysis, can be accomplished only through the determination, imposition, and maintenance of public ends for these corporate institutions.<sup>56</sup> If only corporate insti-

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<sup>53</sup>Ibid., p. 48. Italics added.

<sup>54</sup>Ibid. Italics added.

<sup>55</sup>Jean-Jacques Rousseau, The Social Contract--Discourses, trans. by G. D. H. Cole (London: J. M. Dent & Sons, 1913), p. 23.

<sup>56</sup>One corporate public relations expert suggests that something similar to this took place in the decade of the 1930's. The public, temporarily disenchanted with business, began to demand more of business than mere profit. This was

tutions can act effectively, and only the gigantic "corporation" form of corporate institution is capable of large action in modern industrial society, it is necessary that there be some attempt to ideate the ends which will free these institutions for significant action beyond their end-less efforts to secure their own self-preservation. But, as Professor Jordan points out, it is characteristic of corporate institutions that they cannot envisage ends:

Life as effective will in the corporate individuality of institutions attains its ends in immediate form, but it does this blindly, and the ends attained are raw concreteness without meaning.<sup>57</sup>

The acts of corporate institutions are dominated by subjectivity of reference, by self-determination, and by self-interest;

the industrial organization, in the absence of control by the free intelligence of persons, which control is in the nature of things not possible . . . , exerts all its propulsive tendencies toward the accomplishment of its own "subjective" ends, ends that are subjective because they lie within the organization's own immediacy.<sup>58</sup>

Internal self-direction of the institution is not possible because the persons within it are in actuality its creatures and are directed by it.<sup>59</sup> Ends for corporate institutions

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partially reflected in the New Deal programs, but also in the public attitude toward business. Of course, he thinks that this development could have been avoided through corporate utilization of public relations. John W. Hill, Corporate Public Relations (New York: Harper & Brothers, 1958).

<sup>57</sup>Jordan, Theory of Legislation, op. cit., pp. 248-9.

<sup>58</sup>Ibid., p. 247.

<sup>59</sup>Cr. William H. Whyte, Jr., The Organization Man

must have their source external to the institution itself.<sup>60</sup>

Ends may be determined only by intelligence through speculative method, which is the first stage of the legislative process at all levels of life. Although man as individual cannot act to achieve ends, only man as intelligence can envision ends:

Man can see but cannot accomplish; institutions can ac-

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(New York: Simon & Schuster, 1956).

<sup>60</sup>This seems to suggest that ends cannot be ideated by individuals within the corporate institution, and therefore necessitates some explanation at this point. To the extent that the individual's "mind" is "made up" of the arrangement of fact, the individual's intelligence is not free, and his speculative attempts will yield less end and more interest. "Free intelligence" is, in any case, a logical construct by which to evaluate existent fact; Professor Jordan does not suggest that such a state is either possible or desirable, since present fact furnishes the content from which the individual can fashion ends.

The conclusion must be, then, that the extent to which the individual is able to fashion ends external to the institution of which he is a constituent fact is determined by the extent to which he is able to take a broad view of the social totality--to transcend, as it were, his environmental fact in the process of ideating ends. The late Charlie Wilson's assertion, What's good for General Motors is good for the country, is merely the generalization of abstract interest, and represents the total failure of intelligence; i.e., such a mind is totally "made up" of its immediate environment. Intelligence reasons from the whole to the part, from the universal to the particular; the statement is the inverted form of the intelligible statement, What is good for the country is good for General Motors. Here the legislative task becomes (1) ascertaining the ends of the whole, and (2) individuating General Motors through a definition of its particular end within the whole. The latter will be a functional relationship and its proper form, from the General Motors viewpoint, How can General Motors contribute to the good of the country?

While requiring a knowledge of present fact, intelligence can be freer outside the institution.

comply but they cannot see; this is the surd of life; it makes of life as a whole of value a mystery beyond the capacity of thought to envisage and beyond the ability of action to modify or control. It is this fact which makes of life and thought and action an adventure with nothing assured; life as action is a leap in the dark, and as thought it is speculation within logical conditions, i.e., conditions that do not exist. Man has power only to make the adventure magnificent.<sup>61</sup>

Success in the adventure will depend upon the degree to which the ends that man envisions, through speculation under logical conditions, are realized after the experimental action based thereon. This depends, in the first instance, upon the accurate diagnosis by the speculative intelligence of the end which is inherent in, yet external to the present arrangement of fact. Essential, therefore, is the "act of imaginative reason which synthesizes in the present both the past and the future in a universal"<sup>62</sup> from which, through logical method, the end can be derived.

This intelligence, or imaginative reason, is for social theory the characteristic fact of the human individual. Since the human individual, qua individual, cannot act, "the individual's public obligation is fully met in the act of maintaining clearly idealized ends."<sup>63</sup> This is an obliga-

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<sup>61</sup>Jordan, Theory of Legislation, op. cit., p. 263.

<sup>62</sup>Ibid., p. 150. Professor Jordan notes elsewhere the somewhat inconsistent use of the term "act" in connection with the function of intelligence; it is a shortcoming of language, rather than of the theory itself.

<sup>63</sup>Ibid., p. 377.

tion upon all men, rather than a Platonic elite, since each is an intelligence within a corporate institution. Professor Jordan seems to realize what many economists have come to accept, viz., that the human intelligence is the most important "resource." But whereas the economists tend to base this importance upon its capacity to develop other resources, Professor Jordan goes beyond this to demonstrate that only intelligence can envision ends toward the accomplishment of which all resources acquire their meaning as instruments.

It seems that Professor Jordan would agree, in principle, with the UNESCO statement that

the normal individual, irrespective of race, is essentially educable. It follows that his intellectual life is largely conditioned by his training and by his physical and social environment.<sup>64</sup>

Yet he would see no contradiction in agreeing with Dr. Johnson that "so far is it from being true that men are naturally equal, that no two people can be half an hour together but one shall acquire an evident superiority over the other." The difficulty here is in comparing non-comparables. Granted that the object of life is the full development of life in the human individual; as his characteristic capacity is that for thought, the object then requires the full development and utilization of this capacity. But it may then be assumed

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<sup>64</sup>UNESCO Statement on the Nature of Race and Race Differences by Physical Anthropologists and Geneticists (September, 1952).

that this same "full development" is the object of life in its higher forms of individuality; this requires that, in those forms of individuality, "the thinking and speculative function belongs to the individual who can think." Intelligence is demanded at every level of individuality, however, for the legislative process to which it is essential occurs at every level; the theory thus requires the full development of the capacity for thought in all human beings.

The "freedom" that is therefore appropriate to human individuals is the freedom to think--to perform the public function peculiar to this degree of individuality. The end of thought is, of course, knowledge, which is "attained through the efforts of individuals by private study, and . . . co-ordinated and corrected by the scholarly exchange of opinion. . . ." <sup>65</sup> This implies that freedom of communication is also essential to the growth and well-being of life. <sup>67</sup> Professor Jordan's theory of knowledge, in keeping with his practical orientation, requires that knowledge can become practically important only as it becomes embodied in the public structures of life. A final divorce of knowledge

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<sup>65</sup>Jordan, Theory of Legislation, op. cit., p. 336.

<sup>66</sup>Jordan, The Good Life, op. cit., p. 378.

<sup>67</sup>It is to be doubted whether Professor Jordan would find that the present systems of communications defended under the banner of "freedom of speech and press" fulfill this requirement.

from the active life would render the one completely impotent, the other totally blind.

Since all that the corporate institution can do is act, the only "freedom" which is meaningful to this form of individuality is the freedom to act. Action, of course, in Professor Jordan's analysis requires that it be directed toward public ends. In the absence of ends, corporate institutions become the creatures of necessity--the self-preservative instinct--which negates freedom. Thus, in his discussion of the "private business" corporation, Professor Jordan concluded that "the corporation should be given the freedom to execute its normal purposes, which are the accomplishment of public ends."<sup>68</sup> Productive enterprises must be given the freedom to produce (and only the production of useful items is, to him, production); transport enterprises should be given the freedom to distribute goods; educational institutions should be given the freedom to educate, etc.<sup>69</sup>

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<sup>68</sup>Jordan, Business Be Damned, op. cit., p. 246.

<sup>69</sup>Newton N. Minow, chairman of the Federal Communications Commission, was thinking in these terms when he declared that agency's function to be one of freeing the communications industry (radio and television) from censorship; he identified two dominant types of censorship as "rating censorship," in which subservience to "ratings" is allowed to dictate the type of material offered the public, and "dollar censorship," in which programming is turned over by those ostensibly in charge to advertising agencies, who program to sell the sponsor's products. The example used to illustrate the latter was "The Andersonville Story," in which the title was changed to avoid offending Southern customers, and President Lincoln's name deleted to avoid mention of a competi-

The actual formulation of the end of the corporate institution, as well as the plan of action to achieve it, would require the active participation of those most acquainted with the arrangement of fact within the corporate institution. These Professor Jordan would recognize as the public officials they are. It would also require the active participation of those possessed with a knowledge of the arrangement of fact within which the corporate institution is only a fact--that is, the social whole within which, as universal, the corporate institution finds its meaning as particular. It was the director of public policy research at General Electric, whose theoretical concerns were not as general as those of Professor Jordan, who wrote that, in the future,

perhaps we shall then have no "business" corporation at all, as we now conceive the business function. What seems less likely is that the organizational instrument represented by corporate forms will have outlived its usefulness. The corporation is a superb instrument. . . . The challenge to corporate policy makers today is to transfer its uses to the requirements of a materially, intellectually, and spiritually ambitious race.<sup>70</sup>

The corporate institution does receive some external direction at the present time from life as both natural and cul-

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tor's product. Speech delivered to a conference on freedom and responsibility of the mass media, Northwestern University Law School, (August 3, 1961).

<sup>70</sup>Richard Eells, The Meaning of Modern Business (New York: Columbia University Press, 1960), p. 338. Second italics added. For a picture of the limitations place upon corporations by their general cultural milieu, see "Corporate Responsibilities," ibid., pp. 211-303.



tural. But this direction, according to Professor Jordan, must be changed from the form, "Thou shalt not," to "Thou shalt." Corporate institutions, as the original Anglo-Saxon theory of corporations recognized,<sup>71</sup> must serve public ends.

In conclusion, then, one may infer that "freedom," to Professor Jordan, is meaningless unless it includes as its minimal content the freedom to perform the public functions that relate the individuals to the whole and give them their meaning in relation to the whole. It was his contention, however, "that a logic as strict as may be required is possible in the field of values where freedom . . . is often supposed to be conditioned only upon complete abandonment of logic and the appeal to . . . 'feeling' and 'experience.'"<sup>72</sup>

In this logical system, freedom appears as an essential attribute of purpose and will; it is

the positive and constructive urge which an individual will gives to the propulsiveness of the general will by the consent of the former to the larger purposes defined by the latter. This freedom in its particularized form in any given context is of course conditioned upon a variety of elements which make up a will, the most important of which is the element involving knowledge and intelligence.<sup>73</sup>

It is, however, a freedom within the whole of natural-cultural

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<sup>71</sup>Cf. the quotation from H. C. Adams and L. S. Rowe, in The Corporation and the Economy, by W. H. Ferry (New York: The Fund for the Republic, 1959), p. 20n.

<sup>72</sup>Mack, op. cit., p. 12.

<sup>73</sup>Jordan, Forms of Individuality, op. cit., p. 242.

life; from the standpoint of the individual, freedom appears as a "right." Rights are "the objective relations which are presented to the individual as opportunities."<sup>74</sup> In this sense, a "right" is "natural" in that it is

a simple state of fact which results from the mutual assumptions which persons naturally make with reference to each other and to things. . . . Right does not imply the occurrence of any particular or specific antecedent fact at all; the right is created when the plan of life indicates a new act as advisable.<sup>75</sup>

Freedom is, then, important in a logical and realistic philosophy of purposeful politics, but the objective conditions in which it could be made the purpose of politics have changed to the point where such a formulation no longer is meaningful. Stated as an attribute or by-product of purpose, however, freedom still is necessary to a rational theory of social reality. Seen in this light, the problem of freedom becomes just the problem of identifying and realizing purposes as these emerge in the evolution of natural-cultural life. This, of course, is the legislative process; the freedom of individualities to perform their public functions is the minimal condition of the successful conclusion of this process, for "the fact is that law is derived from right through the exercise of rights."<sup>76</sup>

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<sup>74</sup>Ibid., p. 386.

<sup>75</sup>Ibid., p. 279.

<sup>76</sup>Ibid.

Part II:

Jordan's Philosophy of Purpose as an  
Essay in Political Dynamics

## CHAPTER VII

### INTRODUCTION TO THE POLITICAL PROCESS

In the course of the discussion of the principles or categories of Professor Jordan's philosophy of purpose, in Part I, it was noted that "action is the ultimate substantive fact,"<sup>1</sup> in that it is through action that present fact grows into "ended" fact. This point was not treated extensively, however, attention being fixed instead upon the other categories of the philosophy. Using these principles--purpose, function and end; will and individuality; corporeity and law --as a base, it is now appropriate to turn to a discussion of the active aspects of the theory, or the operational application of the principles in the legislative process.

In contrast to Professor Jordan's approach, modern students of politics have tended to avoid conceptualization as the plague. A reaction, probably, to the dual heritage of individualist "rationalism" and esoteric metaphysics, this has been carried so far as to result in what has been called

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<sup>1</sup>Elijah Jordan, The Good Life (Chicago: University of Chicago Press, 1949), p. 41.

"hyperfactualism."<sup>2</sup> Even today, when the need for theoretical conceptualization seems generally acknowledged, there seems to be an aversion to any kind of theory of the political process that fails to account within its framework for the exact number of mutilated ballots in any specified precinct in any given election.<sup>3</sup> The only theories which purport to be general are those which are based upon conflict,<sup>4</sup> which, it is suggested, fall short of general theory since they virtually ignore the more basic fact of consensus. A political theory, it is assumed, deals with the state, and a state seems more fundamentally to suggest the factor of unity than that of discord.<sup>5</sup> For the most part, however, the

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<sup>2</sup>David Easton, The Political System (New York: Alfred A. Knopf, 1953), p. 37.

<sup>3</sup>This may be part of the heritage of the period of "hyperfactualism." Cf. Easton's general discussion of the problem, ibid., pp. 64-89.

<sup>4</sup>Cf. Hans Kelsen, General Theory of Law and State (Cambridge: Harvard University Press, 1945). Elsewhere Professor Kelsen writes, "from the point of view of rational cognition, there are only interests of human beings and hence a conflict of interests. The solution of these conflicts can be brought about either by satisfying one interest at the expense of the other, or by a compromise between the conflicting interests." Hans Kelsen, What Is Justice? (Berkeley: University of California Press, 1960), pp. 21-2.

<sup>5</sup>Whatever else a state may be, it is at least a group; we know of no efforts on the part of group theorists to explain the group in terms of internal conflict. Professor Sherif, for example, stresses common norms, anchorages, reciprocal status and role relationships, the structuring of experience, goal-directed behavior, etc. Muzafer and Carolyn W. Sherif, An Outline of Social Psychology, rev. ed. (New York: Harper & Brothers, 1956), passim. It is difficult to see how a theory of the group could be constructed on the

conceptualizing efforts of political scientists have been directed to "narrow-guage" theory,<sup>6</sup> wherein the assumption that these theories deal with the actualities of the political process can be only a matter of faith, since they are not connected with a general theory of that process.

It has been said that Professor Jordan's theory of the legislative process bears little resemblance to "legislation."<sup>7</sup> This attitude, which seems reflected in much contemporary political science, ignores the function of theory, which has been explained so well by the positivists.<sup>8</sup> Theory is supposed to explain reality, not "paint pictures" of

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basis of an assumption of conflict, yet such an approach is common to much of contemporary political science, especially "behavior" theory. The whole approach suggests that, in social theory as well as in international politics, the Hobbesian "state of nature" still is "too much with us."

Professor Easton's equilibrium theory, suggestive of Newtonian mechanics, also seems not to overcome this objection. Cf. Easton, op. cit., pp. 283-306.

<sup>6</sup>It could be charged, with some justification, that these theories largely have been designed to fit methodological devices--e.g., sampling and survey techniques--borrowed from other sciences. There still persists the question whether there is a political process that may not be subsumed under the categories of psychology and sociology. This is the question that Professor Easton raises in his appeal to the behaviorists to recognize that "the study of political behavior is nothing more than a way of exploring the functioning of the political process." Ibid., p. 206. This leads to the need for a theory of that process.

<sup>7</sup>Noted in his "Preface" to the second edition, Theory of Legislation, by Elijah Jordan, 2d ed. (Chicago: University of Chicago Press, 1952), p. 7.

<sup>8</sup>Philipp Frank, Modern Science and Its Philosophy (Cambridge: Harvard University Press, 1949), pp. 207-15.

it.<sup>9</sup> Few of the theories of modern physics, generally acknowledged as dealing with a simpler phase of reality than the social sciences, "resemble" the reality they purport to make intelligible.

Part of the reason for the timidity of political scientists in their conceptualizing efforts undoubtedly lies in an aversion to "normative" theory--theory that describes what "ought" to be true. The answer to the normative problems of the social sciences, from Professor Jordan's viewpoint, would seem to be that all attempts at real knowledge--scientific or philosophic--must be normative. Even the use of language in description presupposes an acceptance of norms, since every symbol therein stands in a normative relation to the thing it symbolizes. The normative approach is less apparent in those phases of knowledge which seek to understand the less complex aspects of reality, but become increasingly apparent as one moves up the evolutionary scale to more complex phenomena.<sup>10</sup> The question, then, is not

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<sup>9</sup>Frank points out that the "pictures" themselves are based upon theories that have become commonplace parts of the culture. Ibid. Here, as in other places, Professor Jordan is close to the positivist position. Speaking of the "images" of the mind, he asserts that "spontaneity is really nothing but the life of these images, which are not dead things or abstract replicas or pictures of things at all. They are the things themselves. They are the mind. . . . [I]t is these images that exert sovereign power over the mind. . . ." Elijah Jordan, Essays in Criticism (Chicago: University of Chicago Press, 1952), p. 93.

<sup>10</sup>It is curious that the two undisputed sciences that

whether one should adopt a normative approach, but rather which set of norms, or categories, provides the most adequate understanding of the phenomena under consideration.

This preliminary is a warning, as well as an answer to the objection that Professor Jordan's theory of the political process bears little resemblance to the usual textbook descriptions of that process. Upon the philosophically as well as architecturally sound principle of "form follows function,"<sup>11</sup> he attempts to understand the function of politics, viewing this as a more basic concern than the examination of the formal characteristics of governments.

To illustrate the implications of this approach in terms of the contemporary concerns of the social sciences, it seems to be acknowledged that not all politics occur within the framework of the formal apparatus of government. Increased attention is being directed to the political process as it occurs in other institutional forms. As an economist has stated, writing upon the political aspects of industry, "corporate decisions involve discretion, and where

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deal with living forms--botany and biology--have not been visibly too impressed with the positivist method for avoiding embarrassing questions, such as those dealing with values. In a recent bibliography of logical positivism, comprised of well over 3,000 entries, only six dealt with biology. A. J. Ayers, ed., Logical Positivism (Glencoe: The Free Press, 1959), pp. 381-446.

<sup>11</sup>This is said to have been the guiding hypothesis of Frank Lloyd Wright; philosophically, it is as old as Plato.



there is discretion there is the making of policy, and policy is a political phenomenon."<sup>12</sup> If the policy-making process is not generically different in the corporation and the state, it would seem that an adequate theory of legislation must be one that is couched in principles which can comprehend both, despite formal variations.<sup>13</sup>

Professor Catlin, commenting upon the trend toward social science integration, writes:

Instead of a static description . . . this new fusion points forward to detect a process and a function, in a dynamic field, going beyond a mere schematic definition of limits.<sup>14</sup>

Professor Jordan is a good example of one who attempted to move beyond these schematic limits. His theory of the political process is as comprehensive as life itself, includ-

<sup>12</sup>Walton Hamilton, The Politics of Industry (New York: Alfred A. Knopf, 1957), p. 7.

A labor historian writes that labor unions "are, in fact, private law-making bodies whose rules affect the lives of millions of human beings and thousands of industrial plants. This is evidenced by the more than fifty thousand collective contracts existing in the country. The unions that sign these contracts acquire an influence over the activities of their members which in time circumscribes their daily lives and redefines the privileges of men who, under law, are equal to each other." Frank Tannenbaum, A Philosophy of Labor (New York: Alfred A. Knopf, 1952), p. 140.

<sup>13</sup>See, e.g., Harold D. Lasswell, The Decision Process: Seven Categories of Functional Analysis (College Park: University of Maryland Press, 1956). In the area of administration in general, the same unitary approach is evidenced in Marshall E. Dimock, Administrative Vitality (New York: Harper & Brothers, 1959), pp. xii, 1-8.

<sup>14</sup>George Catlin, "Political Theory: What Is It?" Political Science Quarterly, LXXII (1957), p. 6.

ing therein both the natural and cultural aspects of life.

The process by which culture becomes ordered and orderly, with an intent toward rational ends, and thus itself a basic part of and an element in the whole of existence, is life incorporate in politics. . . .<sup>15</sup>

For perhaps the first time since Aristotle, politics becomes again the "master science"--the means to order in the affairs of man.

### Politics as the "Form" of Life

In the early pages of his work on ethics, Professor Jordan writes that

the moral functioning of the world of things is made possible through its being made into institutions, which, as such, become moral opportunities, that is, instruments to significant action for individuals. How this is done . . . is the fundamental problem of politics and jurisprudence.<sup>16</sup>

The latter part of this statement implies that politics is concerned with how the world of things is ordered--that is, made intelligible--or that politics is procedural rather than substantive. Politics, in other words, is the means through which man attempts to assert rational control over the forces of life; "politics is the pure form of the practical life and gets its content from its relation to the real concrete practical activities of economic, religious, etc., life. . . ." <sup>17</sup>

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<sup>15</sup>Elijah Jordan, Business Be Damned (New York: Henry Schuman, 1952), p. 237.

<sup>16</sup>Jordan, The Good Life, op. cit., p. 37.

<sup>17</sup>Jordan, Theory of Legislation, op. cit., p. 92.

In terms of the principles discussed in the preceding section, politics is the active phase of life in which purposes become objectified and the instruments of action, or property, is ordered so that they can be realized as ends.

[P]olitics is the "form" of all practical relations, and has no specialized content of its own, and represents a peculiar form of activity, different in its generic comprehensiveness from the economic, religious, legal, ethical, etc.<sup>18</sup>

As applied to these substantive forces of life, which furnish the content of the political process, "the political relation is . . . a purely logical one, and the questions which it posits are questions of pure formal intelligibility, that is, are questions of order considered as principle."<sup>19</sup> As purposes emerge during the life-growth-process in the various realms of economics, ethics, religion, etc., the logical task of objectifying these purposes as ends, synthesizing them in the system of ends which is the End of the whole, and adapting the instruments of natural-cultural life to their accomplishment belongs to the sphere of politics. "Politics is thus life as economics, ethics, religion, etc., reduced to intelligibility through the agency of law."<sup>20</sup> To make life intelligible, of course, is also to make it moral.

This content as ordered constitutes the "state." To

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<sup>18</sup>Ibid., p. 73.

<sup>19</sup>Ibid.

<sup>20</sup>Ibid.

Professor Jordan, as indicated earlier,<sup>21</sup> "state" is a logical category<sup>22</sup> which functions in both an empirical and an ideal capacity; he uses it, that is, to describe present fact, "ended" fact, and all the degrees along the continuum from "is" to "ought." "The public order, or constitution, or state . . . are both the object [ideal End] and objective [practical policy end] of the legislator. . . ." <sup>23</sup>

As an empirical category, the state is the "system of tentative speculative principles which experience had imperfectly incorporated in the states which Aristotle could and did observe."<sup>24</sup> In this sense the state refers to the degree of order presently realized in life. The attributes of territory and population, which political scientists identify as essential characteristics of the state, are indices to the practical comprehensiveness of the order, and the effectiveness of its "government" in objectifying and realizing the values of the culture is the index to its quality.

In its capacity of ideal category, the state, for

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<sup>21</sup>Supra, p. 127.

<sup>22</sup>To Professor Jordan, as in "semiotics," all categories used in description, analysis, etc., are logical categories.

<sup>23</sup>Jordan, Theory of Legislation, op. cit., p. 40.

<sup>24</sup>Ibid.

Professor Jordan as for Plato, is the End as the ultimate identity of form and content. The difference, of course, is that Professor Jordan views the ideal in dynamic terms, expanding as new values emerge in the evolution of natural-cultural life, where Plato proposed to exclude these as disruptive. As an ideal category, that is, the state is limited neither by population or territorial size, nor by the complexity of its order; the degree of order in the state, as including the range of fact comprehended within that order, is limited only by the limits of thought. The limits of thought, of course, are determined by the quality of the culture at a given stage of evolution. Thought seems unlimited only as viewed from a given stage of evolution.

These limits expand as life evolves; it is just the task of speculative intelligence, and the speculative phase of the legislative process, to "spy out" new possibilities --new cultural values, etc.--as they emerge, so that these may be incorporated into the order of life. He thought, thus, that the malaise of modern life represented a failure of intelligence rather than a failure of culture; there exist possibilities, or values, in our culture that are not being acted upon. Culture as presently constituted contains inherent promise that is not being realized.

Judging from his critique of the nation-state,<sup>25</sup> our

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<sup>25</sup>"The matter of the interest-contract-property state

culture contains values that point toward the ordering of life on a planet-wide level. Ideally, then, within the limits of thought as these limits are presently embodied in cultural values, the "state" is the world-state, and the rational policy of "states" within that ideal system is to pursue goals that will further the comprehension of this range of fact within order. The life-forces are striving in that direction, because the "wills" in which these values inhere have the characteristic of effectiveness. The question, to Professor Jordan, is one as to the effect of "effectiveness" upon the "sensitive nerve of culture."<sup>26</sup> In our day of massive deterrence and retaliation, it would seem legitimate to

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is the modern nation-state, the active will principle of which is amour propre. The conception of law is that of the positivist command of the sovereign supported by military and police power. While its theory attempts to found law on contract interpreted as assent or agreement, still the agreement is conceived as being obligatory only in so far as the power to compel can enforce it. Even statutory enactments have no force except that which rests upon penalties as sanctions. So at the very heart of the law lies the ogre of force. Political 'thought' in this state consists primarily in adoration and veneration of traditional abstractions of theory and 'respect for law.' Patriotism is the general name for the sum of the citizen's obligations, and consists simply in the duty of maintaining the status quo, an abstract mechanical balance of social forces maintained by law, and since it is pure subjective abstraction, the patriotic sentiment, having thus no objective ground, must be sustained by periodic dramatization in war. As there is no possible objective form of order for the [nation] state, the attempt to think it is frustrated by its own presuppositions, the consequence being that fear takes the place of the intelligent effort to think, and the objective counterpart of fear, force, displaces active effective law which is the appropriate embodiment of intelligence." Ibid., pp. 127-8.

<sup>27</sup>Ibid., p. 265.

be concerned as well about the effect upon "the sensitive nerve of life." As Professor Morgenthau has commented, "the nation state is too small and weak a mold to contain atomic power."<sup>28</sup>

Professor Jordan felt, then, that in the modern era the dominant actors, corporate institutions, had not been kept oriented to public ends, with the result that the will-energies of life had fallen under the control of those whom he characterized as "businessmen"--those who sought control for the sake of control. Under the resulting system, politics has become a matter of "keeping the businessmen sufficiently within the rules of their own game to avoid the consequences of an autonomous justice."<sup>29</sup> This more or less conceals the real political problem, which, according to Professor Jordan, is

one of finding how these technically adequate institutions can be made to function together toward the realization of democratic ends, instead of exploiting each other, as they tend to do, under the dominance of business democracy.<sup>30</sup>

Thus he feels that the present system is destined to die under its own weight--that the will-urges of life will be effective, although perhaps not of public ends, despite the ef-

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<sup>28</sup>Hans J. Morgenthau, The Purpose of American Politics (New York: Alfred A. Knopf, 1960), p. 175.

<sup>29</sup>Jordan, Business Be Damned, op. cit., p. 187.

<sup>30</sup>Ibid., p. 234.

forts of the dominant force to curtail them.<sup>31</sup> His concern, as noted before, was whether culture itself could survive the death. In his Theory of Legislation he writes:

it is the assumption of this book that suggestions and clues of great value [for the nature and function of the legislative capacity] are already being worked out by the blundering and floundering of political life, and it is the purpose here to inquire whether these suggestions may not be made deliberately effective by an honest and persistent attempt to understand the facts and relations of life in which they are showing themselves, so that the blundering, if it must be, may yet be with less cost to the sensitive nerve of culture.<sup>32</sup>

This effort to "understand the facts and relations of life" requires a theory of the state. This theory must be

a factual picture of the constitution of the state, not precisely as a fixed or static form or design of the state, but . . . [based] upon the grounds of the state as these grounds are discernible in the metaphysical implications of the methods and principles of the practical disciplines, ethics, politics, law, aesthetics, and the institution of industry, which . . . has as yet no "science."<sup>33</sup>

The state which Professor Jordan envisions, in these "implications," possesses a structure which is "nothing more or less than the system of these practical disciplines as they are organized . . . in the institutions of culture."<sup>34</sup>

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<sup>31</sup>Even war, to Professor Jordan, is evidence of the active energies of life as will, issuing in an irrational manner because of the failure of intelligence to direct its energies toward public ends. In this instance, public ends would be supra-national ends.

<sup>32</sup>Jordan, Theory of Legislation, op. cit., p. 265.

<sup>33</sup>Ibid., p. 7.

<sup>34</sup>Ibid., pp. 7-8.



The constitution of the state, the continuous creation and maintenance of which is the end of legislation, is then in reality just the nature, in the Greek sense, of these institutions of culture as it manifests itself as the organon of life.<sup>35</sup>

In this effort, as he noted, he was not concerned with "types of constitutions," since "there must be a constitution that is the genus of the types."<sup>36</sup> This is a point that is important for a theory of the state, as the students of comparative government are beginning to recognize;<sup>37</sup> viz., that comparisons are meaningful only against a background of identity or sameness.

Professor Jordan rejects the doctrine of "sovereignty," whether this is used in the sense of exclusive autonomy of the state or the internal monopoly of force. This doctrine, which was born and grew up with individualism and the nation-state,<sup>38</sup> is of doubtful validity or utility and has been questioned or rejected by most recent theorists.<sup>39</sup> Pro-

<sup>35</sup>Ibid., p. 8.

<sup>36</sup>Ibid.

<sup>37</sup>Cr. Roy C. Macridis, The Study of Comparative Government (Garden City: Doubleday & Co., 1955), pp. 2-3. Quoted supra, p. 9n.

<sup>38</sup>This doctrine was born during the Reformation, in the work of Jean Bodin, but it was brought to full logical consistency in the individualist framework in the writings of Thomas Hobbes. Professor Reinhold Niebuhr suggests that it is a necessary corollary--practically and logically--of individualism. In W. H. Ferry, The Corporation and the Economy (New York: The Fund for the Republic, 1959), pp. 84-5

<sup>39</sup>Andrew Hacker, Political Theory: Philosophy, Ideology, Science (New York: The Macmillan Co., 1961), pp. 214-5.

fessor Jordan would agree with Professor Merriam, who wrote that "sovereignty as the rational defense of irrational deeds, as the jurist's plea for what the despot's power could not achieve, this sovereignty is dead."<sup>40</sup>

Professor Jordan states quite plainly that "the power of force and fear never were any part of the state's nature or activity; the state rests rather upon consent or respect; power will always pass to or inhere in the strongest agent."<sup>41</sup> The degree of force necessary to maintain the prevailing system is itself testimony to the quality of the order which is incorporated therein. Force, furthermore, is not only testimony to a poor quality of order, but the force that must be used to maintain the system subvenes the effort, inherent in life itself, to devise new purposes and new forms of order. "Political control has then no reference to restrictive regulations as imposed upon a people but implies the free action of a people through their common unity attained through common ends ordered as institutions."<sup>42</sup> To the extent that

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<sup>40</sup>Charles E. Merriam, Public and Private Government (New Haven: Yale University Press, 1944), p. 34.

<sup>41</sup>Jordan, Business Be Damned, op. cit., p. 187. Thus, "a state public service commission is almost invariably an executive instrument of private business utilities, although ostensibly organized as a political instrument to control them." Ibid., p. 55. Cf. Samuel P. Huntington, Clientalism in Administrative Politics (Cambridge: Harvard University, unpublished Ph.D. thesis, 1951).

<sup>42</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 459.

power is expended in the form of force to maintain the system, the total available power cannot be directed toward the satisfaction of human purposes, which is the true function of the political process. Soldiers and police cannot be farmers and workers, artists and writers.

The satisfaction of human purposes is then the end of all political activity. As action is necessary to achieve these purposes, it is the function of politics to order the facts of life in such a way as to make possible this action. The state is the result of the ordering process, and thus the nature of the state can be understood only as the process is understood.

The individualists, in their reaction to the sterile institutionalism of the middle ages and the étatisme of the early modern period, saw that purposes are not "created" by the state. This was their positive contribution, from which their error should not detract; viz., that purposes evolve with and out of life itself. Their error was that, in the attempt to free individuals for significant action, they failed to see that the process of ordering these purposes as ends is the political process. Thus, in the desire to free life for purposive creativity, they went so far as to ignore the political function. The state, for example, came to be a "thing"--generally an undescribable thing, to judge from its conflicting definitions--and the political process be-

came the mechanism of the thing. In actuality, "the political life as expressed in legislation is . . . the eternal active effort directed toward the creation and maintenance of such environmental conditions as will render action significant,"<sup>43</sup> and it is in terms of this function that the political process must be understood.

### A Functional Approach to Legislation

Professor Jordan's approach to the legislative process is termed a "functional" approach despite the fact that many treatments of that process would make the same claim. As a matter of fact, however, most of the material on legislation has given formal characteristics precedence over the legislative function in society as a whole. This is true even in the cases of Bentham<sup>44</sup> and Smith,<sup>45</sup> two of the very few attempts to give the legislative process a theoretical base. In so far as others have given any consideration as a function, there seems to be a tacit agreement that the function is to create statutes. Even those who recognize the broader implications of "policy-making" still limit this process to the formal machinery of government.

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<sup>43</sup>Jordan, Theory of Legislation, op. cit., p. 45.

<sup>44</sup>Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (Garden City: Doubleday & Co., 1935).

<sup>45</sup>T. V. Smith, The Legislative Way of Life (Chicago: University of Chicago Press, 1940).

Professor Jordan's approach to legislation is much more comprehensive, and appears to place the functional consideration prior to the formal. In the same manner that he uses the term law to refer to the totality of the order in life, his use of the term legislation

carries no peculiar reference to established government, but becomes rather an elementary category from the point of view of which . . . a total and comprehensive survey of all the facts of life regarded as active may be attained.<sup>46</sup>

It is apparent, then, that his conception of legislation is not defined in terms of the peculiar organizational structure customarily termed "government" at the level of fact-order termed "state," but rather as a function that is found in all degrees of individuality from the natural person to the state. "Legislation is . . . the general process of life activity, the process through which will through intelligible action embodies itself in institutions."<sup>47</sup> The theory, therefore, has to be stated in categories applicable to all of these, and not limited by the formal characteristics of the policy-making machinery in established government.

To define his concept of legislation in terms of the principles or categories of the philosophy as they were discussed in Part I, it may be said that legislation is the process whereby purpose becomes objectified as an end, and the

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<sup>46</sup>Jordan, Theory of Legislation, op. cit., p. 107.

<sup>47</sup>Ibid.

will which incorporates the purpose becomes ordered as an individuality--that is, is individuated as a function within the whole. Thus,

legislation . . . is a question of any and every agency of life through which purpose as imaged end finds implementation and embodiment. . . . Legislative right or authority will be found therefore wherever there is found constructive social or corporate action, however humble may be the instance in which a public life is thus recognized.<sup>48</sup>

These "agencies of life" are the forms of individuality--the corporate institutions--into which life incorporates itself during its natural-cultural evolution. The institution "gets its legislative power and its raison d'etre from the source whence comes all agency and effective influence, that is, from its being the body in which life incorporates itself."<sup>49</sup>

It is for this reason that

institutions cannot properly be distinguished as public and private; . . . they are all engaged, through the performance of their appropriate function, in the legislation of public law, and the quality of that law depends upon the fitness and adequacy of the institutions to the designs of the public will.<sup>50</sup>

As a new purpose emerges during the evolution of natural-cultural life, and becomes embodied in a system of fact,<sup>51</sup> a new will appears. As this purpose becomes objec-

<sup>48</sup>Ibid., p. 43.

<sup>49</sup>Ibid., p. 310.

<sup>50</sup>Ibid., pp. 103-4.

<sup>51</sup>As in his example of the organization of a bank, quoted supra, pp. 76-7.

tified as end, and the system of fact ordered to its accomplishment, new law is made. The order of the new individuality is law for its fact-content, and, as a function within the whole, the order of the institution toward the accomplishment of its end becomes a part of the law of the whole.

The legislative process in institution has two forms.

(1) In the one case, the institution exerts a productive force through mechanical and technological processes in which goods ranging from the simplest economic to the higher forms of practical arts are provided to the life process. This is the process in which individuals produce exclusive objects, and since in this case the individual is an institution, its object will be exclusive with reference to itself, and will be such an object as will tend to support and maintain it exclusively, just as in the natural individual self-preservation is accomplished in the same way. (2) In the second case, the institution expresses its energy also in the form of a constitutive or constitutional process through creative agencies, in which ends attained are orders of human ends further synthesized into institutional or corporate forms, and are such by virtue of the fact that the institution, when operating as creative agency, transmits or extends its elements of order into the system of objects produced by individuals as natural agents, thus incorporating these orders of exclusive objects into cultural ends, or the ends of civilization.<sup>52</sup>

The purpose of the corporate whole or "state," to be objectified as the end around which the fact-content of the whole is to be ordered, is just to organize these ends, and the instruments necessary to their attainment, into a system of order. Thus it is that the legislative function is in a peculiar sense ultimately the function of the corporate whole, wherein it "should be the progressive interpretation of ends

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<sup>52</sup>Jordan, Theory of Legislation, op. cit., pp. 87-8.

as ends are defined in universal terms in the progress of culture."<sup>53</sup> This function ultimately should be performed by the official legislative agencies of the corporate whole; at present, in Professor Jordan's view, it is being left to inferior and "private" institutions which disclaim any such responsibility for their actions. As a result, these "private" institutions are exercising public power and authority in the irrational pursuit of interests. He believed, of course, that these institutions should be recognized as public, and their functions determined within the good of the whole.

The purpose that emerges during the evolution of natural-cultural life sometimes is so apparent in the "logic of the situation" that the end-imaging function of the speculative intelligence as a conscious process is not necessary for a will to become individuated within the whole.<sup>54</sup> The whole import of his theory, however, suggests that this becomes increasingly difficult as culture matures in more complex organizational patterns; then the speculative intelligence becomes increasingly important in "the converting of things into objects"<sup>55</sup> that is legislation.

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<sup>53</sup>Jordan, Forms of Individuality, op. cit., p. 316.

<sup>54</sup>Jordan, Theory of Legislation, op. cit., p. 202.  
 "[T]he legislative act is the act of objective will whereby it, acting as intelligence but not necessarily as consciousness, undertakes to embody itself." Ibid.

<sup>55</sup>Ibid., p. 328.



In professor Jordan's view the prevailing theories of politics have come to hinder rather than to assist in the legislative process, because these restrictively tortured conceptions of the process prevent the organization of life-purposes into a system of political ends toward which the active energies of the wills which embody these purposes can be directed. This is the fundamental importance of the functional approach--viz., it demonstrates that the legislative function is being performed throughout life, and that the denial of authority to constituted government does not result in individual liberty but merely allows the power that inheres in the strongest corporate agents to become the controlling force of the entire society. Anarchy is the result; not anarchy conceived as the absence of power, but anarchy characterized by power expended as force in the pursuit of irrational pseudo-ends. This does not mean, however, that the mere conferral of increased "power" upon the constituted authorities would yield automatically the desired result.

#### Implications of the Functional Approach

Before analyzing in detail the nature of the legislative process, as conceived in terms of the function of legislation in the totality of life, there are some implications of the approach which merit consideration. To begin with a summary statement of the legislative function:

It is then the function of legislation, as the rationalized activity of the public or corporate will made ef-

fective in institutions and directed by thought, to devise means through which the capacities and abilities proper to man as an individual and those appropriate to institutions may be combined and their effectiveness centered upon the solution of the major problems of life.<sup>56</sup>

Professor Jordan felt that current practice had so far deviated from this basic function that "most of man's political wisdom and energy is devoted to the effective prevention or contravention of the welfare it is supposed to create."<sup>57</sup>

Most of the difficulty he believed to be traceable to the doctrines of the individualists after Hobbes, who attempted to overcome the "evil" of government as Hobbes had pictured it by restricting the authority of the official agencies of government--the legislative capacity of the whole. This approach ignores the general prevalence of governance throughout society, and merely serves as a bulwark behind which the active agencies of life, as "private," organize life in accordance with their own subjective interests. Thus,

while politics has ignored the material facts of mere existence, the property system, as beneath its exalted dignity; and has regarded the facts of mere value in religion as beyond law; these facts have gone on in their own way, and as constrained to do by their own inherent "will," to find an organization without the help of such ideals and standards of law as intelligence might have contributed; the result being that politics and government have exhausted themselves with empty abstractions while business and religionism, practice in its original lawless form, have "organized" the world.<sup>58</sup>

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<sup>56</sup>Ibid., p. 264.

<sup>57</sup>Ibid., p. 218.

<sup>58</sup>Ibid., p. 228.

Professor Jordan felt that the general unsatisfactoriness of the result, from the standpoint of the needs of the moral life as opposed to the mere satisfaction of existing material wants, was reflected in the ever-present desire for reform in public life.<sup>59</sup> Precluded by the prevailing ideology from attacking the real problems of life, these efforts resulted in a proliferation of governmental machinery designed to "regulate" the abuses which should be bred out of the system.

We have created abstract governmental mechanisms because we have had no will, forgetting that, in nature, where there is a will there is a way; there would in a really intelligent practical order, that is, an order made harmonious with its own will, be no occasion for specialized governmental or political machinery, since life as practical naturally finds its adequate implementation in the immediacy of fact with which and in which it embodies or incorporates itself.<sup>60</sup>

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<sup>59</sup>Ibid., p. 130.

<sup>60</sup>Ibid., p. 78. Professor Jordan does not include such agencies as the Tennessee Valley Authority and the Post Office as "specialized governmental or political machinery," the distinction being that these promote life-purposes in a positive way rather than attempt to regulate or control them.

It is here that Professor Jordan comes nearest to Marx and Engels. His statements that "public property is . . . the ground of the universality of law and the final basis upon which respect for law, which as consent is the essence of law, is to be rested," (Jordan, Forms of Individuality, op. cit., p. 338), and that "the object of legislation is ends, not men," (Jordan, Theory of Legislation, op. cit., p. 338), are versions of the Marxist replacement of the government of persons with the administration of things. Cf. Friedrich Engels, "Letter to Bebel," Marx and Engels: Selected Works (Moscow: Foreign Languages Publishing House, 1958), II, p. 39.

Cf. with the following: "Communism is the positive abolition of private property, of human self-alienation, and thus, the real appreciation of human nature, through man and for man. It is therefore the return of man himself as a social, that is really human, being, a complete and conscious

His functional approach then makes evident these and other inadequacies of contemporary theories of politics and their correlated practices in government. It focuses attention upon the fact that the "order" in life increasingly is the product of and imposed by "private" institutions, and therefore results in the use of public power--i.e., the power to define and provide for the realization of public ends--by the strongest corporate agents in the irrational pursuit of their subjective interests.

As indicated earlier, the concentration of this power in the hands of "businessmen" has brought not only the economy but all phases of life under their domination. In this shift of control,

the original suspicion of government, which came first from the fear of tyranny as expressed in the principle of the divine right of kings, and later, from the development of public activities independently of public authorities in the industrial revolution, have developed in the businessman, to the point of nihilism--the conviction that the public function of government should be

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return which assimilates all the wealth of previous development. Communism as a complete naturalism is humanism, and as a complete humanism is naturalism." Karl Marx, Economic and Philosophic Manuscripts, in Karl Marx: Selected Writings in Sociology and Social Philosophy, ed. and trans. by T. B. Bottomore and Maximilien Rubel (London: Watts & Co., 1956), pp. 243-4. Similarities in ideal should not confuse real points of difference, both in the nature of the social process and the meaning of history; Professor Jordan, for example, has no dialectic. For a conclusion similar to that of Professor Jordan, but supported with a greater array of empirical observations, see Elton Mayo, The Social Problems of Industrial Civilization (Cambridge: Harvard University Press, 1945).

destroyed, and replaced by the use of government for private advantage.<sup>61</sup>

From the "business" viewpoint, "the political structure, as the embodiment of all public values, is a 'resource' to be exploited."<sup>62</sup> As was perhaps true of the institutions of Church and state in the medieval period, each of which pretended to full universality, "business and politics are . . . diametrically opposed. Each can survive only by destroying the other. Business in the era of its success is destroying political life."<sup>63</sup>

These results indicated to Professor Jordan that a rethinking of the problem of control in human affairs was necessary. Such a rethinking cannot be bound by the limits

<sup>61</sup>Jordan, Business Be Damned, op. cit., pp. 177-8.

<sup>62</sup>Ibid., p. 102. He was objecting to what an economist has described as follows: "[G]overnment supposedly exists to serve the ends of the people. . . . In practice, this means in good part serving the interests of those groups who can make their will and desires felt by the officials charged with the formulation, interpretation, and enforcement of laws. Government, then, does not constitute an independent interest group [from the viewpoint of the leadership of the business corporation] but is a means through which the groups in the community seek to maintain and further their respective interests." Robert A. Gordon, Business Leadership in the Large Corporation (Washington: The Brookings Institution, 1945), pp. 222-3. To Professor Jordan, the dominant interest is that of "business," which it uses its power to maintain. In any case, the fact that other groups adopt the approach does not validate the approach itself. "Legislation is not therefore the mere process of effecting a harmony of interests. There is no harmony of interests possible; there is an element of subjectivity in interest which makes it incapable of law." Jordan, Theory of Legislation, op. cit., p. 154.

<sup>63</sup>Jordan, Business Be Damned, op. cit., p. 113.

of an ideology, the "democratic" or any other. He did, it is true, state that he "assumed that the ultimate polity will rest upon democratic principle as major premise,"<sup>64</sup> but it seems that he did not conceive this as implying a form of organization of the polity but rather a legislative purpose. To say that he was unconcerned with organizational aspects of the political process would not be true, but the organizational features of his theory are definitely secondary to its functional base in the facts of life, will and law.

As indicated earlier, he seemed to feel that the organizational pattern of government would follow from its functional organization. A priori organizational theories, that is, have little effect upon the institutional patterns which actually emerge during the evolution of life; the most the theorist can do is to function in a maieutic capacity to furnish direction to the institutions as they emerge. Thus, "as for its having been responsible for the new types of organization in modern life, democracy as an idea system has had little to do with that."<sup>65</sup> He goes even further to say that "most modern attempts at democracy have resulted in the establishment of the opposite type of administrative system."<sup>66</sup>

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<sup>64</sup>Jordan, Theory of Legislation, op. cit., p. 345.

<sup>65</sup>Ibid., p. 419.

<sup>66</sup>Ibid., p. 422.

His particular bête noir was the theory of representation, as presently constituted, which he believed

perhaps comes from copying the system of immanent mediators which the early religious philosophers had set up between man and God as an administrative system in the hands of God, who used it as a medium for the dispensation of grace.<sup>67</sup>

In the hands of the individualists, however, "the direction of its incidence upon the practical life is reversed."<sup>68</sup>

Professor Jordan's primary difficulty with the theory is the logical impossibility of the assumption that "one will can represent another."<sup>69</sup> His concern is that what was at best an expedient has been erected into an article of faith, so that whatever "interest" wins in the struggle is automatically endowed with "right." To quote at length to present his full argument:

This doctrine of vicarious transfer of the political or public capacity lies at the basis of all the dogmas of representative government, but it is not, for the theory, merely and solely a matter of the mandate given by the electorate. It is also conceived as incorporate in na-

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<sup>67</sup>Ibid., p. 22. There has been great controversy over the origin of the representative system. A good summary of the various positions is found in E. M. Sait, Political Institutions: A Preface (New York: Appleton-Century-Crofts, 1938), pp. 467-99. It must be admitted, however, that representation as the principle of organization of law-making bodies is rather new, and from the evolution of the role of representative legislatures in the three hundred-odd years of their history one may assume that the final determination of the validity of the principle is by no means settled, ideological commitments to the contrary notwithstanding.

<sup>68</sup>Jordan, Theory of Legislation, op. cit., p. 22.

<sup>69</sup>Ibid., p. 336.

ture, hence the "authority" of the natural is inherent in it. It has many forms, and, for the modern practice of politics, this variety of form and degree of vicariousness is likely to be the ground of distinction among the great variety of practical concepts, such as interest, right, the lawful, etc. It is the basis also of the elementary distinction among "forms of government" and their classification. It is thus a classificatory and descriptive conception which has tended, since the time when men ceased to regard Aristotle, to substitute a shallow scientific account of governments for the philosophy of the state. The theory that regards government as the system of instruments which act vicariously for the public will, assumes, on the part of political philosophy, the conscious or tacit adoption of the hypothesis that obligation may be shifted or alienated. This accounts for the peculiarly artificial character which the administrative function has developed in recent politics, and for the anomaly that, under the influence of the fear of autocracy on the part of the executive and in the interest of shearing the executive of all power and hedging him about with "checks," the executive has nevertheless come to be the dominant element within the political machinery of recent times, largely because, when allowed no peculiar or appropriate function, he has taken advantage of the ambiguous status in which administration has been left, and has converted it into the means of wellnigh unlimited power. Hence in the detail of political theory, and in its popular development in practice, it means that political obligation may at will be assumed or put off, allowed to fall into abeyance or negotiated, interpreted in terms of interest, or bluffed away. Political obligation thus lies on the neck of the political agent not as a burden of moral necessity, but as a detachable collar whose forms and colors may vary with the winds of fashion or the whims of interest. The collapse of the representative system is thus readily understood. Its disintegration was inherent in its fundamental assumption of the possibility of the substitution of wills--the superstition that one will may take the place of another.<sup>70</sup>

As we will see, however, Professor Jordan is aware that there is a necessity for the expression of all the "points of view" concerning the facts of life in the legis-

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<sup>70</sup>Ibid., pp. 24-5.



lative process. This follows from his assertion that "legislation . . . is finding the law in the facts, not making the law for the facts. . . ."71 What he does deny is that these "points of view" can be expressed by "the people," or that they can be reduced to "public opinion."

[I]n any concrete situation involving the mental or subjective life of a people which may become important politically, the element of opinion, if by that term we mean any form of serious thought or consideration of fact, is at a minimum. And the more emphatically the "public mind" is expressed through the ballot or any other of the existing modes of political expression, the more certainly is that "public mind" dominated by passion and emotional attitude.<sup>72</sup>

While he does not deny the importance of the emotional element in the human being, he does deny that the political process is the proper place for its expression. The satisfactory performance of this process requires that the element of risk involved in action be reduced as much as possible, whereas emotion merely heightens the risk if it doesn't render it absolute in the existentialist sense. Man is not a rational creature in the individualist sense, and as the theory of representation originally supposed. He is a creature with a capacity to reason.

Representation, then, in practice yields not facts but interests. "[I]t is not with the interests of men or of a class of men that legislation is concerned. The object of

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<sup>71</sup>Jordan, Forms of Individuality, op. cit., p. 342.

<sup>72</sup>Jordan, Theory of Legislation, op. cit., p. 344.

legislation is ends. . . ."73 The attempt to represent interests results in a hodge-podge in which the ends of the whole are lost from sight. The result of the process can only be the victory of the one over the other, or a compromise by mutual reduction. Professor Jordan felt that "to attain an end by compromise . . . is a simple contradiction of terms. The compromise theory of political organization is futile."74

Government, then, must be conceived as the agent of the "general will" rather than a battleground for the conflict of interests.

The question of fundamental difficulty involved in the problem of the nature of government, when conceived as the legislative instrument of the public will, becomes one of reducing the abstractions referred to as the common or public will, and its assumed modes of action, to some degree of concreteness, and of discovering and locating this will and its activities within obvious fact.75

The constitution of the state which results from this process continually is being made, as this will becomes endowed with concrete particulars. But "since legislation must follow upon the definition of ends in the ordinary business of life, it will of necessity trail somewhat behind the requirements of practical life. . . ."76 This means only that

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73Ibid., p. 338.

74Ibid., p. 53.

75Ibid.

76Jordan, Forms of Individuality, op. cit., p. 316.

Utopia must remain where its name already has located it--existing only in the creative imagination of the speculative intelligence. There is, in fact, a danger

inherent in the very perfection of our institutional machinery; the machinery is adequate to the satisfaction of by far the larger majority of existing human wants; consequently, instead of the mind's fashioning its instruments with respect to its ends, the system of instruments because of its satisfactoriness fashions the mind to mere process which has no end. The ostensible purpose of the system of institutions seems to be the idea of a mind perfectly adapted to its environment. But the whole theory of adaptation is looked at from the wrong end. What is in fact adapted is the mind to its environment, while it is the very function of mind to appropriate and adapt its environment to its own purposes.<sup>77</sup>

Rather than simplifying the legislative process, such perfection could render it more difficult. Failure, however, would be disastrous, especially for the cultural aspect of life, and would cause the modicum of truth in criticisms of the "welfare state" to become critical.<sup>78</sup>

#### Preliminary Statement of the Legislative Process

Before beginning a detailed analysis of Professor Jordan's interpretation of the legislative process, it seems desirable to essay a brief statement of that process in its totality in order that the various stages or phases may be

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<sup>77</sup>Ibid., p. 304.

<sup>78</sup>The situation to which Professor Jordan is alluding is graphically portrayed in the sterile paradise of Huxley's "Brave New World." Aldous Huxley, Brave New World (New York: Harper & Brothers, 1939, first published, 1932). It is difficult to visualize an answer to this picture in terms of the assumptions of liberal democracy.

located more readily within the whole. It will be apparent that most of what will be presented in the remainder of the study has been covered by implication in the discussion of the principles of his philosophy, but here the emphasis will be upon the active aspect of the theory. Viewed in active terms, the experimental nature of the theory as a whole will become particularly apparent.<sup>79</sup> Professor Jordan describes legislation as process in the following terms:

Legislation is therefore adventure, the assumption of risk as destiny, the chance of extinction which will accept in preference to the repetitious emptiness of mere wont. Legislation is, then, the great choice, the act of acceptance of an end as the end.<sup>80</sup>

This approach to the legislative experience is not, upon reflection, as revolutionary as it seems, but merely points up an obvious fact that has been overlooked by most students of the legislative process--scholars and participants alike. No one pretends the existence of an exact science of human behavior; Professor Jordan merely recognizes this lack in conjunction with legislation.

We should repeat that this interpretation of the legislative process is not intended to "describe" the operating

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<sup>79</sup>In a recent treatise on the six "classic" American philosophers--Peirce, James, Royce, Santayana, Dewey and Whitehead--it was noted that "more than any of our canonical six . . . it was Elijah Jordan . . . who has developed a social philosophy conducive to experimental politics." Max H. Fisch, ed., Classic American Philosophers (New York: Appleton-Century-Crofts, 1951), p. 36n.

<sup>80</sup>Jordan, Theory of Legislation, op. cit., pp. 201-2.

procedures of existing legislatures, or even proposed ones. It is intended, rather, as an interpretation of how the facts of life are ordered, without regard to the agents of the ordering process. From this functional viewpoint, the concern is with the ordering, regardless of its source, rather than with the activities of groups of men who happen to go under the name, "legislators." If the political process is the form of life, then the ordering agents are political agents regardless of whether we choose to name them so in our terminology.

The problem of legislation, then, as the methodology of political reality, is one of speculatively determining, in advance of the experiencing or living through them, the ends and principles which, when experienced or lived through, will be felt intermediately as the fulfillment of human nature in the substance of the relations which incorporate the human with the natural into a world.<sup>81</sup>

Thus conceived, the legislative process occurs within all the forms of individuality from the natural person to the state. As the parts are elements of the whole, however, the task of legislating ultimately is the responsibility of the political whole, or state.<sup>82</sup>

Three stages of the legislative process are implicit in the preceding quotation: (1) the speculative determina-

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<sup>81</sup>Ibid., p. 144.

<sup>82</sup>Professor Jordan uses the term, "political state," as synonymous with "government." We have generally used the latter term, and point out the usage here because it appears occasionally in later quotations.

tion of ends and principles, (2) the application of these in the life experience, and (3) the "intermediate" reflection upon the results.<sup>83</sup> The three stages of the legislative process are then speculation, administration, and adjudication.

[T]he executive and judicial functions are modifications of the form of the legislative function made necessary by the different stages through which the process of objectification of purpose passes. . . .<sup>84</sup>

The use of terms familiar to the description of our own pattern of government does not imply any endorsement of the American principle of "separation of powers." Professor Jordan rejects especially the corollary of this doctrine, the idea of "checks and balances," which to him is "the effort on the part of political thought to accept the idea of self-contradiction as its fundamental postulate . . . and simply cancels political order out of the facts of life."<sup>85</sup>

Professor Jordan then feels that "separation of powers" and "checks and balances" are erroneous concepts, based upon the view of interest as the content of the political relation, which in turn was based upon the individualist per-

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<sup>83</sup>"Intermediate" reflection may be explained as follows: the end is known mediately prior to realization--i.e., as mediated by thought. It is known immediately (if at all) in the action by which it is hoped to realize it. The satisfactoriness of the end is felt "intermediately" through thought reflecting upon the content of the experience as compared with the mediated end.

<sup>84</sup>Jordan, Theory of Legislation, op. cit., pp. 360-1.

<sup>85</sup>Ibid., p. 93.

version of the Stoic doctrine of rationality--viz., the substitution of man as a rational creature for the idea of man with a capacity to reason. Continued adherence to the doctrine serves merely to perpetuate the role of interest in the process, whereas "the more perfect political organization, the more completely will it eliminate interests which interfere with public organization."<sup>85</sup> Conversely, an increased role for interest indicates the progressive deterioration of political organization, and is accompanied by an increased reliance upon force to maintain the system.

The agents who perform the various functions of the legislative process are determined by the capacities of the various forms of individuality. Thus, "the logical capacity of the individual leads to speculative activity and the determination of policy."<sup>86</sup> The same applies, generally, to the reflective evaluation which follows action to achieve the ends of policy.<sup>87</sup>

But while the activity of the individual in his logical capacity--that is, as intelligence--is essential to order and direction, the individual qua individual is powerless to affect directly the course of events. It is only as the

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<sup>85</sup>Ibid., p. 432.

<sup>86</sup>Ibid., p. 294. To be discussed in detail, infra, pp. 224-266.

<sup>87</sup>To be discussed in detail, infra, pp. 315-351.

speculatively determined end becomes the content of an assumption upon which action is to be based that it becomes meaningful in the practical life. Thus,

law is really made only in the natural and original process of life without control of the life process by the speculative or reflective intelligence. Law is re-made by the speculative and the reflective intelligence into the order of ends. It is thus the completion of the order of ends that becomes the criterion for the validity of laws.<sup>88</sup>

This means that it is only through experimental action toward ends in the administrative process that contact actually is made with the life-process, and it is in this contact that law becomes effective, prior to the reflective evaluation of its validity.

As only corporate institutions can act effectively to achieve ends, this form of individuality is the appropriate organ for administration, and ends that are not put into operation as the content of assumptions upon which the actions of these institutions are based never become law. In the case of "anti-trust" legislation, for example, and despite its irrationality on other grounds, this never became law because it never became the assumption upon which corporate behavior was based; after a half-century of anti-trust, corporate concentration is greater than before.

The following three chapters will be devoted to the

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<sup>88</sup>Ibid., p. 437.



detailed examination of these three stages of the legislative process, which Professor Jordan himself briefly summarized as follows:

[L]egislation . . . as experimentation under logical conditions, determines the objects of life in their ideal capacity; that is, converts the objects in which life is embedded into objectives or ends in which life becomes rational. But speculation also creates the agencies through which these same objects of life-experience are subjected to experimentation under temporal and causal conditions. That is, it creates the agencies of administration through the activities of which the life-experiences are given immediate objectivity in the form of the goods of life; which are, naturally, and as originally constituted, public and common. And the process of completion of the objects into the ends of life is effected in the judicial process, which gives mediate or corporate objectivity to the goods of life, and these corporately organized or realized goods of life are the body through which the continuity and permanence of life is guaranteed, i.e., institutions.<sup>89</sup>

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<sup>89</sup>Ibid., p. 55.

## CHAPTER VIII

### LEGISLATION AS THE SPECULATIVE DETERMINATION OF ENDS

Professor Jordan's view of legislation as involving all phases of "governmental" activity<sup>1</sup> seems to be gaining acceptance among students of politics<sup>2</sup> and of law.<sup>3</sup> It is recognized, in other words, that administrative agencies and the courts are involved along with legislatures in the making of law.

But while there has been an increasing awareness of what Professor Jordan might term the "unity" of the legisla-

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<sup>1</sup>These phases, for Professor Jordan, are the speculative, administrative, and adjudicative.

<sup>2</sup>The categories suggested by the American "branches" of government--legislative, executive, and judicial--gave way early in the century to the two-fold division, "politics" and "administration." This division now seems to be on the way out, in so far as it suggests the performance of these functions by separate agencies. Cf. Paul H. Appleby, Policy and Administration (University: University of Alabama Press, 1949); and Harold Stein, ed., Public Administration and Policy Development (New York: Harcourt, Brace & Co., 1952).

<sup>3</sup>Professor Auerbach, for example, has written that "by law-making institutions I mean the judicial, legislative, executive and administrative agencies." Carl A. Auerbach, "Law and Social Change in the United States," 6 U. C. L. A. Law Review 516 (1959).

tive process, as it occurs through the various agencies of government, this has not been matched by an adequate conceptualization of the distinguishable kinds of activity within this unity. As Professor Snyder has written with regard to one of these, "despite centuries of interest in public policy and despite the development of theory and systematic analysis in the public administration field, we have no really fruitful concept of decision-making (i.e., policy-formulation)."<sup>4</sup>

Nor has there been any systematic effort to relate this new view of the legislative process to the whole of life in a theory of society and social organization. Not only does there persist a tendency to view "government" and "society" in dichotomous terms, there is also a marked preference for regarding governmental decisions and policies as somehow generically different from those of other elements of the society. This is not to deny that the student of the formal judicial process may find it valuable to distinguish between custom and law, for example, but rather to emphasize the fact that when both custom and law are to be considered as elements of a systematic social theory their functional identity must be recognized. Nor, in the study of decision-

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<sup>4</sup>Richard C. Snyder, "A Decision-Making Approach to the Study of Political Phenomena," Approaches to the Study of Politics, ed. by Roland C. Young (Evanston: Northwestern University Press, 1958), p. 12.

making or policy-formulation, does it seem valid for political scientists to attempt to justify their concern with decisions by public officials by viewing these decisions as generically different from all others.<sup>5</sup> It would seem beyond argument, in terms of social theory, that policy-making occurs at all of what Professor Jordan calls the levels of individuality--natural person, corporation, and state--and that the result in each case becomes part of the order of the whole. As Professor Leighton has remarked, "any administrative body is always part of the pattern of leadership

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<sup>5</sup>Professor Snyder defends his narrow concern with decisions by "public" officials as follows: "[O]nly decisions actually made by public officials are politically authoritative. A decision by a corporation or an organized group may be very significant politically, but it is not binding on the community as politically organized. Furthermore, I know of no way that such non-governmental decisions can be shown to have consequences for governmental decisions without accounting for the behavior of official decision-makers." Snyder, op. cit., p. 16.

If this is not mere semantic confusion or an assertion of the old doctrine of "sovereignty" in its crudest form, and if "governmental" is viewed functionally rather than formally, the answer is very simple: they have consequences when the community accepts the decisions as authoritative regardless of their source. One of the best answers is given by another "decision-making" analyst in the same volume: "To qualify as a community decision, a choice must be made by an authoritative person or group, i.e., one which either by law or by custom has the legitimate and recognized right to make the decision in question. . . ." Peter H. Rossi, "Community Decision-Making," Approaches to the Study of Politics, op. cit., p. 364. This analyst, who by his own definition cannot plead concern with formal government only, accomplishes the same result by excluding decisions which are not "community oriented, e.g., the market decisions of business organizations." Ibid. Unfortunately, he does not justify this exclusion, which can be among the most important decisions made by and for any community.

and authority in the social organization of the community in which it operates."<sup>6</sup>

In both of these regards, Professor Jordan's theory of the legislative process is more advanced than anything yet encountered in political science. In the first instance, he distinguishes the various phases of the legislative process by capacity. Identifying the phases as speculation, administration, and adjudication, he finds that the first and last require an intelligence found only in the natural person. Administration, or legislation in its active phase, requires a capacity for action found only in the corporate institution. The further distinction between speculation and adjudication, both of which require the reasoning capacity of the natural person, is temporal; one occurs prior to, the other after, the administrative process wherein an attempt is made to realize the ends decided upon.

In the second instance, Professor Jordan's theory of the legislative process is an integral part of a comprehensive social theory; the process, for example, occurs at all levels of individuality. In the life activities of the natural person, the individual as intelligence ideates his ends and orders his environment--the instruments of action which, together with the individual and as organized, constitute a

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<sup>6</sup>Alexander Leighton, The Governing of Men (Princeton: Princeton University Press, 1945), p. 335.

corporate institution--so that action to realize them becomes possible. After the action by the corporate institution, the individual as intelligence adjudges the results to determine the mutual satisfactoriness of end and action.

In the highly organized industrial society, the opportunities of individuals to order their fact-milieu is sharply curtailed as the individual himself becomes merely a fact in a corporate institution made up of masses of men and property. Action toward ends then becomes possible only as these institutions act toward ends. In either case, the difference in the legislative process is merely one of degree, since both in their active aspect become corporate or social institutions; that is, they are, as active,

organizations of practical objects as naturally come into being as a reflex result of the operation of the agency of life and will and which as yet have none of the artificial characters of government. It is thus that all social institutions are legislative agencies. . . .<sup>7</sup>

They are, in other words, public institutions in fact, regardless of whether they are so recognized in law. If recognized as such, and continually instrumented toward public ends, there would be less need of the "artificial characters of government"--the enforcement agencies which operate mainly to restrict the spontaneity of life as it manifests itself in new purposes and their appropriate institutional embodiments.

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<sup>7</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 425.

These "artificial characters of government" may be found in corporate institutions at all levels of comprehension. The individual, for example, can become a slave to his tools, as when he seeks their possession for the sake of mere possession. The corporation can curtail production for the sake of maintaining a given price. The state can guarantee, and enforce through its "government," the exclusive "right" to property that is not being used to accomplish ends.

But while legislation as speculation (and its attendant possibility of failure) occurs at all levels of individuality, it is in a peculiar sense the function of the corporate whole, the state, which is merely the organization of human and material fact at the maximum degree of comprehension. This follows from the fact that each corporate institution is a system of human and/or material fact embodying within the system a purpose which, when objectified as end, is the function of the corporate institution. The electric utility, for example, is a system of human and material fact incorporating within its organization the purpose of providing electric power. When providing the power--that is, in achieving the end--it is performing its function within the whole.

The purpose of the corporate whole is just the ordering of its fact-content with respect to public ends synthesized as the End of the whole. When this is being accomplished, the state is performing its function--legislation.

The state, then, ultimately is responsible for the objectification of the ends of its constituent fact-systems, deriving these ends from "values" or purposes that emerge during the course of the evolution of natural-cultural life.

### Legislation as Speculation

In its initial phase, then, legislation is speculation, and as such it is the peculiar responsibility of the natural person, for only this form of individuality possesses the rational capacity through which to search out the emerging purposes of life.

[T]he human individual . . . makes his contribution to law only in the process of adventuring in speculative thought to define the end, and this is his function because he alone, among the forms of individuality, possesses the idealizing capacity.<sup>8</sup>

As we have seen,<sup>9</sup> the "mind" of the human individual is "made up" of the order that prevails among the system of objects of which the intelligent individual is a constituent part. Intelligence is his capacity to see within this order new possibilities and a "better" order--that is, an order more efficacious in the realization of the new possibilities. This requires that the intelligence be free, which it can never be in fact since it operates only with and through the order of fact which constitutes the "mind."

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<sup>8</sup>Ibid., p. 104.

<sup>9</sup>Supra, pp. 119-27.



"Free intelligence" is, then, an ideal construct which can be approximated only to the extent that the intelligence comprehends the totality of the order prevailing among objects, including new possibilities inherent therein. Intelligence becomes "free" only by maximizing its knowledge of the objective world in and through which it functions. Thus it is that legislation in its speculative phase is, "in its first implications, the process of rational understanding of our environment in its order of detail. Thus the necessity of making law becomes the obligation to know."<sup>10</sup>

It should be noted, in passing, that the problem of information has been cited by some students of legislation as one of the reasons why the role of legislatures in the initiation of policy has diminished.<sup>11</sup> One close observer of the United States Congress, which probably plays a greater role here than most other legislatures throughout the world, says that "the quest for effective power has become inextricably tied up with the search for the sources of knowledge."<sup>12</sup> Another writes that

the primary source of legislative data is in the federal departments. In the formulation of policy Congress leans heavily upon periodic and special reports from adminis-

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<sup>10</sup>Ibid., p. 153.

<sup>11</sup>Professor Jordan sees other and additional reasons, as noted infra, pp. 251-2.

<sup>12</sup>Douglass Cater, "The Lonely Men on Capitol Hill," The Reporter, XXI (October 15, 1959), p. 24.

trative agencies and upon the testimony of departmental experts at committee hearings.<sup>13</sup>

It would seem that, for whatever reasons, Congress lacks sufficient information to serve effectively as the initiator of policy.

The amassing of information as to present conditions is, however, only a precondition of legislation in its speculative phase. At best it can only indicate what must be done to make life possible and tolerable. As Professor Dimmock has written, the "main resource of any institution that would survive . . . is the high quality of its leadership, offered by men able to act creatively and to anticipate institutional and administrative needs."<sup>14</sup> Analysis in se is inadequate for this task,

for the facts of life for which the law is being made have never happened; they lie within the penumbrous nebula of the future, and it is the legislative function to invent for them . . . a law which will give them order when and if they occur.<sup>15</sup>

The concern of the speculative intelligence with present fact is, therefore, "to determine the nature of objects and of the cultural possibilities of the various types of experience content and the place which they should respectively

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<sup>13</sup>George B. Galloway, The Legislative Process in Congress (New York: Thomas Y. Crowell Co., 1953), p. 40.

<sup>14</sup>Marshall E. Dimmock, Administrative Vitality (New York: Harper & Brothers, 1959), pp. 57-8. *Italics added.*

<sup>15</sup>Jordan, Theory of Legislation, op. cit., p. 199.

occupy in the scheme of life."<sup>16</sup> The function of the legislator, to borrow a metaphor, is to sail the ship of state, not merely to patch it up and keep it afloat.

This obligation for leadership points up once again a weakness of modern legislatures, pointed out with reference to the United States Congress by Professor Laski:

once the need for a positive state began to be admitted --as it was reluctantly admitted in the Presidency of Theodore Roosevelt--one outstanding principle was clear. It was the principle, long ago adumbrated by John Stuart Mill, that the formulation of legislative proposals is not a task for which a legislature is fitted. A legislature can criticize; it can ventilate grievance; its power to investigate through committees is invaluable; and, not least, as it fulfills these tasks it provides a process of public education which is pivotal to democratic government. But a legislature like Congress is at once too big and too incoherent of itself to devise an organic and unified approach to the problems of the time.<sup>17</sup>

To Professor Jordan the reason for this unsuitability is the attempt to fit the legislative (i.e., speculative) function onto a body in the organization of which the formal consideration--as in its "representative" pattern--took precedence over its function. A "legislature" organized with reference to the function of envisioning ends would differ considerably from one based upon a particular theory of representation.<sup>18</sup>

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<sup>16</sup>Ibid., pp. 89-90.

<sup>17</sup>Harold J. Laski, The American Presidency (New York: Harper & Brothers, 1949; quoted from The Universal Library edition), p. 158.

<sup>18</sup>Cf. his critique of representation, supra, pp. 213-17.

While emphasizing the "speculative" and "creative" nature of the initial phase of the legislative process, however, it should not be forgotten that the "ends" that are envisioned are objectified purposes--that is, purposes that are stated as ends and instruments ordered to their accomplishment. Purposes are not "created" by the intelligence; they emerge during the life-growth-process. Thus, it is the

function of legislation, in its first and most important instance, that of speculation, to find the limits within which intelligence can affect the course of law development; and while intelligence in this case works constructively, its constructions are in all cases carefully adapted to the limitations imposed by the nature of the given materials.<sup>19</sup>

This is but to say that the speculative intelligence is always bounded by the possible, and what is possible--in both end and means--is contingent upon the given stage in the natural-cultural evolutionary process. Regulation of the conditions of labor would not be too important in a subsistence economy, whereas in an "affluent society" the situation would be quite different.

Legislation in its speculative phase may then be described as the "clarification of public issues,"<sup>20</sup> where "issue" is taken in its original meaning as "outflow" or "going out." It deals with possibilities that are emergent in the natural-cultural world, but not yet completely realized in

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<sup>19</sup>Jordan, Theory of Legislation, op. cit., p. 206.

<sup>20</sup>Ibid., p. 133.

fact. Legislation as speculation is then "experimentation with facts previously to their full actualization, and is the process through which the actualization of purpose into fact is controlled."<sup>21</sup> The experimentation takes place before the facts are completely realized, (that is, while they are still possibilities), and is therefore an experimentation in thought--"under pure logical conditions. . . ."<sup>22</sup>

In the speculative phase of the legislative process, then, an attempt is made to derive the hypothesis upon which action will rest in the administrative process. Administration, or practical life, requires these guiding hypotheses if it is to have any real chance of success. Thus, "practical facts are speculative phenomena, necessitating the use of speculative method."<sup>23</sup> Although based upon an understanding of the present, speculation is essentially a venture in thought into the future, and in this venture the legislator has little to guide him other than the laws of thought--the rules of deductive logic.

Despite his criticisms of positivism, Professor Jordan's description of the legislative process is quite similar to the logical positivist version of scientific method,

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<sup>21</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 388.

<sup>22</sup>Jordan, Theory of Legislation, op. cit., p. 199.

<sup>23</sup>Ibid., p. 52.

with perhaps more emphasis upon what Professor Sherif has called the "phenomenology of the problem"<sup>24</sup> than is found in the positivist approach. The speculative phase of Professor Jordan's legislative process corresponds to the initial step of the positivists' scientific method; that is, it involves the construction of a "postulational system" or "theory," from which are to be derived, through logical deduction, verifiable propositions in the form of "protocol sentences." As will be seen, the administrative phase of Professor Jordan's theory corresponds to the experiment in which the protocol sentences of the positivists are tested empirically, and adjudication is roughly equivalent to the evaluation of experimental results to determine whether the protocol sentence has been verified and the theory thus "confirmed."<sup>25</sup>

In summary, then, as "the process of specialized social machinery set up for the purpose of constructing principles of order for the social body,"<sup>26</sup> legislation in its speculative phase

is primarily a rational and intellectual process, and its method is quite properly that of formal logic as ex-

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<sup>24</sup>Professor Sherif's concept, as we understand it, is a plea for more concern with the totality of a situation before beginning to "build models" or construct hypotheses to guide in the conduct of experiments.

<sup>25</sup>The positivists probably would not claim the approach as their own, admitting at best to an operational similarity. This, of course, is all we suggested.

<sup>26</sup>Jordan, Theory of Legislation, op. cit., p. 132.

pressed in discussion and argumentation. The process is artificial in that it goes on without contact with the content which it ultimately means, and its product is ideal for the reason that as imaged it is the higher, better, more perfect condition of the fact-system upon which life in its eternal present rests. It is artificial therefore in that it is made up largely of the pure rational process of deductive logic, and it is the opposite and complement of that aspect of the law which is the automatic formulation in custom of the immediate processes of life and which is ordinarily called the common law.<sup>27</sup>

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<sup>27</sup>Ibid. It should be noted that the conception of the relation between common law and legislation that is implicit in this statement is somewhat at variance with that which generally prevails in the courts of the United States, particularly at the state level. It is more nearly that of the first hypothesis in the following optimistic statement of Dean Pound:

"Four ways may be conceived of in which courts in such a legal system as ours might deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly. The fourth hypothesis represents the orthodox common law attitude toward legislative innovations. Probably the third hypothesis, however, represents more nearly the attitude toward which we are tending. The second and first hypotheses doubtless appeal to the common law lawyer as absurd. He can hardly conceive that a rule of statutory origin may be treated as a permanent part of the general body of the law, but it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis." Roscoe

Discussion as Method

Professor Jordan asserts that knowledge "is attained through the efforts of individuals by private study,"<sup>28</sup> but he adds that this knowledge must be "co-ordinated and corrected by the scholarly exchange of opinion among workers in the field."<sup>29</sup> As knowledge is the source of the guiding hypotheses for the practical life, the "scholarly exchange of opinion" would seem to be especially important at the level of the state. The speculative function, in other words, requires a maximum of intelligence to provide the maximum degree of knowledge; given the range and complexity of the ordered fact at the level of the state, this would suggest that the speculative function at this level must be performed by a body of men.

In this body, the proper method for speculation is discussion. Professor Jordan's criticism of modern legislatures would not be that they talk too much and do too little, but rather that they talk too little and attempt to do too much they are not qualified to do. "[T]he most elementary general function of the legislative body is to talk."<sup>30</sup>

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Pound, "Common Law and Legislation," 21 Harvard Law Review 383, 385 (1908).

<sup>28</sup>Elijah Jordan, The Good Life (Chicago: University of Chicago Press, 1949), p. 378.

<sup>29</sup>Ibid.

<sup>30</sup>Jordan, Theory of Legislation, op. cit., p. 346.



It is perhaps more obvious in other forms of individuality than the modern state, with its more formal machinery, that "law begins in the definition in idea of fact in terms of order."<sup>31</sup> In his example of a group of men organizing a bank, mentioned above,<sup>32</sup> he asserts that the new order that will be created begins when the idea first emerges that certain elements of fact can be arranged in a certain manner to accomplish the purpose that exists only in the idea. The men involved discuss the idea--the need for a financial agency--and it begins to take body as it is to be realized in fact. "This is the speculative method of legislation and the justification of infinite discussion."<sup>33</sup> The same pattern ideally would be true of legislation in its speculative phase on the level of the state; "legislation in the specific political sense is the discussion process within a specially organized body of men. . . ."<sup>34</sup>

Much of what is done by existing legislatures, however, is more properly the function of either administration or the courts.<sup>35</sup> Thus, for example,

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<sup>31</sup>Ibid., p. 145.

<sup>32</sup>Supra, pp. 76-7.

<sup>33</sup>Jordan, Theory of Legislation, op. cit., p. 145.

<sup>34</sup>Ibid., p. 345.

<sup>35</sup>Professor Morgenthau charges that the Fair Labor Standards Act of 1938 (52 Stat. 1060) "failed to define clearly the boundaries between the domain of legislative en-

no more hopeless failure of modern government is imaginable than that due to the attempt of legislatures to make law for specific ills. This is the source of all class legislation.<sup>36</sup>

"Specific ills" are deviations from general rules, and usually become apparent during the course of administration. Public administration theorists long have argued that these situations can be more easily rectified within the administrative process. Professor White, for example, has written that "the legislature discharges its duty by creating strong agencies of self-control within the administrative system, which can quickly detect and remedy administrative faults or omissions."<sup>37</sup> In case a satisfactory solution cannot be made in the administrative process, Professor Jordan looks to the courts for the ultimate solution; in adjudication the entire process is reviewed to determine the suitability of the end postulated, the machinery set up for its accomplishment, and the circumstances of the deviation. Such matters are of con-

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actment and the sphere of administrative rule-making. Thus it has come to pass that the administrator is, on the one hand, assuming powers which, under a sound division of functions, should be exercised by Congress, and that, on the other hand, powers that are necessary for the enforcement of the act and functionally belong to the administrator are vested neither in him nor in Congress nor anywhere else but are, in case of litigation, discharged by the courts." Hans J. Morgenthau, Dilemmas of Politics (Chicago: University of Chicago Press, 1958), p. 124.

<sup>36</sup>Jordan, Forms of Individuality, op. cit., p. 389.

<sup>37</sup>Leonard D. White, "Legislative Responsibility for the Public Service," New Horizons in Public Administration: A Symposium (University: University of Alabama Press, 1945), p. 17.

cern to the speculative intelligence only as part of the total fact to be considered in its continuous examination of life in all its factual detail in the search for purposes.

The value of the discussion method in the speculative phase of legislation, Professor Jordan argues, is that

discussion is the method by which ideas get cleared up as to their logical consistency with each other, and the formal statement of ideas in judgments under the pressure of critical comparison with other ideas constitutes that experimentation under logical conditions which we have accepted as the definition of legislative thinking. A parliamentary body is a laboratory to provide these conditions.<sup>38</sup>

He is speaking here of the Socratic method, which has been so well described by Leonard Nelson, as a method of instruction, as to warrant extensive quotation:

Only persistent pressure to speak one's mind, to meet every counterquestion, and to state the reasons for every assertion transforms the power of that allure [of knowledge] into an irresistible compulsion. This art of forcing minds to freedom constitutes the first secret of the Socratic method.

But only the first. For it does not take the pupil beyond the abandonment of his prejudices, the realization of his not-knowing, this negative determinant of all genuine and certain knowledge.

Socrates, after this higher level of ignorance is reached, far from directing the discussion toward the metaphysical problems, blocks every attempt of his pupils to push straight on to them with the injunction that they had better first learn about the life of the weavers, the blacksmiths, the carters. In this pattern of the discussion we recognize the philosophical instinct for the only correct method: first to derive the general premises from the observed facts of everyday life, and thus to proceed from judgments of which we are sure to those of which we are less sure.<sup>39</sup>

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<sup>38</sup>Jordan, Theory of Legislation, op. cit., p. 346.

<sup>39</sup>Leonard Nelson, Socratic Method and Critical Phi-

Professor Jordan also illustrates the meaning and importance of the discussion method by demonstrating what it is not. Thus, "discussion is not debate,"<sup>40</sup> in the sense of antagonists defending their "convictions." "A conviction is an interest that pretends to universality. But it is still an interest."<sup>41</sup> As interest, it is not subject to the rational consideration vital to the successful conclusion of the legislative process. Debate is a method of elimination, he feels, wherein the point that survives supposedly must be accepted as proved. But "facts . . . cannot be proved, but merely must be found as existences. . . ." <sup>42</sup>

Also, "discussion is not argument."<sup>43</sup> Argument, he contends, differs from debate in that the conflict of ideas takes on a positive flavor in demonstrating through analysis the truth of the "argument." But

argument is positive and constructive only with reference to the specific idea in favor of which it is presented, and gives no hint as to the methods through which the idea it represents may be incorporated within a larger system.<sup>44</sup>

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losophy, trans. by Thomas K. Brown III (New Haven: Yale University Press, 1949), p. 15.

<sup>40</sup>Jordan, Theory of Legislation, op. cit., p. 346.

<sup>41</sup>Ibid.

<sup>42</sup>Ibid., p. 347.

<sup>43</sup>Ibid.

<sup>44</sup>Ibid., p. 348.

The argumentative method still retains the subjectivity of reference which characterizes interest, even though it is expressed in a positive manner. It cannot give the larger "fulfillment" of interests which must characterize successful legislation, but can yield conclusions only through the mutual reduction of the contending positions.

With regard to both of these, there are students of the legislative process who doubt that they play any significant role in the making of policy. As against Professor Young's comment that "the debate is not an end in itself but a part of the long process of resolving conflict and making an eventual decision,"<sup>45</sup> there stands Galloway's assertion that

policies are seldom determined by speech-making in the Senate because they have already been formulated in the committee rooms. Decisions arrived at in committee, where the Senate really deliberates, usually control legislative action on the floor. Debate in the Senate is "after the fact," so to speak, designed more to air opinions than to decide courses of action.<sup>46</sup>

With regard to committee "deliberation," furthermore, a recent study suggests that

if a policy measure is seen to affect substantial interests in a representative's legal constituency, then he will rely on his perception of the interests affected (his policy constituency) when he acts at the working level (usually the subcommittee) in regard to this measure.<sup>47</sup>

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<sup>45</sup>Roland Young, The American Congress (New York: Harper & Brothers, 1958), p. 128.

<sup>46</sup>Galloway, op. cit., p. 558.

<sup>47</sup>Charles O. Jones, "Representation in Congress: The

The more one seeks to find a place within Congress where deliberation plays a significant role in the making of policy, the more it seems that the voters of Bristol were correct, and that policy-making, in Congress at least, amounts largely to the totalling of the power of the contending interests.

Professor Jordan also rejects the "small group discussion" approach to the reconciliation of differences and the making of public policy,<sup>48</sup> insofar as the "members" of the group are present as representatives of interests. And despite the loud approval in many quarters of "collective bargaining," it seems legitimate to wonder whether it could be effective were there no third parties--as, e.g., consumers or weaker nations--to absorb the impact of "solutions" reached in this manner. The "group-discussion" method, for Professor Jordan, retains all the shortcomings of debate and argumentation, both of which make the mistake of assuming "that a truth exists ready-made, and that it is only weakness in ourselves that we do not immediately comprehend it. . . ."<sup>49</sup> In actuality, however, truth must be created continually as the values to which it refers emerge as purposes in the course of the evolution of natural-cultural life.

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Case of the House Agricultural Committee," American Political Science Review, LV (1961), p. 367.

<sup>48</sup>Jordan, Theory of Legislation, op. cit., pp. 349-51.

<sup>49</sup>Ibid., p. 350.

Clearly, what Professor Jordan is arguing is that methods which involve the defense of pre-formed positions are not adequate for the speculative phase of the legislative process, although they may have a place within that process.<sup>50</sup> There must be a wider synthesis, divorced from specific interests, so that emergent facts, or values, may be noted and accommodated within the whole. This requires the operation of intelligence free to range over the whole panorama of fact to find the crucial elements that will become the ends of future action. It is the "good life" that must be achieved, not past privileges defended. To apply traditional values to new situations is, as Professor Hart has noted, "to make new abuses into established rights and to build up grievances toward the day when revolutionary upheaval will break the bond of tradition and destroy the traditionalists as well as weaken the best in what they cherish."<sup>51</sup>

#### The Organization of the Legislative Body

Professor Jordan's theory of legislation is disappointing from the standpoint of the political scientists' traditional preoccupation with the formal aspects of government. This probably does not indicate a lack of political perspicacity on his part,<sup>52</sup> but is simply consistent with

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<sup>50</sup>Ibid., p. 352.

<sup>51</sup>James Hart, An Introduction to Administrative Law, 2d ed. (New York: Appleton-Century-Crofts, 1950), pp. 26-7.

<sup>52</sup>There are many places in which he indicates an

his philosophic approach. He is more concerned with the legislative function, regardless of its source. If this be defined in terms of policy-making, it probably is true that present students of the legislative process largely are students of legislatures rather than of legislation. In view of the tremendous power of "private" institutions in contemporary life, for example, it is important that legislative theory be applicable to these as well as to the "state."

Implicit in Professor Jordan's functional approach, furthermore, is the belief that proper form will follow upon the understanding of the legislative function. Purposes, unchecked by interests operating negatively, will find their appropriate embodiment. In any case, the constitution of a legislative body is an act, and is experimental after the manner of all action. The prediction of the results is always difficult, never exact.

The question, then, of how the legislator is to be "isolated" and set to his proper function is a difficult one. But there is no question as to what the isolation of the political individual means: it means that the most perfect possible of conditions must be maintained for the proper functioning of the intelligence, and intelligence is the prerogative of the individual.<sup>53</sup>

Thus, while the question of "how" the legislature is to be set up is difficult, and a matter for experimentation, it is

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awareness equal to much advanced research of the political scientists of the day in areas such as political behavior.

<sup>53</sup>Jordan, Theory of Legislation, op. cit., p. 337.



nevertheless possible to indicate some general requirements based upon an understanding of the nature of the legislative function.

First, since intelligence is the prerequisite for effective legislation in the speculative phase,

there must be maintained within the social or political body a corporate class of free intellects whose speculative imagination is allowed to wander at will in the construction of the schema of ideas. . . .<sup>54</sup>

This does not imply, however, a Platonic class of philosopher kings. Without questioning the adequacy of the Platonic proposal for the Greek cultural milieu, Professor Jordan was acutely aware of the intense specialization, or division of labor, characteristic of industrial society. This would require any adequate legislative body to be composed of men with a high degree of particular knowledge and skill, as well as those with general knowledge.

Just at this point it seems that the legislator within the state that is promised in present conditions as the form of life for the future, will be the man of undisputed competence in any field, and that his legislative capacity will consist in the performance of the acts that are the appropriate expression of that capacity.<sup>55</sup>

This conclusion was based upon several judgments concerning the legislative problem. First, it should be re-emphasized that he believed the legislative process to occur primarily in life as active--that is, life as life is lived. Secondly,

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<sup>54</sup>Ibid., p. 345.

<sup>55</sup>Ibid., p. 338.

he assumed that it must be performed, and that the competent must perform it, if natural-cultural life is to survive.

Thirdly, he argued that all the political organization can do is to locate the legislators and provide them with an environment suitable to the expression of their special capacities in speculative inquiry.<sup>56</sup> Thus he concludes that "the thinking necessary to the adequate formulation of ends must be done by a highly specialized body of men. . . ." <sup>57</sup>

Within these broad limitations, however, he states that "the deliberative body need have no definiteness of overt form, but its form may be that of any of the institutions which the structure of the human mind immediately implies. . . ." <sup>58</sup> In fact, the only concrete suggestion he makes is that the learned society is a prototype of how the legislative body should operate, and that some sort of "synthesis of all learned societies, each engaged with the practical aspects of its peculiar problem" <sup>59</sup> should yield "the

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<sup>56</sup>He perhaps would consider Stuart Chase's vision as ideal: "I see, perhaps a hundred leading Americans, men and women, meeting in some high quiet place to prepare it [the Agenda of 1950]. They are not the kind of people who are active in Me First groups. They are scientists, judges, teachers, university people, philosophers of business, lovers of land, statesmen; and they think in terms of the whole community." Stuart Chase, Democracy Under Pressure (New York: Twentieth Century Fund, 1945), p. 133.

<sup>57</sup>Jordan, Theory of Legislation, op. cit., p. 338.

<sup>58</sup>Ibid., p. 303.

<sup>59</sup>Ibid., p. 365.

public will made effective through appropriate implementation in actual life."<sup>60</sup> The objection that such an organization would be a body of mere theorists he felt to indicate a basic lack of understanding of the nature of the legislative process in its speculative phase. The determination of ends is a theoretical--that is, a speculative--function. The legislature so constituted "is limited absolutely to the definition of ends,"<sup>61</sup> and the objection therefore loses much of its force.

In any case, Professor Jordan believes that the legislative body should be composed of the most intelligent men the society has to offer. This can be assured by

requiring the highest possible tests as to knowledge of specific aspects of reality in pretty much the same ways by which scholarship is evidenced, and a knowledge of the philosophic aspects of order which can be evidenced by significant production.<sup>62</sup>

In lieu of literacy tests for voters, Professor Jordan would require intelligence tests for the holders of public office --at least the holders of speculative office.

Comparison of this ideal, sketchy as it is, to the contemporary legislature leaves Professor Jordan appearing as a utopian of the first order. In all fairness, however,

<sup>60</sup>Ibid., p. 366.

<sup>61</sup>Ibid.

<sup>62</sup>Ibid., pp. 365-6.

his theory of the speculative function should not be compared with an idealized version of, e.g., Congress as the locus of that function. This is to say that in a realistic comparison with policy-making bodies the ideal loses some of its seeming irrelevance. It is simply a fact, as Galloway has noted, that "very little legislation originates within the legislature itself."<sup>63</sup> Commenting further on this development, he notes that "today the fact that a bill has been drafted 'downtown' adds luster to its quality"<sup>64</sup> for the Congressmen themselves, and "many committees, in fact, refuse to consider legislation that has not been cleared by the Bureau of the Budget."<sup>65</sup> It should be noted, furthermore, that even the committees of Congress are now assisted by reputedly "expert" staffs.

Professor Ewing, noting the origin of legislation in the administrative departments, writes that

in the formulative stages of bills, an endless amount of discussion, criticism, and evaluation has occurred among administrative experts, which in itself amounts to deliberative action generally superior to that at any stage of the congressional process.<sup>66</sup>

The point is, of course, that the policy-making function has

<sup>63</sup>Galloway, op. cit., p. 38.

<sup>64</sup>Ibid., p. 9.

<sup>65</sup>Ibid.

<sup>66</sup>Cortez A. M. Ewing, American National Government (New York: American Book Co., 1958), p. 289.

shifted, for whatever reasons, from the legislature. There is no reason to suppose that this development has reached its ultimate. Thus Mannheim suggests, in the vein of Professor Jordan but with more concrete articulation, that

we may ask ourselves whether democracies in the Age of Planning will not have to establish a new institution outside the general machinery of the representative system though forming an integral part of the political process. We may call it an Order. We would define it as a voluntary organization, recruited from the most prominent representatives of the various strata and elements of the community. This body should serve to maintain democracy and freedom by mediating in cases where democratic pluralism might lead to a stalemate and to indecision in planning operations. This agency should be a kind of supreme tribunal to guarantee consistency and continuity in planning. Whereas in dictatorial countries the paramountcy of the party guarantees such consistency and continuity in a democratic state the process of integration might be fostered by a nonpartisan body of highly esteemed and disinterested men. Just because it remains outside the contest for power, this body might gain great moral prestige and become the "conscience of the country." The members should represent the diverse social and intellectual currents of the community, so that their agreement and joint resolve would represent a high-level mediation of tensions at large. As in a religious order, admission would require such rigorous commitments from members that the highest devotion and disinterestedness would be secured. The system of election should combine co-optation and delegation. In critical situations, when mediation is unsuccessful, a committee might be nominated by the body to arbitrate the issues.

This proposal is advanced less in the belief that it would materialize exactly as outlined, than for the sake of dramatizing the need for top-level integration in an age of planning.<sup>67</sup>

This amounts, virtually, to an admission of the inadequacy of the representative legislature, as presently constituted, to perform the policy-making function.

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<sup>67</sup>Karl Mannheim, Freedom, Power, and Democratic Planning (New York: Oxford University Press, 1950), pp. 166-7.

The reference to "democratic pluralism" in the above quotation points up another shift in the locus of the policy-making function--one that should be examined in determining the relevancy of Professor Jordan's ideal. Public policy increasingly is made by large scale corporate enterprises. It may be that the design of the board of directors--while operating, in Professor Jordan's view, under the faulty motive of interest--approaches the organizational ideal much nearer than regularly constituted legislative bodies. Certainly this would be true of its procedures.

Among the latter--i.e., regularly constituted legislative bodies--one should note, however, such agencies as the city planning commission which, even when operating under the pressure and even the domination of special interests, yields value judgments close to Professor Jordan's concept of ends. The council in the "council-manager plan" might also be mentioned. Although Professor Jordan was highly critical of the plan as being merely an example of "business administration," he never saw it as do most political scientists. When seen through their eyes, it appears that

a higher type of personnel has been elected to the council under the manager plan than under either the mayor and council or the commission plan. One reason is because the council-manager plan frees the council from responsibility for administrative details and permits the members to give their attention to general policies and programs. The members feel that their time is being spent on fundamental questions and not on minor matters of a routine nature. The council-manager cities have thus tended to attract community leaders who are anxious

to be of service to their government when the opportunity is presented.<sup>68</sup>

Once again it may be noted that procedures in such an organization more closely approximates the discussion method than is true of more formal legislative bodies.

With regard to policy-making on a society-wide basis in formal legislatures, special mention should be made of Great Britain, where the alienation of the policy-making function, if such it may be called, has progressed, among the democracies, to the greatest extent. There is today no pretense that the British parliament "makes policy." One student of British government has even said that "Parliament is not, and never has been, a legislature, in the sense of a body specially empowered to make laws."<sup>69</sup> This is not to deprecate the function of Parliament in the British governmental process, but merely to indicate that the question as to the formal characteristics of the policy-making function may not be dismissed with a glib reference to existing legislatures. It may be that developments yet unseen and therefore unaccommodated within the traditional patterns of anal-

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<sup>68</sup>Charles M. Kneier, City Government in the United States, 3rd ed. (New York: Harper & Brothers, 1957), pp. 264-5. See also Harold A. Stone, et al., City Manager Government in the United States (Chicago: Public Administration Service, 1940).

<sup>69</sup>L. S. Emory, quoted in Patterns of Government: The Major Political Systems of Europe, by Samuel H. Beer, et al. (New York: Random House, 1958), p. 62.

ysis will justify the ideal which Professor Jordan posited as the legislative body in its function of speculative imagination.

Negatively, Professor Jordan's concern was more radical in view of current political practice and what seems to be the approved view of the democratic way of life, for he wished to eliminate subjective interest from the legislative body. The advocate of interest as the basis of legislation, he charges,

overlooks the fact . . . that these ideas have characteristically been in conflict with the ideas and conceptions that have sustained such order as there has been in the world during the predominance of individualism; that order of a significant degree has been maintained in spite of the dispersive tendency of the practical systems built around the concept of interest.<sup>70</sup>

Law is order, but interest is the source of the disorder in the world. It cannot then be made the basis of law.

The extent to which Bentley's attempt "to fashion a tool"<sup>71</sup> for social analysis has become accepted as normative by American scholars is evidenced not only in the writings of such theorists as T. V. Smith<sup>72</sup> and empirical studies of American politics; in a recent work on the "emerging nations"

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<sup>70</sup>Jordan, Theory of Legislation, op. cit., p. 369.

<sup>71</sup>Bentley is credited with the origin of "interest group" analysis. Cf. Arthur F. Bentley, The Process of Government (Chicago: University of Chicago Press, 1908).

<sup>72</sup>T. V. Smith, The Democratic Way of Life (New York: American Library, 1951).



the authors call for, as part of the "political development" of these nations, "the creation of party and interest-group systems."<sup>73</sup> It should be noted, in passing, that conservatives have not always approved of the system; there stands the assertion of Burke that

Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain an agent and advocate, against other agents and advocates, but Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where not local purposes, not local prejudices ought to guide, but the general good. . . .<sup>74</sup>

And there is at least one student of American government who refuses to accept the interest-pattern as normative; Professor Griffith suggests that "how and how far a more general interest can utilize, discipline, or curb the special interests in the governmental process is a supreme test of a people's economic and political genius."<sup>75</sup> Professor Jordan certainly would agree, and insist further that the "curbing" must begin in the legislative body.

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<sup>73</sup>Max F. Millikan and Donald L. M. Blackmer, The Emerging Nations (Boston: Little, Brown & Co., 1961), p. 74.

<sup>74</sup>Edmund Burke, quoted in C. J. Friedrich, Constitutional Government and Politics (New York: New York University Press, 1937), p. 230.

<sup>75</sup>Ernest S. Griffith, Congress: Its Contemporary Role (New York: New York University Press, 1951), p. 113. Professor Elliott's is the classic American philosophic critique of the "group" or "interest" approach. His view is that "political pluralism is not so much a philosophy of the state, as a description of its pathological symptoms." William Y. Elliott, The Pragmatic Revolt in Politics (New York: The Macmillan Co., 1928), p. 103.

Along with interest he also would eliminate such interest devices as "checks and balances." Bicameralism, although he sees no particular reason for its existence, is not in se objectionable.

It is probably, as is true of the entire democratic system of governmental organization, a result not of conviction of the legislature being an organ for the expression of the public will in the most serviceable fashion, but a result of the more or less morbid fear of governmental organization of any kind on the ground that such organization tended toward tyranny, and it is easily conceivable that the motive to prevent government from being able to do anything at all in the fear that it would always do too much, had more to do with the splitting of the legislative power than any defensible theory of the proper function of legislation as the process of the life of the public will.<sup>76</sup>

Bicameralism becomes objectionable, however, when it is part of the system of checks and balances. And whatever the legislative body's specific form, he argues that "its strictly ends-forming function makes it essentially a unitary instrument. . . ." <sup>77</sup> It has, that is, a single function, the envisioning of ends, and its organization must be one that facilitates the performance of this function.

As regards the size of the legislative body, the only limitations are, first, that it should not be so large as to impair the operation of discussion as method. Secondly, its "purpose of social policy requires it to work through an assembly large enough to represent in its differences of

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<sup>76</sup>Jordan, Theory of Legislation, op. cit., p. 357.

<sup>77</sup>Ibid., p. 303.

of view all aspects of a question of policy under consideration. . . ."<sup>78</sup> Professor Jordan recognizes that to meet these requirements the utilization of committees may be necessary,<sup>79</sup> but he objects to the operational procedure of contemporary American legislative committees.

The breaking-up of the legislative body into an indefinite number of ad hoc or permanent committees results often in furnishing an instrument for "killing" a proposed measure rather than expediting its passage and provides for minority control of the legislative function. And this negative purpose to prevent legislative action comes often to be the major function of the committee, and much of the legislature's efforts are often spent in the attempt to get bills "out of committee." The legislature is made impotent through inability effectively to instrument its own acts and is paralyzed by its own machinery.<sup>80</sup>

This development, however, does not mean that the committee is inherently contradictory to the demands of life upon the political machinery, but rather that it has been taken over by private interests; under a rational organization, "the act of the committee is . . . law-making in the concrete; its function is the placement of an element of value within the whole of the good."<sup>81</sup>

In summary, it must be re-emphasized that Professor Jordan's organizational notes do not constitute a signifi-

<sup>78</sup>Ibid., p. 303.

<sup>79</sup>Ibid., pp. 363-4.

<sup>80</sup>Ibid., p. 12.

<sup>81</sup>Ibid., p. 364. Italics added.

cant part of his theory, except as illustrations of his philosophic position. His major contribution lies in his suggestion that closer attention be given to the function of legislation in its end-imaging phase, rather than forcing functions onto preconceived and perhaps outmoded structures. This is perhaps the major contribution of the entire theory.

Still, despite his insistence upon his concern with the practical life, Professor Jordan leaves the political scientist wishing that he had been a bit more practical in the usual as well as the philosophic sense. The political scientist, in his more prosaic and perhaps more pragmatic concerns, is hardly to be consoled by the philosophic demonstration of the final efficacy of will--that purposes will receive expression, whether rational or not. Nor, we would suggest, should the truly practical philosopher; for if the will-trends of natural-cultural life have triumphed in the past over restrictive institutional forms, there are examples--pace Toynbee<sup>82</sup>--where the natural-cultural life, or civilization, has "suffered" and "died" as well as the institutions. Professor Jordan might well have made a greater impact upon the thought and practice of his day if he had suggested more specifically the implications of his theory at a given stage of the development of natural-cultural life.

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<sup>82</sup>Arnold J. Toynbee, A Study of History (New York: Oxford University Press, 1934-54), I, passim.

The Instrumentation of Action Toward Ends

When the legislative body has perceived, or as Professor Jordan says, "spied out" the major human purposes emergent in the life process and synthesized them into a system of ends--keeping in mind the definition of end<sup>83</sup>--its task is only partially completed.

[A]s a corollary function, and by way of completing the policy act, the legislator also speculatively devises instruments through which ideas of policy are realized. In the main these are administrative bodies (including the whole executive system) and the system of judicial machinery.<sup>84</sup>

This conception of the policy-making act is identical to that of Professors Lasswell and Kaplan, who view policy as "a projected program of goal values and practices. . . ."<sup>85</sup> The legislative act is not complete, in its speculative phase, until the instruments to achieve the ends have been devised.

One of the most important points Professor Jordan makes in stressing the importance of the speculative function is that the very efficiency of the administrative machinery depends upon the clarity of its objective. His observation in this regard has been borne out by many later

<sup>83</sup>Supra, p. 35.

<sup>84</sup>Jordan, Theory of Legislation, op. cit., p. 133.

<sup>85</sup>Harold D. Lasswell and Abraham Kaplan, Power and Society: A Framework for Political Analysis (New Haven: Yale University Press, 1950), p. 71. *Italics added.* These scholars, as Professor Jordan, distinguish the two.

students of the administrative process. Thus, as stated in one important text on administration,

the administrator with a clear objective to guide him is in a fortunate position. When the Recruitment and Manpower Organization was created during World War II, for example, the single objective was to prevent ship delays . . . due to incomplete crews. With so clear an objective, administrative policies fell naturally into place. . . .<sup>86</sup>

This offers support for Professor Jordan's contention that, despite the view of "interest-politics" to the contrary, "ideas, even the rarified [sic] and abstract ideas of policy as they are formed into ideals of social purpose, do have and exert an influence upon the course of public action. . . ." <sup>87</sup>

This importance of ideas in shaping administrative programs, Professor Jordan would argue, points up the obstacles imposed by interest operating as the dominant motive in the legislative process. The same work on administration contains the normative statement that

in a democracy the public interest must be forged from a variety of group interests equitably represented, and the resulting compromises must be accepted even if they do complicate the determination of . . . programs.<sup>88</sup>

Professor Jordan would argue that such compromises indicate a lack of basic speculative thought to search out the ends,

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<sup>86</sup>Marshall E. Dimock, Gladys O. Dimock, and Louis W. Keonig, Public Administration, rev. ed. (New York: Rinehart & Co., 1958), p. 349.

<sup>87</sup>Jordan, Theory of Legislation, op. cit., p. 366.

<sup>88</sup>Dimock, Dimock, and Koenig, op. cit., p. 348.

or what Professor Sherif has termed "superordinate goals," which the fact of society requires and its idea presupposes. Professor Jordan contends that the method of compromise normally suggested by American political scientists and public administrators actually means negation and loss, and therefore prevents even the clear statement, much less the realization, of ends. The administrative process--the experimental verification of ends--involves risk in any event, he argues, but when the ends are clouded by interests, balanced or otherwise, their precise statement is precluded and the element of risk becomes absolute.

The end is then the idea around which intelligence, reasoning from present fact, speculatively determines the appropriate instruments through which it may be realized as an element of value within the good of the whole. In the state, as in the case of the individual in his environment, the "organization of things is an indirect and incidental by-product of the idealization of ends. . . ."89 It is an essential by-product, however, because the mere definition of ends in idea "constitute the mere abstract condition of a practical life. . . ."90 They can be realized only in the active life, which is the administrative process; the instruments of this process are designed in speculation.

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<sup>89</sup>Jordan, Theory of Legislation, op. cit., p. 377.

<sup>90</sup>Ibid., p. 378.

Once the administrative instruments have been designed, the only reason for the continuing concern of the legislature with these instruments should be their improvement through speculation. The relation between the speculative body and the administrative organizations should be designed with this in mind. Professor Jordan was well aware of the unfortunate consequences of legislative interference with the administrative process.

The speculative branch should therefore organize the administrative system with a view to the latter's developing an elementary and unique autonomy out of its own rationality, and should find such an overt organization as would automatically bear and tend in the directions desired.<sup>91</sup>

The speculative function will have completed its portion of the legislative task when the instruments have been designed; further interference in the administrative process can only create confusion.

This point, of course, will occasion no surprise on the part of students of American government at all levels--state, local and national--where cries for reform often have turned upon this problem. Thus Professor White writes:

The details of . . . government have escaped the competence of legislative committees and chairmen; the possibility of deciding policy by settling details, once perhaps feasible, has disappeared; and in the future, legislatures perforce must deal with administration on the basis of principle and generality if they are to deal with it effectively and in the public interest.<sup>92</sup>

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<sup>91</sup>Ibid., p. 385.

<sup>92</sup>White, op. cit., pp. 5-6.



This last point, Professor Jordan would insist, is just the rub; concern with details is not in the public interest, but to promote private interests. One reason for the advocacy of council-manager government for cities, although nowhere stated so baldly, seems to be that it frees administration from the influence of the special interests represented on the average city council. One authority has stated that "if the council is unwilling to stay out of the field of administration the plan will not be successful."<sup>93</sup>

Finally, Professor Jordan relates the instrument-fashioning aspect of the speculative phase of the legislative process to the phenomena known as the "delegation of power." The purpose of the boards created to exercise delegated power is not and should not be considered as administration, he contends.

The abstract creation of a commission or an administrative board . . . is in fact merely the delegation to a manageable group of power designed not to effect the social purpose in question, but to find means through which the purpose may be made effective through the activities, it may be, of existing institutions. The primary purpose of the commission or board is still speculative. . . .<sup>94</sup>

The commission is simply a technique for exercising this last phase of speculation; it is equivalent to the committee which operates, in the end-forming phase, as a fact-finding agency prior to the determination of the end.

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<sup>93</sup>Kneier, op. cit., p. 271.

<sup>94</sup>Jordan, Theory of Legislation, op. cit., p. 305.

Professor Jordan, then, would argue that the dispute over these commissions--whether they are part of administration or of legislation--is primarily a confusion over the function of legislation in its speculative phase. It is tied up with the question of the extent to which legislatures have abandoned, in their subordination to private interests, their responsibility for public policy. He feels, that is, that in such a delegation the end must be defined by the body with competence to organize all ends into a synthesis of ends; the question is whether this function is being performed by the legislature or has shifted to some other locus in the framework of government.

In any case, he would oppose the "independence" of the commission; it should be an instrument of the parent body--the body with responsibility for synthesizing ends. He would oppose also the "regulatory" activities of most such agencies, seeing these as the "artificial characters of government" that are required when public functions--i.e., transportation, the provision of fuel, etc.--are in the hands of private interests. Such attempts, he feels, are futile; the regulated interest responds by taking over the agency, leading to what one student of the commissions has defined as "clientalism," wherein, for example, the Civil Aeronautics Board, "having identified the financial welfare of the existing mail carriers with the public interest, has gone to

considerable lengths in adapting its subsidy policies to the needs of those lines."<sup>95</sup> Similar examples could be found in state public utility commissions, which customarily "take care of" the utility companies.

Professor Jordan's assessment here would be that this failure of the legislative process results, first, from the ambiguous statement of the end by the legislative body, the vision and procedures of which is dominated by interest. As stated, the pseudo-end is a restrictive application of force to thwart the normal growth-tendencies of life. Secondly, he would argue that this interest motive is derived from the property system, which is the ultimate issue of the notions of modern subjectivism. Lastly, he would see the commission as a failure properly to define the legislative function of this agency.

In all of these problems, the critical point is to recognize the function of legislation in its speculative phase. Changes in organization, etc., may improve the operation of the system, but until the ends-imaging function is recognized and implemented, the element of risk still will be much greater than can be tolerated by natural-cultural life. When this function is recognized and performed, on

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<sup>95</sup>Samuel P. Huntington, Clientalism in Administrative Politics (Cambridge: Harvard University, unpublished Ph.D. thesis, 1951), p. 58.

the other hand, Professor Jordan seems to believe that formal considerations will cease to be critical.

[T]he remedy for the defects of mechanism in practical relations lies in clearer perception of the ends involved, and this is a matter of clear thinking on the part of those upon whom rests the responsibility for the determination of ends--the legislator in his capacity as speculator.<sup>96</sup>

What must be realized, then, is that politics is the ordering of life; the order which results, far from being a static condition, is a function of, and can be no better than, the ends toward which life is ordered. The most crucial problem of the entire legislative process, then, is that of "seeing life whole"--that is, seeing it in all of its present order of fact, but as including the purposes emergent within that order of fact. The speculative objectification of these purposes as ends, followed by the elaboration of the appropriate instruments for their realization, is the initial stage of the legislative process.

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<sup>96</sup>Jordan, Theory of Legislation, op. cit., pp. 389-90.

## CHAPTER IX

### LEGISLATION AS SOCIAL EXPERIMENTATION

Public administration was one of the earliest areas in the study of politics to show promise of becoming a "science" in the sense of having a body of fixed "principles" to use as tools of analysis. In its initial phase, the movement in this direction reached a zenith in the mid-1930's, characterized by the work published under the editorship of Professors Gulick and Urwick.<sup>1</sup> While admitting that "at the present time administration is more an art than a science,"<sup>2</sup> Professor Gulick evidenced considerable optimism as to the possibility of advancing "scientific knowledge and control in the world of human affairs."<sup>3</sup>

The foundations for this attitude, although not the attitude itself, were questioned in 1945 by Professor Simon, who claimed that

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<sup>1</sup>Luther H. Gulick and L. Urwick, eds., Papers on the Science of Administration (New York: Institute of Public Administration, 1937).

<sup>2</sup>Ibid., p. 191.

<sup>3</sup>Ibid., p. 195.

it is a fatal defect of the current principles of administration that, like proverbs, they occur in pairs. For almost every principle one can find an equally plausible and acceptable contradictory principle. Although the two principles of the pair will lead to exactly opposite organizational recommendations, there is nothing in the theory to indicate which is the proper one to apply.<sup>4</sup>

Almost as if Professor Simon's "pairs of proverbs" were consciously in mind, a recent work listed 40 basic issues in public administration--covering virtually every aspect of the field--and presented papers by prominent scholars defending opposite views on each question.<sup>5</sup>

Not least in importance in the development of the field has been the intrusion of the sociologists, who have demanded that the study of administration be placed in its total social context.<sup>6</sup> This has been accompanied by a deterioration in the distinction, long assiduously maintained, between "public" and "private" administration, as evidenced in Professor Dimock's assertion that "administration is now so vast an area that a philosophy of administration comes close to being a philosophy of life."<sup>7</sup>

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<sup>4</sup>Herbert A. Simon, Administrative Behavior (New York: The Macmillan Co., 1949), p. 20.

<sup>5</sup>Donald C. Rowat, ed., Basic Issues in Public Administration (New York: The Macmillan Co., 1961),

<sup>6</sup>Robert K. Merton, et al., eds., Reader in Bureaucracy (Glencoe: The Free Press, 1952). The editors state that "the study of bureaucracy, like the study of other major forms of social organization, is not the exclusive province of the historian, economist, or political scientist; the sociologist or social psychologist. . . ." Ibid., p. 11.

<sup>7</sup>Marshall E. Dimock, A Philosophy of Administration

These points are mentioned, not to suggest that there is no reliable information about this area of the social sciences, but rather to point up the fact that what has been considered virtually a "cut-and-dried" subject is actually a field of ferment and controversy--a healthy condition for any science. Professor Jordan's theory of legislation--which is, as Professor Dimock suggests it should be, a "philosophy of life"--may offer explanations, if not solutions, for some of the problems that divide the field.

### Politics and Administration

One of the earliest of these problems, dating at least from the work of Professor Goodnow (with which Professor Jordan seems to have been familiar), is the distinction between politics and administration. In Professor Goodnow's view, "the action of the state as a political entity consists either in operations necessary to the expression of its will, or in operations necessary to the execution of that will."<sup>8</sup> He later says more specifically that the

two functions of government may for purposes of convenience be designated respectively as Politics and Administration. Politics has to do with policies or expressions of the state will. Administration has to do with the execution of these policies.<sup>9</sup>

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(New York: Harper & Brothers, 1958), p. 2.

<sup>8</sup>Frank J. Goodnow, Politics and Administration (New York: The Macmillan Co., 1900), p. 9.

<sup>9</sup>Ibid., p. 16.

Contemporary students of administration recognize the limited applicability of this distinction, at least in so far as they recognize that administrators do make policy. The distinction is, nevertheless, maintained, even by Professor Simon, whose "decision-making" approach seemingly would place administration wholly within the field of policy; that is, the concept of "decision-making" implies a choice between alternatives, and a choice between alternatives is the essence of policy-making.<sup>10</sup>

Among the basic issues discussed in the work cited earlier,<sup>11</sup> fully half stemmed from the distinction between politics and administration. Many of these, of course, depended upon organizational forms within which government operates--e.g., the "separation of powers." Professor Jordan was little concerned with forms of government, and it was for this reason that it was suggested that his philosophy may hold the key to the explanation of the problems; in so far as they depend upon formal considerations, he makes no concrete recommendations as to possible solutions.

In the first instance, Professor Jordan points up

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<sup>10</sup>Simon, op. cit., pp. 56-9. Professor Simon recognizes the limited applicability of the categories; that he retains them seems to stem from his desire to separate "facts" from "values." Once again, however, it would seem that a choice between alternatives is necessarily valuational.

<sup>11</sup>Supra, p. 268.



the basic unity of all the law-making functions by treating them as aspects of legislation: viz., legislation as speculation, legislation as administration, and legislation as adjudication.<sup>12</sup> Secondly, he emphasizes that this

idea of legislation carries no peculiar reference to established government, but becomes rather an elementary category of order from the point of view of which . . . a total and comprehensive survey of all the facts of life regarded as active may be attained.<sup>13</sup>

These legislative categories, that is, apply to all the forms of individuality--natural person, corporate institution, and state. As the administrative agency is a form of individuality, (and he includes all of the organizations known as "private businesses" as administrative agencies), it contains within itself a policy-making, or ends-forming, element: the intelligent individuals therein.

The problem of policy-making by administrative agencies, then, he would explain through his concept of purpose as public or objective, and legislation as the means to its

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<sup>12</sup>A group of legal scholars have endorsed this approach in a recently published work, which aims "not to teach legal doctrines in any particular area of substantive law, but rather to present the methods and processes of legal decision-making common to all areas. These methods and processes are . . . examined in action, with special reference to how our law-making institutions--the judicial, legislative, executive, and administrative agencies--have dealt with a problem of wide public concern. . . ." Carl A. Auerbach, et al., The Legal Process: An Introduction to Decision-Making by Judicial, Legislative, Executive, and Administrative Agencies (San Francisco: Chandler Publishing Co., 1961), p. v.

<sup>13</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 107.

realization. A purpose, objectified as an end, lies beyond the individuality within the whole of which the individuality is a constituent part. In terms of customary administrative organization, the administrative department is provided to accomplish an end speculatively defined. This end, however, is broken up into constituent ends for each of the corporate institutions, or bureaus, which form the larger institution. This end is the purpose of the bureau; its actualization is its function within the whole department, as the accomplishment of the larger end is the function of the department within the whole of society.

All of the phases of legislation, then, occur at each level of individuality. The natural persons at each level function in their capacity as intelligence to ideate subordinate ends within the good of the whole, as they function in their technical capacities to realize them.<sup>14</sup> After the experimental act which seeks to embody the end, of course, natural persons function in their capacity as intelligence to reflectively evaluate the whole process, including the end. Thus the problems of administrative legislation and administrative adjudication are natural functions of any corporate institution, and not a usurpation of power; the relevant problems concern the nature of the end involved. Administrative agencies (including "private businesses") should not

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<sup>14</sup>Ibid., p. 105.

be allowed to define or adjudicate action to embody ends of the whole; they are limited to problems instrumental to the accomplishment of their portion of that good as defined in the speculative phase of the legislative process.

### Administration as Experimentation

Administration per se, at whatever level of individuality,<sup>15</sup> is action to realize a purpose in actual fact. The implications of this statement best may be demonstrated through a brief review of the principles of Professor Jordan's philosophy.<sup>16</sup>

First of all, purpose is always objective in that it lies beyond the system of fact, as presently constituted, as the end of that system of fact.<sup>17</sup> Ends, furthermore, can be realized only through action--motion directed toward an end.<sup>18</sup> The natural person by himself cannot act, because action always involves persons and things external to the person; only corporate institutions can act.<sup>19</sup> For the same reason--that is, because action always involves the comprehension of

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<sup>15</sup>In terms of administrative theory, every staff agency has a line, as every line agency has a staff; "administration per se" is the activity of the line in each such agency, with the exception of the "general staff."

<sup>16</sup>Discussed in Part I, especially pp. 27-115.

<sup>17</sup>Supra, pp. 32-5.

<sup>18</sup>Supra, pp. 42-7.

<sup>19</sup>Supra, pp. 47-58.

new content--action is always public, or objective.<sup>20</sup>

In Professor Jordan's analysis, the will of the corporate institution--the logical ground of action--is blind; its energy, that is, is spent in a mere attempt to be effective. Its effectiveness in realizing ends depends upon the degree to which the will of the individual--his capacity of intelligence--is available speculatively to determine the ends toward which its effectiveness may be directed. In other words, the will of the corporate institution is able to effectuate ends only as it receives the direction of the intelligence of the natural person.

Administration per se, then, is the corporate institution operating in blind effectiveness. As guided by intelligence, however, "the field of administration is . . . the laboratory of experimentation in which the experiences of the active life are rationalized";<sup>21</sup> that is, the experiences are brought into conformity with the system of ends as ideated by the speculative intelligence.

Professor Jordan feels that, since there is no "log-

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<sup>20</sup>Supra, p. 36. In the practical, as opposed to the speculative, life, the only new content which the natural person can comprehend is that which contributes to the maintenance of the organism. As intelligence, of course, he can absorb new content without limit except as limits are imposed by the evolutionary level of the culture.

<sup>21</sup>Jordan, Theory of Legislation, op. cit., p. 55.

ic of action,"<sup>22</sup> an element of risk is always involved in administration. This is perhaps recognized in the widespread practice of providing some form of judicial review of administrative practices. It is stated in one work on administration, for example, that

historically, adjudication grew out of administration, and even today, despite the constitutional separation of the executive and judicial branches of government, adjudication remains functionally connected with the administrative process. The courts provide the remedies when the normal processes of administration are not enough.<sup>23</sup>

To Professor Jordan, administration is social action involving consequences which no science can predict with exactitude. Administration is, therefore, basically experimental.

His conception of administration as experimentation perhaps will be confusing to some due to the dual meaning usually attributed to the term "experiment." On the one hand the word is used to describe the rigidly controlled verification procedure of the scientist, while on the other it denotes the pure chance of "trial and error." Reflection

<sup>22</sup>Supra, pp. 44-5.

<sup>23</sup>Marshall E. Dimock, Gladys O. Dimock, and Louis W. Koenig, Public Administration, rev. ed. (New York: Rinehart & Co., 1958), p. 530. A related development, seemingly, is the demand for due process of law under the administrative processes of private corporations. Thus, "businessmen are already disturbed by proposals for ensuring due process of law within the corporation--one aspect of a growing insistence on some form of corporate constitutionalism." Richard Eells, The Meaning of Modern Business (New York: Columbia University Press, 1960), p. 54.

shows, however, that in the first place the scientist's control over the verification procedure is never absolute, and, secondly, that "trial and error" always occurs under the guidance of the functional equivalent of an hypothesis.<sup>24</sup>

While Professor Jordan does emphasize the element of risk involved in action, accepting the Humean critique of causality as proof that this element of risk can never be wholly eliminated, this is not his final word. If it were, of course, he would be squarely within the existentialist camp. Indeed, his whole philosophy may be viewed rather as an effort to provide a method of social analysis that will reduce this risk. This analysis he summarizes as follows:

[I]n a genuine practical situation, as viewed by administration, there must be real and fundamental unity of end foreshadowed by and in those aspects of the situation which we normally call things or material or means; and there must also be a unity of purpose as representing a conceived harmony between the unity of end as thus foreshadowed and the experience as idealized in anticipation through which the unity of end is to be achieved and maintained.<sup>25</sup>

That is, risk in the administrative process may best be re-

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<sup>24</sup>This is supported by Professor Brecht, in a statement which also recognizes the experimental nature of administration. Distinguishing "experimental tests, pure type" and "experimental tests, less severe forms," he puts most administration in the latter category and writes that "experimental tests play a greater role in political science . . . than has been recognized. . . . Indeed, the entire history of government and institutions supplies an almost inexhaustible source of tested hypotheses." Arnold Brecht, Political Theory (Princeton: Princeton University Press, 1959), p. 95.

<sup>25</sup>Jordan, Theory of Legislation, op. cit., p. 436.

duced through speculatively determining the values or purposes inherent in a present state of fact, plus the arrangement of that fact that will be required to achieve this purpose as an end. As was seen in the last chapter, the first part of the speculative act is the determination of the end; the latter part is its instrumentation. The implementation in actual fact of the end and its instruments is the administrative process.

### Instruments and Machines

The area of administration which has attracted the greatest amount of interest, popularly if not academically as well, is that of organization and, particularly, reorganization. Groups such as the Cockrell Committee, set up by the Senate in 1887, Theodore Roosevelt's Keep Commission, President Taft's Commission on Economy, the Brownlow Committee (1937), and the two Hoover Commissions have been only the most prominent of a series of studies that have focused attention upon the question. Yet, as one work noted, "the motives and purposes behind reorganizations . . . are numerous and mixed."<sup>26</sup> The practical effect of "mixed motives and purposes" easily can be seen in a comparison of, say, the Brownlow and the Hoover reports.

This discrepancy points up the need for a theory on

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<sup>26</sup>Dimock, Dimock, and Koenig, op. cit., p. 217.

which to base such efforts. Professor Jordan's theory is relevant to the problem, not for his concrete suggestions (he offers very few), nor for the novelty of the implications of his approach (most are not alien to the best administrative theory), but because it is a theory of administration based upon a comprehensive philosophic analysis.

While "ends" and "instruments" are obtained through the functioning of the speculative intelligence from and for the evolution of natural-cultural life, that life is itself characterized, in many of its aspects, by a certain degree of necessity. The former, the ends and instruments, are obtained mediately--that is, as mediated through thought; life in its aspect of necessity, on the other hand, is characterized by its immediacy. The difference between the two is recognized by those public servants who complain about the conflict of "theory" with the "hard facts of life."

Between these dichotomies--the idealizing capacity on the one hand and the demands of necessity on the other--lies the province of administration:

the abstractions mediated by speculation as well as the raw concreteness of sensory immediacy leave a large area of life to be filled with legislative effectiveness by the accident of mere directionless growth. This area of blind effectiveness is the field of administration.<sup>27</sup>

Necessity, or immediacy, is its own "law," in the sense that

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<sup>27</sup>Jordan, Theory of Legislation, op. cit., p. 138.



it is not subject to rational direction toward ends other than those dictated by necessity. Speculative policies, on the other hand, are the abstract ends of action, or law in its ideal state. Between these two lies such development of law as results from action grounded in necessity but striving through growth--will in its blind effectiveness--to realize purpose which the legislator as speculator has attempted to objectify as end. This realm is the source and province of administrative law; administrative law, in Professor Jordan's formulation, is only that which is made in administration as the active aspect of life.<sup>28</sup>

As "laws" drop from the hand of the legislator they are the unfinished generalities of thought, and before or in the process of making applicatory contact with the facts of life they require to be milled down to the concrete particularity which the actualities of life always show.<sup>29</sup>

As phrased by Frankfurter and Davison, "we are dealing with law in the making. . . . Administrative Law is groping; it necessarily is still crudely empirical. . . ." <sup>30</sup> Professor Jordan would add that it always will remain so.

Within this framework Professor Jordan distinguishes

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<sup>28</sup>Cf. with Professor Hart's formulation that "administrative law includes the law that is made by, as well as the law that controls, the administrative authorities of a government." James Hart, An Introduction to Administrative Law, 2d ed. (New York: Appleton-Century-Crofts, 1950), p. 8.

<sup>29</sup>Jordan, Theory of Legislation, op. cit., p. 386.

<sup>30</sup>Felix Frankfurter and J. F. Davison, quoted in Hart, op. cit., p. 22.

between instruments and machines or mechanisms.<sup>31</sup> Instruments, of course, are speculatively designed to accomplish ends ideated in the initial phase of the legislative process. In the course of the application of the end to the actualities of life, through the instruments designed for this purpose, additional and supplementary "instruments" evolve. These, which he calls the administrative mechanism, or machines, appear "as a by-product of the experiential process."<sup>32</sup>

Machines are not thus directly purposed, but come into existence as incidents of the expenditure of effort for the production of objects which have no relation to the machine produced. They are essentially apparatus.<sup>33</sup>

The machine is the result of the experimental process, which process is carried on by and through the instruments devised by the speculative intelligence to actualize purposes objectified by this intelligence.

This suggests that Professor Jordan was basing the distinction primarily upon origin: viz., instruments have

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<sup>31</sup>This distinction is similar in form to that made by other students of administration. Thus, "most of the elements of administration--rules, regulations, organization, procedures--are merely the means to administrative accomplishment. Accordingly, the main emphasis in administration must be administration by objective." Dimock, Dimock, and Koenig, op. cit., p. 364. The former is similar to Professor Jordan's mechanism; these authors presuppose the existence of the administrator, whose provision, in Professor Jordan's theory, is part of the "instrumentation" provided by the speculative legislator. "Administration by objective," of course, would refer to the speculatively determined end.

<sup>32</sup>Jordan, Theory of Legislation, op. cit., p. 388.

<sup>33</sup>Ibid.

their origin in the legislature, while mechanisms are created by the administrative instruments. This is only apparently true. The real distinction he was trying to draw is one based upon function. A machine

connotes a purpose in the making, or the stage of a purpose where its connotation depends upon the fitness together of facts of environmental character. A machine differs from an instrument in that whereas an instrument is a permanent means adapted to a generalized process, a machine is a **temporary** and makeshift combination of instruments to expedite a specific purpose. Then the machine must be continuously recreated.<sup>34</sup>

The basis of the distinction is then that the instrument always implies the end of which it is the means to the actualization; instruments are instrumental to the actualization of an end. Machine, on the other hand, indicates merely a repetitive process, and contributes to ends only as it receives instrumentation. In the machine production of atomic energy, steel, etc., whether the machines contribute to the actualization of ends depends upon their instrumentation--i.e., their function within the social whole. They can produce bombs as well as power, guns as well as building material.

Machines, then, are the tools through which action occurs, when they are properly instrumented toward ends. As the outgrowth of propulsive life-facts (will), the machine has power even to generate its own instrumentation if its

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<sup>34</sup>Ibid., p. 389.

purpose is clearly recognized. "A right purpose has the spontaneity to supply itself with the instruments appropriate to its adequate fulfillment."<sup>35</sup> Thus, for example,

a public utility ought to evolve out of its own structure the administrative instruments necessary to harmonize its activity with the whole of public life, and would do so if it were a public utility. And the only "legislative" authority it would require would be the mere speculative formation of the purpose involved as a matter of policy by the legislative body.<sup>36</sup>

Without instrumentation, however, which means in the first instance without direction by intelligence toward ends, the machine bogs down in mere repetitive process in which the machine attempts to substitute itself--that is, its self-preservation, etc.--as an "end."

In terms of Max Weber's theory of the ideal types of bureaucracy, Professor Jordan's "machine" parallels the "bureaucracy"; the instrumented machine represents Weber's conception of the rational bureaucracy. Both agree that

the capitalistic entrepreneur is, in our society, the only type who has been able to maintain at least relative immunity from subjection to the control of rational bureaucratic knowledge.<sup>37</sup>

This does not mean that there is no economic machine, or bureaucracy; it means, in Professor Jordan's terms, that it has not been instrumented toward ends.

<sup>35</sup>Ibid., p. 382.

<sup>36</sup>Ibid., p. 305.

<sup>37</sup>Max Weber, The Theory of Social and Economic Organization, trans. by A. M. Henderson and Talcott Parsons (New York: Oxford University Press, 1947), p. 340.

In Professor Jordan's theory, what have been called the "social pathologies of bureaucracy"<sup>38</sup> result from a failure to keep machinery instrumented toward ends. As one writer comments,

an organization conforming closely to the hierarchical principle . . . faces the constant danger that these routine operations will become sterilizing ends in themselves rather than effective means to desirable ends. When this happens the usual result is an entanglement of "red tape," or as the French are wont to call it, la paperasserie, mere routine thereby becoming bad routine.<sup>39</sup>

"Mere routine" is, to Professor Jordan, not the only result. The effectiveness of will frequently results in more overtly "unsocial" kinds of behavior, as, for example, that described by one analyst as "white collar crime":

the violations of law by corporations are deliberate and organized crime. This does not mean that corporations never violate the law inadvertently and in an unorganized manner. It does mean that a substantial portion of their violations are deliberate and organized.<sup>40</sup>

The "cure" for the "ills" of bureaucracy, in Professor Jordan's view, does not lie in naive attempts to abolish it. He would agree with Weber that modern society tends to be "organized in large-scale corporate groups which are inevitably subject to bureaucratic control. This is as inevit-

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<sup>38</sup>This is the title of a section of reading selections in Merton, et al., op. cit., pp. 396-422.

<sup>39</sup>Walter Rice Sharp, "Procedural Vices: La Paperasserie," Ibid., p. 407.

<sup>40</sup>Edwin H. Sutherland, White Collar Crime (New York: The Dryden Press, 1949), p. 233.

able as the dominance of precision machinery in the mass production of goods."<sup>41</sup> But not only would he agree with Weber that it is inevitable, he also would agree with him that bureaucracy is potentially beneficial. As Weber wrote,

bureaucratic administration means fundamentally the exercise of control on the basis of knowledge. This is the feature of it which makes it specifically rational.<sup>42</sup>

To Professor Jordan the basis of knowledge which makes administration rational, or approximately so, is the speculative determination of purposes and the concomitant instrumentation of the machinery of modern life.

The "rational control" of administration is, then, a function of the speculative intelligence. Professor Jordan goes so far as to suggest that administration per se<sup>43</sup> has an innate tendency to avoid thought. "Thought raises questions continuously, while it is the purpose of the practical or administrative interest to settle questions and adapt action to circumstances as they are."<sup>44</sup>

This does not mean that intelligence ceases to operate in the administrative process, but that the "knowledge" utilized in administration is "technical" in nature. It is

<sup>41</sup>Weber, op. cit., p. 340.

<sup>42</sup>Ibid., p. 339.

<sup>43</sup>Cf. supra, p. 273n.

<sup>44</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 324.

concerned, that is, with the adaptation of the materials at hand to the immediate goals of the process. The Selekman, noting the "moral dilemma of the businessman," write that

he is immersed, day in, day out, in issues raising the technical "must" against the ethical "ought". . . .

[A]ny given decision is most likely to be biased in the interests of financial prudence, even though costly to human values.<sup>45</sup>

This, to Professor Jordan, merely points up the fallacy of viewing ethical issues subjectively. As an administrator, the technical "must" is the proper concern of the "businessman"; his moral dilemma results from the fact that the organization of which he is part is not instrumented toward public ends. That is, one must view "all action, for political purposes, as a system of objective functions which cannot be understood by references to individuals."<sup>46</sup>

#### Machinery and Purpose

While the similarity of Professor Jordan's administrative theory with much current theory in the field is apparent, he draws ethical implications from it that few American theorists, at least, would reach. The most important of these is related to the distinction between "execution" and "administration."

Most American students of administration seem to have

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<sup>45</sup>Sylvia and Benjamin Selekman, Power and Morality in a Business Society (New York: McGraw-Hill, 1956), pp. 179-80.

<sup>46</sup>Jordan, Theory of Legislation, op. cit., p. 423.

identified the administrative and executive functions in their division of government into the two spheres of politics and administration. As Professor White has written, administration consists of "all those operations having for their purpose the fulfillment or enforcement of public policy."<sup>47</sup> Professor Jordan, on the other hand, maintains the distinction; in his analysis, administration deals with the fulfillment of public policy while execution is its enforcement, and he has an almost anarchistic desire to see the latter "bred out" of human life. At best, the only function of the executive, in the end-realizing sense, is as a symbol to remind the people of the public prerogative.<sup>48</sup> Otherwise,

there is no real public objective function which the executive can perform, and he is to be regarded rather as a source of danger and weakness in the public life on account of the fact that he is likely to confuse his subjective status as deferential symbol with inherent authority, and the "interests" he comes to represent with the sovereignty and authority which belong properly only to the law.<sup>49</sup>

The executive function of enforcement should be overcome through the improvement of the law to the point where it approaches a self-enforcing validity.

Professor Jordan, then, would view the identification

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<sup>47</sup>Leonard D. White, Introduction to the Study of Public Administration, 4th ed. (New York: The Macmillan Co., 1955), p. 1.

<sup>48</sup>Jordan, Theory of Legislation, op. cit., p. 426.

<sup>49</sup>Ibid.



of the executive and the administrative as an acceptance of the imperfections of the legislative process as normative, whereas the use of force to maintain "law" is testimony to its defective nature.<sup>50</sup>

Force, in his view, ultimately is self-defeating when used to maintain a given pattern of life, because life, as natural and cultural, can survive only as it is adaptive to change. This is true regardless of the methods of force that are used--police organizations, armies, Pinkerton detectives, regulatory agencies, or the more subtle methods of psychological control. Long before the present discussion of "hidden persuaders" and "Madison Avenue," Professor Jordan was critical of the techniques of psychological control, saying that the

psychological method . . . assumes that the attention and interests of persons may be distracted from the real issues of a practical situation, and while thus distracted the individual may be made to perform the function desired of him. . . . Thus the use of psychological methods consists simply in distracting the person and relieving him of his intelligence and of his interests as a person while his activities are being habituated and mechanized in the interest of abstract process.<sup>51</sup>

Such methods are self-defeating; they deceive both the subject and the manipulator, because "the actor alone can rationally control action; and any control from any source

<sup>50</sup>Cf. supra, pp. 146-54.

<sup>51</sup>Jordan, Theory of Legislation, op. cit., p. 435.

outside the actor himself is a form of force, however it may be veiled in psychological or mental trappings."<sup>52</sup>

But while Professor Jordan maintains that "force can neither establish nor maintain anything permanent in the cultural life,"<sup>53</sup> he does not ignore its importance. His formulation, for example, goes beyond the seeming semanticism of Ortega y Gasset, who writes that

this stable, normal relation among men which is known as "rule" never rests on force; on the contrary, it is because a man or group of men exercise command that they have at their disposition that social apparatus or machinery known as "force."<sup>54</sup>

Force, for Professor Jordan, receives its natural expression as power--the active will-energy expended in the effort of the institutional will to effectuate an end. This idea is no more mystical than Professor Dimock's observation that

when a revolutionary new product or service appears on the scene, and at the same time a strong personality also appears, an empire is likely to be built in short time. During this period a driving force is at work, apparently without much thought for proper methods of organization and administration, but successful nonetheless because the opportunity is so great.<sup>55</sup>

<sup>52</sup>Ibid., p. 435.

<sup>53</sup>Jordan, Forms of Individuality, op. cit., p. 339. The similarity between Professor Jordan's theory and that of Max Weber seems to end on this point. Weber emphasizes positively the power relation in society, to the point that Professor Friedrich has suggested that he "sanctifies power." Cf. C. J. Friedrich, "Some Observations on Weber's Analysis of Bureaucracy," in Merton, et al., op. cit., pp. 27-33.

<sup>54</sup>Jose Ortega y Gasset, The Revolt of the Masses (New York: W. W. Norton Co., 1932), p. 138.

<sup>55</sup>Marshall E. Dimock, Administrative Vitality (New

Such events are characterized by Professor Jordan as "institutionalizations of natural forces and agencies . . . brought autonomously into existence for the peculiar task of giving expression to a purpose. . . ."56 At such times, "the intervention of [executive] authority with its abstractly manufactured instruments is disastrous."57 Such intervention prevents the fulfillment of the purpose and serves merely to maintain outmoded institutional expressions of past purposes.

Professor Jordan argues that this negative approach to administration--i.e., as in "executive control"--is an inheritance from individualism, with its law of conflict as the ultimate "social" fact, and its resulting conception of the "state" as an abstract regulatory device. To him, on the other hand, the state is in reality "the system of institutions through which will realizes purpose. . . ."58 As such, it includes all of the institutions through which will realizes purposes, including the economic institutions with their "private" property base which he sees as dominating contemporary society. He asserts that

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York: Harper & Brothers, 1959), p. 11. While Professor Jordan seeks rational control by the speculative will of the individual, he allows for such cases as this in his belief that intelligence is not always necessarily conscious.

56 Jordan, Theory of Legislation, op. cit., p. 305.

57 Ibid.

58 Ibid., p. 410.

the industries of distribution of food and provision of fuel, etc., all such practical purposes, are aspects of public life, and, as such, are property, and when adequately appropriated to their purpose are public functions, and should be incorporated within the administrative mechanism as public functions.<sup>59</sup>

His position is not that corporations "ought" to be public enterprises, but rather that they are public functions.<sup>60</sup>

<sup>59</sup>Ibid., p. 412.

<sup>60</sup>His view is that since these institutions play a role in public life they are public functions and ought therefore to be public institutions. The relevant question is the functional one which, in terms of the "decision-making" approach, seeks to find the source of the decisions that affect public life.

Stated in these terms, Professor Jordan has been joined in his interpretation--at least to the extent of recognizing the inadequacy of "private property" notions--by such scholars as Peter F. Drucker, The Concept of the Corporation (New York: The John Day Co., 1946); C. Wright Mills, The Power Elite (New York: Oxford University Press, 1956); Adolf A. Berle, Jr., The 20th Century Capitalist Revolution (New York: Harcourt, Brace & Co., 1954), and Power Without Property (New York: Harcourt, Brace & Co., 1959); Robert A. Gordon, Business Leadership in the Large Corporation (Washington: The Brookings Institution, 1945); Robert A. Dahl, "Business and Politics: A Critical Appraisal of Political Science," American Political Science Review, LIII (1959), pp. 1-34; Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (New York: Harper & Brothers, 1942); Walton Hamilton, The Politics of Industry (New York: Alfred A. Knopf, 1957); John K. Galbraith, American Capitalism (Boston: Houghton-Mifflin, 1952); James G. Burnham, The Managerial Revolution (New York: The John Day Co., 1941); and many others.

Among the political scientists, Professor Merriam wrote in 1944 that "many of the common distinctions between states and other societies distinguish little on close analysis. That the state has a universal jurisdiction over its territories and a monopoly of violence is usually declared, and at times this conclusion may serve a useful purpose, with value as a broad historical observation. But if traditional forms of violence are superseded by milder forms of aggression not definable as violence, such as psychological pressure? What if the state be a world state?" Charles E. Merriam, Public and Private Governments (New Haven: Yale University Press, 1944), p. 16.

His demand is that they be recognized as such and given their proper place within the public life. Otherwise, "no system of public policy can work until the function of property and the economic interest are given their place under the requirements of ultimate ends."<sup>61</sup>

This view of Professor Jordan's was only an early trumpet in what has become a rising chorus of dissent from the accepted but futile attempt to regulate these economic institutions through "anti-trust" legislation<sup>62</sup> and regulatory agencies.<sup>63</sup> Thus Professor Berle has written that

corporate managements have reached a position for the first time in their history in which they must consciously take account of philosophical considerations. They must consider the kind of a community in which they have faith, and which they will serve, and which they intend to help construct and maintain. In a word, they must consider the ancient problem of the "good life," and how their operations can be adapted to affording or fostering it.<sup>64</sup>

A labor historian writes: "If the corporation is to survive, it will have to be endowed with a moral role in the world."<sup>65</sup>

<sup>61</sup>Jordan, Theory of Legislation, op. cit., p. 431.

<sup>62</sup>The failure has been discussed by David T. Bazelon, "Facts and Fictions of U. S. Capitalism," The Reporter, XXI (September 17, 1959), p. 47.

<sup>63</sup>This has been researched by Samuel P. Huntington, Clientalism in Administrative Politics (Cambridge: Harvard University, unpublished Ph.D. thesis, 1951).

<sup>64</sup>Berle, The 20th Century Capitalist Revolution, op. cit., pp. 166-7. These are statements of pious preaching, rather than descriptions of fact.

<sup>65</sup>Frank Tannenbaum, A Philosophy of Labor (New York:

Recognition of the public functions of corporations comes from corporate managers as well as from scholars. The Chairman of the Board of United States Steel, although an ardent defender of managerial autonomy, has stated that

in a corporation, the managing employees decide what should be made, who shall sell, and who shall account for its affairs; in a word, who shall prudently balance the interests of owners and employees in the group. Such decisions, however, are successful only if they also meet the requirements of persons outside the productive group who are being served by it.<sup>66</sup>

And an expert on corporate public relations has stated the case even more strongly:

The support of the corporation should be made evident for every kind of community enterprise that contributes to human progress. . . . Any management which expects to thrive on the basis of cultural progress developed by others, without also making a real contribution of its own, is living the life of a leech, however unconsciously--and will ultimately be so regarded and in the long run met with discipline. . . . The corporation therefore has a proper economic concern in knowing that its plant communities have attractive libraries, modern hospitals, good recreation facilities for both youth and adults, and an education system that provides a sound foundation of interest and knowledge in both the sciences and the liberal arts.<sup>67</sup>

These are novel ideas among American corporate managers,<sup>68</sup> however, and seemingly none of them realize any po-

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Alfred A. Knopf, 1952), p. 168.

<sup>66</sup>Roger Blough, Free Man and the Corporation (New York: McGraw-Hill, 1959), p. 8.

<sup>67</sup>John W. Hill, Corporate Public Relations (New York: Harper & Brothers, 1958), p. 84.

<sup>68</sup>Recent research has disclosed that American businessmen possess "almost a stubborn intellectual conserva-

litical implications of such extensive public responsibilities. They illustrate only partially, therefore, Professor Jordan's early analysis of the problem posed by such institutions for administrative theory. They certainly would disagree, furthermore, with his correlated demand for the results of which they speak "to be achieved along with a rational political organization."<sup>69</sup> He maintains that

government, as the representative of the political life, and interest, as representative of the economic life, inevitably come to combination under the same purposes. Only, under present political methods, organized interest takes possession and complete control of government and thus of the direction of public life; whereas interest and the economic process should be made the content of the political life and the institutions of industry made instruments of public administration.<sup>70</sup>

As related to his theory of administration, Professor Jordan's point is that the institutions of industry are only machines, engaged in the production and distribution of "things" which may or may not be "objects"--i.e., the realization of purposes. These machines cannot be rationally controlled, since rational control presupposes intelligibility which, in turn, is possible only through their definition in

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tism." Francis X. Sutton, Seymour E. Harris, Carl Kaysen, and James Tobin, The American Business Creed (Cambridge: Harvard University Press, 1956), p. 385.

<sup>69</sup>Jordan, Theory of Legislation, op. cit., pp. 431-2.

<sup>70</sup>Ibid., pp. 411-2. He obviously rejects what has been described as an attempt "to avoid public ownership in favor of public regulation. . . ." Dimock, Dimock, and Koenig, op. cit., p. 139.

terms of their purpose within the whole--their public function. The administrative problem with regard to these institutions

is one of adapting or appropriating human activity--work --to the possibilities of utility in things--utility being interpreted in terms both of use and enjoyment but without reference to ownership; and of adapting or appropriating human thought with respect to ends and means to the substance and method or process of human activity.<sup>71</sup>

Under the present arrangement, both human activity and the human capacity for thought are appropriated to the mere subjective interests of the corporate institution, without regard to the end of the process.

In any case, Professor Jordan sees most of the "enforcement" aspects of government--i.e., its executive functions--as a result of this irrational division of the political and the economic, wherein corporate or group interest plays such a dominant role in the making of public policy that opportunity for action to achieve ends is minimized. Naturally, a general deterioration in the quality of the social fabric results, manifested in various unsocial--e.g., criminal--forms of behavior. What requires to be done in this situation is to free the institutional wills for effective action to attain ends. But this, in turn, involves the elimination of executive controls, which can be done safely only after the elimination of the interest motive which has

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<sup>71</sup>Jordan, Theory of Legislation, op. cit., p. 436.



had to be checked to make life possible in its bare essentials. Interest, finally, can be eliminated from public life only through the elimination of the "privacy" of property, and the recognition of property as a form of individuality--i.e., as a means by which public purposes are actualized.

But these arguments all lead to the conclusion that administration is effective only when the machines of production are properly instrumented to public ends. To put it succinctly, ends

come into existence then through the adequate embodiment of purposes in forms objectified in action, and this statement is the whole philosophy of the practical life and the ground principle of administration.<sup>72</sup>

It is in the achievement of these ends that law is actually "made," as opposed to its mere ideation. This far, at least, Professor Jordan agrees with Justice Holmes that "the life of the law has not been logic; it has been experience."<sup>73</sup>

To reiterate, then, "administration is . . . the making of law out of fact, the rendering situations of fact rational and intelligible for use, which, as a legal conception, refers to the position or status which fact occupies in the end."<sup>74</sup> The fact is made intelligible, and thus usable, by

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<sup>72</sup>Ibid., p. 392.

<sup>73</sup>Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown & Co., 1881), p. 1.

<sup>74</sup>Jordan, Theory of Legislation, op. cit., p. 437.

being converted into a will, or systematized with respect to a purpose. As will, the system of fact is effective, but it is only as will becomes a form of individuality--i.e., individuated as a function within the whole--that its effectiveness results in the realization of ends.

As a form of individuality, the "corporate will is productively active in the process of administration, where the method employed is that of social experimentation and where law is made in its matter and its detail."<sup>75</sup> Thus, "the ultimate source of law is the administrative process."<sup>76</sup>

The law of life, then, in the sense of whatever degree of order prevails therein, ultimately is made by the machinery of life, but machinery must be instrumented toward ends through administration before the law becomes rational as resulting from and assisting the realization of purposes. The alternative is for the machinery to be its own "law," in which case natural-cultural life becomes the grist for the undirected repetitive process of the mill--as, e.g., when people are persuaded to consume more and more unwanted because unneeded goods for the sake of the economic mechanism, rather than utilizing that mechanism to supply objects for the "good life." This life would include the "public realm"

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<sup>75</sup>Ibid., p. 242.

<sup>76</sup>Ibid., p. 426.

which Professor Galbraith finds poverty-stricken in the midst of private affluence.<sup>77</sup> Machinery is the means through which purposes are realized, and law is made; left to itself, or uninstrumented toward ends, it becomes a monster which feeds upon the natural-cultural life in which it has its origin.

### Administrative Organization and Personnel

Turning from Professor Jordan's functional interpretation of administration, it may be noted that he dealt in greater detail--although still sparingly--with the organizational aspects of this phase of the legislative process than either of the others. His suggestions in this regard will be considered under three headings: administrative technocracy, the problem of personnel, and the size of the administrative mechanism.

### Administrative Technocracy

Professor Jordan felt that traditional concepts of administrative organization must be and were being modified to provide the flexibility demanded by the experimental method and the expertise required by the specialized nature of industrial life. This new type of administrative organization, which he calls the "technocratic," needs to be recognized as to its proper function within the whole of life.

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<sup>77</sup> John K. Galbraith, The Affluent Society (Boston: Houghton-Mifflin, 1958), p. 251.

He introduces his theory of administrative technocracy<sup>78</sup> through a discussion of the "two general types of methods of administration"<sup>79</sup> which he feels have characterized control over public life in the past: (1) autocratic administrative organization, and (2) democratic administrative organization.

In the autocratic model, which he believed to have been most prominent throughout history, "administrative activity is conceived to arise within a central absolute authority and flow outward and downward so as to embrace the entire system."<sup>80</sup> This method of administration has been particularly prevalent in "cases where public processes are under private control. . . ."<sup>81</sup> This includes, of course, the control of industry by "business."

It is not always true that a single individual issues every directive in the autocratic model. In fact, the corporate institution frequently develops a blind autonomy

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<sup>78</sup>The relation between Professor Jordan's conception of technocratic administrative organization and the political movement that flourished briefly under the name during the early 1930's seems to be no greater than the influence of Thorstein Veblen upon both, even though Professor Jordan penned his theory at about that time. Certainly he did not wish to give control over the speculative and reflective functions to technicians.

<sup>79</sup>Jordan, Theory of Legislation, op. cit., p. 413.

<sup>80</sup>Ibid.

<sup>81</sup>Ibid.

that operates effectively to control all the fact-content, human and material, embraced within the system. In the case of employer-employee relations in industry, for example,

the rigidity of the control is mitigated, in its subjective rigor, at least, by the fact that the control is made impersonal in being mediated through the machinery by which the individual's activities are instrumented. . . .<sup>82</sup>

Domination of the individual is then exercised by the mechanism itself, rather than by a "manager," and the machine's process becomes its own "law." In such cases,

the total effect of the system of machinery is to create for the system a sort of blind automatism, and, with a certain degree of "perfection" of organization and machinery, the degree of automatism reaches the point where all persons involved, even including "management," are equally subject to the absolute control of the mere weight of the mechanism.<sup>83</sup>

As expressed in modern industrial organization, Professor Jordan thought that the autocratic method of administration is "the natural heir of the old political autocra-

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<sup>82</sup>Ibid.

<sup>83</sup>Ibid. This would be an excellent statement of Whyte's general thesis. Cf. William H. Whyte, Jr., The Organization Man (New York: Simon & Schuster, 1956). It is also similar to the Sherifian concept of the group as characterized by internalized norms and accepted status and role relationships, especially when these norms and role relationships continue to persist after the functional relations that prompted their emergence cease to exist. Cf. Muzafer and Carolyn W. Sherif, Groups in Harmony and Tension (New York: Harper & Brothers, 1953).

It is in a situation such as this, when the individual is "used" by a mechanism, that the Kantian ethical dictum loses all relevance, because "the will of a property-mass cannot be questioned by the individual." Jordan, Theory of Legislation, op. cit., p. 414.

cy,"<sup>84</sup> regardless of the extent to which it becomes camouflaged in oligarchy. And, like all forms of autocratic administration, the organization of business

can be shown to fail in every respect of the attainment of human ends, and to become wooden and abstract in its incidence upon the human elements in the organization; and it is maintained not because of its contribution to the public welfare or good, but by the mere blind weight of the property-masses which are incorporated in its structure.<sup>85</sup>

This result, which follows from the failure to instrument the machines toward public ends, he felt to be even more characteristic of economic than of political autocracy, and for that reason the former should be more easily overcome. Political autocracy, that is, did pretend concern with the public good, regardless of the degree to which it failed in actual practice; economic autocracy, on the other hand, completely ignores human values as beyond its scope.<sup>86</sup>

Professor Jordan's conception of the democratic model of administrative organization is closer in attitude to the derogatory opinion of democracy that prevailed prior to the seventeenth century than to the attitudes in the liberal "democracies" of the present day. He asserts that democracy as an administrative system is an ideal that has not been tried,<sup>87</sup>

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<sup>84</sup>Ibid.

<sup>85</sup>Ibid.

<sup>86</sup>Ibid., p. 145.

<sup>87</sup>Ibid., p. 417.

despite its use as ideology to explain and justify various social movements, some of which may have been healthy in that they served to promote human values. Ideologies, however, have little to do with the changes that occur "as nature impinges upon purpose [and] create[s] automatically the corporate forms"<sup>88</sup> which embody these changes. Thus, "as for its being responsible for new types of organization in modern life, democracy has had little to do with that."<sup>89</sup>

He argues, in fact, that when the changes have occurred and attempts have been made to put into effect the ideas used to justify them, the results have been disastrous. Some of these ideas which have been applied with remarkable lack of success are:

(1) With respect to personnel, anybody can do anything, and one can do it as well as another.

(2) Administrative means are selected on a basis of least cost.

(3) Nothing requires to be done permanently or finally, and the same thing may be done successively in different ways.

(4) The test of the rightness of what is done is its satisfactoriness, chiefly to the person who does it.

(5) Its method is not experiment, since it recognizes no principles, but hazard or adventure, depending only on suggestions of the moment.

(6) The object of administrative proficiency is temporary utility.

(7) Administration should exalt the individual. Every individual is theoretically an autocrat.<sup>90</sup>

<sup>88</sup>Ibid., p. 418.

<sup>89</sup>Ibid., p. 419.

<sup>90</sup>Ibid., p. 421.

The attempt to apply such principles to the exigencies of life is partly responsible, he claims, for the fact that "most modern attempts at democracy have resulted in the establishment of the opposite type of administrative system, viz., the autocratic and tyrannous mechanism of oligarchic minority."<sup>91</sup> In terms of the actual effect of democratic administrative systems upon the human values it was supposed to exalt, "nothing can be more cruel or brutal than the destruction of human beings by waves of democratic prejudice. . . ."<sup>92</sup> The innerent rationality of the human individual upon which the ideal rested was a chimera, and, in actual operation, the democratic mode of administration "is now being recognized as a failure."<sup>93</sup>

Professor Jordan thought that the new technocracy presently evolving combines whatever is valid of both the democratic and autocratic methods under the highly specialized conditions of modern life. Elements of the democratic ideal which he sees as valid are the desire to educate the individual, which "endeavors to raise the standard of his capacities to the point where full access to the public good may be allowed him,"<sup>94</sup> and the idea that all individuals must

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<sup>91</sup>Ibid., pp. 421-2.

<sup>92</sup>Ibid., p. 420.

<sup>93</sup>Ibid., p. 419.

<sup>94</sup>Ibid., p. 422.



be given access to the instruments through which ends may be fashioned and realized. Under modern conditions, of course, this necessitates the recognition of property as a public function. Democracy also emphasizes the public obligation of every citizen for his contribution to the order of life.

The valid element of the autocratic model is its concept of "superior right," which is being transferred from the "divinely endowed" autocrat to the person of superior technical competence.

[W]herever the old autocracy involved the loss of rights by the individual who happened to stand in the way of the autocrat, the newer autocracy of the technician or competent expert undertakes, however faultily, to redistribute the rights as objective social functions, not regardless of the individual, but independently of his special claims, in a system whose "goods" will accrue to the persons involved in the social body without specialized reference to any person. That is, problems of politics are being viewed objectively and impersonally.<sup>95</sup>

The conception of equality which this involves is not an absolute, because abstract, "natural" equality, but the guarantee of access to the objects and activities upon which the full life depends, to the extent that the person can utilize these by means of his natural endowment as developed to the maximum degree through the educative process.<sup>96</sup>

The technocratic administrative system, in Professor Jordan's view, avoids both the Charybdis of autocratic or

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<sup>95</sup>Ibid.

<sup>96</sup>Ibid., p. 429.

technical narrowness and the Scylla of the administrative incompetence of the masses. Such a system, he believed, would demonstrate "that democratic equality is not incompatible with aristocratic competence,"<sup>97</sup> because as it became more and more rational, the full capacities of each individual would be utilized in the process of life.

Given the best possible administrative organization, Professor Jordan does not believe that control of the emergent novelty in life actually will lead to a Utopia. Nor does he believe that novelty follows any particular law of historic development, as in Marxism. He would agree with Heilbroner that,

looking at some of the institutions we nourish and defend, it would not be difficult to maintain that our society is an immense stamping press for the careless production of underdeveloped and malformed human beings, and that, whatever it may claim to be, it is not a society fundamentally concerned with moral issues, with serious purposes, or with human dignity.<sup>98</sup>

So although Utopia will not be realized in fact, the novelties that emerge during the course of natural-cultural evolution are possibilities that contain the promise of a better life; the realization of their potential depends upon what Heilbroner calls "historic control." And while "it is unquestionably true that the exercise of . . . historic con-

<sup>97</sup>Ibid., p. 430.

<sup>98</sup>Robert L. Heilbroner, The Future as History (New York: Harper & Brothers, 1959), p. 199.

trol is fraught with risk, . . . so is the exercise of non-control."<sup>99</sup>

### The Problem of Personnel

In so far as this control depends upon the administrative process, its perfection depends upon the technical adequacy of the administrative mechanism. This, in turn, depends upon the technical competence of its personnel.

The two problems faced by administrative technocracy in this regard are (1) the recruitment of experts, and (2) keeping these experts oriented toward the public good, the end of the corporate whole. In the first place, Professor Jordan believes, the problem of recruiting experts "is largely overcome in advance in that the legislative act that establishes the system prescribes the qualifications for its main officers."<sup>100</sup> This is part of the speculative instrumentation of the end; that is, the speculative intelligence, in suggesting the means whereby purposes may be realized, does this largely by determining the type of technical competence required by the particular function.

He further believes that

the position or function, once itself rationally defined under the conditions of justice and proper performance of function, will find in the aspirations of men the kind of competence and the degree of loyalty and integ-

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<sup>100</sup>Jordan, Theory of Legislation, op. cit., p. 430.

rity required for the proper performance of its function.<sup>101</sup>

While this perhaps seems optimistic or even idealistic, it appears to be the operational hypothesis of most personnel programs. Thus the Civil Service Assembly's Committee on Position-Classification has written that

position-classification . . . adheres strictly to the view that the current duties and responsibilities of a position are the sole basis for its classification, and recognizes at the same time that these may be changed in character, difficulty, or scope by reason of the capabilities of the employee occupying the position.<sup>102</sup>

This is not different in substance from Professor Jordan's application of the ideal:

the administrative agent should be examined in advance of his selection as to his possession of the capacities peculiarly appropriate to the function for which he is selected. . . .<sup>103</sup>

In either case there seems to be a hope that individuals will see in the position an opportunity for action that will satisfy their creative abilities, and that this vision of opportunity "will establish a prior claim upon the aspirations of persons, and lead them to desire a life work within its activities in preference to another connection."<sup>104</sup>

<sup>101</sup>Ibid., p. 382.

<sup>102</sup>Civil Service Assembly's Committee on Position-Classification, "'Position' Does Not Mean 'Employee,'" in Rowat, *op. cit.*, p. 226.

<sup>103</sup>Jordan, Theory of Legislation, op. cit., pp. 380-381. Italics added.

<sup>104</sup>Ibid., p. 381.

The solution to the second problem--keeping the experts oriented toward the public good--is no more difficult in its theoretical statement than the first. Its solution initially depends, once again, upon the successful completion of the speculative phase of the legislative process, particularly in the determination of the end-object of the administrative phase. This is because the administrative system

tends to develop a spontaneity which maintains its organization and effectiveness in justice by virtue of the rightness and wisdom of the speculative ideals in accordance with which it was originally constituted.<sup>105</sup>

If the purpose is properly objectified and instrumented, "the inertia of the system will exert a directing influence over the activities of any member."<sup>106</sup> Professor Jordan adopts a Weberian approach to the difficulty, if not the impossibility, of control (in the usual sense of arbitrary direction) of the administrative system;<sup>107</sup> "the larger functional group operating as an individual will be controlled and directed by the functional system of which it is a part. . . ."<sup>108</sup>

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<sup>105</sup>Ibid., p. 383.

<sup>106</sup>Ibid.

<sup>107</sup>"Bureaucratic administration means fundamentally the exercise of control on the basis of knowledge. This is the feature of it which makes it specifically rational. This consists on the one hand in technical knowledge which, by itself, is sufficient to insure it a position of extraordinary power. But in addition to this, bureaucratic organizations . . . have the tendency to increase their power still further by the knowledge growing out of experience in the service." Weber, op. cit., p. 340.

<sup>108</sup>Jordan, Theory of Legislation, op. cit., p. 383.

Given a system rationally conceived and honestly embodied in proper instruments, and there is little likelihood that it will fail practically. The reason so many public agencies will not "work" is that the intention that they should work was never pure.<sup>109</sup>

This lack of purity of motive is reflected in practical life in an organization colored by the demands of subjective interest. This prevents the achievement of full corporeity, wherein the organization could "develop spontaneity of self-control. . . ." <sup>110</sup>

Successful implementation of purpose depends then in large degree upon the speculative determination of the purpose as an end, but it also requires the creation, through

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<sup>109</sup>Ibid., p. 384.

<sup>110</sup>Ibid., p. 383. Professor Dimock, commenting upon Max Weber's theory of bureaucracy, says that, according to Weber, "the dearest wish of a bureaucracy is to be left alone to generate its own momentum, thus guaranteeing permanence, purity of motive, impartiality, faithfulness to routine, and all the rest." Dimock, Administrative Vitality, op. cit., p. 82. While derogatory in tone, this is a fairly accurate summary of the Weberian thesis, and Professor Dimock's criticisms seem to turn upon a semantic problem involving the terms "rationality" and "impartiality." Professor Dimock does not note, here in criticism, that the continental use of the term "bureaucracy" does not carry the unfavorable value judgment characteristic of its Anglo-Saxon usage. Cf. Fritz Morstein Marx, The Administrative State (Chicago: University of Chicago Press, 1957), pp. 16-33.

Professor Schumpeter, a follower of Weber, suggests that the bureaucratic transformation of capitalism will lead to its transition into a form of socialism, wherein a closer approximation of Weber's ideal-type will be realized. Schumpeter, op. cit., pp. 190ff.

Professor Jordan's view is quite similar, although far less detailed, to those of Weber and Schumpeter; with allowances for the semantic difficulties, it is also quite close to that of Professor Dimock, on many points at least.

education, of technicians with broader viewpoints than has been characteristic of technicians under business democracy. A type of technician must be produced who, "at the same time that he possesses a unique capacity, also possesses the breadth and comprehensiveness of view necessary to enable him to keep the public whole in mind as an item in every plan or decision."<sup>111</sup> This will be possible with the elimination of property as "private"--the "concrete" expression of subjective interest in the legislative process.

With more specific reference to the administrative mechanism itself, it is important that none of its human fact-content--the technicians--become so engrossed in their particular phase of the operation that they lose sight of the entire mechanism, along with its function within the society as a whole. What he has in mind in this regard has been utilized by some corporate personnel managers in training programs, in which new employees spend orientation time in many if not all of the departments of the operation before beginning their specific task. Professor Jordan's view is

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<sup>111</sup>Ibid., p. 427. As indicated, this means the elimination or supercession of interest as a motive. That such is possible Professor Jordan believed to be evidenced by the whole of human culture, which "already as a matter of fact rests upon a basis in which interest has no part whatever. . . . The destiny of culture rests upon the possibility that a sufficient element of humanity remains disinterested, and it does not require either unusual wisdom or faith to see that, just now, the burdens of cultural affairs of mankind are being carried by men who have and will have no interests whatever." Ibid., p. 432.

that knowledge of these aspects of the administrative mechanism is so important that "the highest order of persons within the system should have no function other than to see that the status of the whole is known to every part."<sup>112</sup> Such a knowledge will help minimize the opportunity for any single phase of the administrative process to succumb to the repetitive demands of subjective interest, and will thus increase the chance for successful administration. It also will serve to buttress the moral status of the administrative agent himself. For example, the sanitation department employee, a menial task by contemporary standards, can gain increased moral awareness of the importance of his function as he is made aware of the entire mechanism which seeks to promote sanitation, and the nature of the purpose which this mechanism seeks to embody in its organization.

Finally, Professor Jordan recognizes the element of risk involved in the increased importance of the technician in social processes. There is "a grave danger that the technician may become a new autocrat, and as such the more dangerous just because of his extraordinary capacity in a narrow line."<sup>113</sup> There is no choice, however, as to whether the technicians will be important; the only choice concerns the possibility of their control in the sense of utilizing

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<sup>112</sup>Ibid., p. 385.

<sup>113</sup>Ibid., p. 422.



their capacities to accomplish public ends. This is the element of risk that cannot wholly be eliminated from life. It can be reduced, however, through the recognition that no man is merely a technician; that is, "the administrative capacity of agent in the individual presupposes his capacity as thinker."<sup>114</sup> Allowing technicians to become mere technicians, with their capacity for thought diminished through the "making up" of their minds out of their own technical processes, is the fundamental cause of technocratic autocracy.

#### The Size of the Administrative Mechanism

Probably the most common popular attitude toward administration, at least in its bureaucratic implications in government, is the fear of size.<sup>115</sup> While it would be easy to dismiss this fear as the result of a lack of understanding of bureaucracy, rooted in the presuppositions of individualism, one finds many academicians supporting the thesis that large size per se is bad. Professor Toynbee, for example,

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<sup>114</sup>Ibid., p. 381.

<sup>115</sup>There is "an abundance of literature by critics of 'bureaucracy,' typically conceived by them as a despotic autocracy of civil servants, . . . notable chiefly for its richness of invective rather than for its contribution to a social science of organization." Merton, et al., op. cit., p. 11.

Professor Marx comments that such denunciation "has little reference to the institutional characteristics and the working processes of public administration, but it has done much to lower the esteem in which government is held. It has exerted a detrimental influence upon both the performance of the administrative system and the behavior of civil servants." Fritz Morstein Marx, The Administrative State (Chicago: University of Chicago Press, 1957), p. 33.

sees large size of the bureaucracy as a prelude to the deterioration of civilization.<sup>116</sup> Most public administration theorists, however, would agree with Professor Dimock that "there is no quarrel with size that is technologically induced because if the technological aspects of the undertaking are efficiently handled there are always means of overcoming the human problems that arise."<sup>117</sup>

Weber's approach, which has served as a beginning point for much recent work in administration, sees organization as characteristic of life, and bureaucracy as a concomitant of organization. The greater the degree of organization, which follows a greater division of labor in society, the larger the size of the administrative mechanism. In the words of Mannheim, another follower of Weber,

a chief characteristic of modern culture is the tendency to include as much as possible in the realm of the rational and to bring it under administrative control--and, on the other hand, to reduce the "irrational" element to the vanishing point.<sup>118</sup>

Mere condemnation of size, many think, merely causes blindness to the real problems of administrative organization,<sup>119</sup>

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<sup>116</sup>Arnold J. Toynbee, A Study of History, 10 vols. (New York: Oxford University Press, 1934-54), V, p. 44.

<sup>117</sup>Dimock, Administrative Vitality, op. cit., pp. 254-5.

<sup>118</sup>Karl Mannheim, Ideology and Utopia (New York: Harcourt, Brace & Co., 1936), p. 114.

<sup>119</sup>One such problem, in Weber's analysis, is that of "routinizing" charisma; this may be done by two methods: (1)

although the latter, it may be true, may be compounded by increased size.

Professor Jordan's view of the administrative mechanism is neutral with reference to size, which he feels will be determined by the nature of the purposes which will attempt to embody in fact. The "mere limitation of machinery, like any process of negation, can never, as such, represent a practical purpose."<sup>120</sup> If the will receives proper individuation within the social whole--if its characteristic of effectiveness operates to actualize purposes as ends--a rational administrative mechanism will result. Thus,

what we lament about machinery is not then the number or the adequacy or serviceableness of machines taken as isolated tools, but the disorder of their relations and the fact that they have as a whole no assignable meaning.<sup>121</sup>

The size of the mechanism will be determined, in large part, by the evolution of natural-cultural life as purposes emerge and as will exerts its propulsive force in blind efforts to realize them. World-wide purposes, as for example the postal service, control of atomic energy, etc., require administrative mechanisms of equal scope; man's efforts should be expended, therefore, not in the self-defeating effort to ne-

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traditionally, and (2) rationally. Inattention to the problem of administrative organization through a blanket condemnation of size does not prevent its growth, and favors traditional over rational routinization. Weber, op. cit., p. 364.

<sup>120</sup>Jordan, Theory of Legislation, op. cit., p. 392.

<sup>121</sup>Ibid., p. 393.

gate purpose through limitation of size, but through the speculative determination and instrumentation of these purposes.

Professor Jordan, it should be noted, did not consider the idea of the possibility of such universal mechanisms as novel and idealistic. He maintained, rather, that

certain administrative mechanisms with very important legislative capacity operate in the interest of the whole of humanity, and . . . illustrate the practicality of the organization of human life in a single world state. . . .<sup>122</sup>

Among these are the "organized methodologies of religion, science, art and culture generally, all of which are universal in scope, and determine the more comprehensive types of action for mankind."<sup>123</sup> These mechanisms he sees as adequate to a fairly high degree, although frequently failing of proper instrumentation. "The difficulty is not that there is too much machinery, . . . but in the lack of clear principle of a speculative and ideal sort by which machinery and process may be brought to order."<sup>124</sup>

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<sup>122</sup>Ibid., p. 403.

<sup>123</sup>Ibid.

<sup>124</sup>Ibid., p. 389.

## CHAPTER X

### LEGISLATION AS REFLECTION: THE JUDICIAL PROCESS

As was noted earlier,<sup>1</sup> the distinction of the three stages of the legislative process which are necessary to its analytical discussion is misleading in that it suggests what would be labelled in formal government as a hard and fast "separation of powers." It suggests three distinct processes; speculation, followed by administration, followed by reflective adjudication. In the ordinary processes of life, however, the three stages are found operating simultaneously without hard and fast lines separating them. This is but to say that social evolution occurs along a continuum, rather than in "stop here, start there" distinctions among the functional phases of this change. The speculative intelligence constantly is in quest of new purposes, which it attempts to realize in idea in order to devise the instruments through which they may be realized in fact. The realization of these purposes in fact is attempted in the experimental action of administration, during the course of which they undergo continual modification and redefinition.

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<sup>1</sup>Supra, p. 220.

The third stage of Professor Jordan's legislative process is also continuous. While the total success of an experiment cannot be determined reflectively before its conclusion, the more obvious failures can be detected before the experiment has run its course. The reflective intelligence, therefore, is active from the moment at which the speculative ideal begins to make contact with life in its concreteness in the experimental action that looks to the realization of this ideal as part of the order of life.

The separation of powers is not, then, part of Professor Jordan's theory of the legislative process. There are reasons for supposing that he envisioned a separate legislature and a separate system of courts at the level of individuality termed the "state,"<sup>2</sup> but the state is only one--the most comprehensive--of the forms of individuality, and the legislative process is characteristic of all of these.

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<sup>2</sup>He does write, on the other hand, that "there is no good reason to divide the legislative act into a speculative and a deliberative motive [as] is shown by the English custom by which the legislative organ is given full autonomy and paramount authority, with exclusive power to determine and establish its own meanings. The sovereignty of parliament thus proves that there is no necessity to split the legislative function, and the English custom of associating the final authority with the King in parliament, meaning, I take it, that the legislative function is more fundamentally connected, from the point of view of actual practice, with the administrative organ than with the judicial, would seem to be reasonable since it puts the emphasis upon the utility and serviceability of law rather than upon its power and authority." Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 356.

The organization comprised of a natural person and his instruments and objects is, for example, a form of individuality, and therefore a locus of the legislative process. The person as intelligence speculates upon ends and acts, in his technical capacity, to effectuate them; while doing so, he reflectively evaluates the effect of his efforts and the real nature of the end. By the very nature of things, however, there could be no "separation of powers."

Nor did Professor Jordan envision any such separation in the individualities which, in his theory, comprise the agents of the administrative process--masses of men and property organized as economic, religious, etc., institutions. Here, too, all of the phases of the legislative process ordinarily have their locus in the same elements of fact.<sup>3</sup>

The "separation of powers" is, then, in the strict sense a misnomer. There is only one legislative process, and it is a whole--a unity. Speculation, experimentation, and

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<sup>3</sup>Eells, referring to the proposal for a "due process of law" within the corporation, writes: "The prospect of patterning corporate governance after the norms of democratic constitutionalism, as we know it in public government, is not attractive to most professional managers. Separation of powers, checks and balances, judicial review of rule-making powers, periodic elections and the party system, representative assemblies and legislative investigations--these and many other devices to get public accountability for public servants, if translated into proposed patterns of corporate governance, would arouse vigorous antagonism in most business circles." Richard Eells, The Meaning of Modern Business (New York: Columbia University Press, 1960), p. 54.

adjudication are abstractions from this whole and, in true analytical fashion, receive their meanings from their relation to the whole and the other parts within the whole.

The Relation of Adjudication to Speculation  
and Administration

The primary analytical distinction among the three phases of the legislative process is based upon logical priority. Experimental action, as opposed to the mere movement characteristic of process, logically presupposes the objectification of purpose as an end by the speculative intelligence. This is to say that there must be "something in mind" before and during the administrative process.

Adjudication, as the act of the reflective intelligence, by the same token logically presupposes experimental action as the source of the experience-content upon which it "reflects." Action, that is, "necessarily imposes upon the intelligence the task of analysis and comparison";<sup>4</sup> as action presupposes end-directed movement, so the results of action, or administration, must be analyzed and compared with the end which it attempts to realize. The reflective function, then,

differs . . . from the speculative function in that it contemplates the system of ends as embodied, and as thus the element of permanency of order in life, whereas the speculative contemplates the system of ends as ideal,

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<sup>4</sup>Jordan, Theory of Legislation, op. cit., p. 297.



and as in the continuing process of growth.<sup>5</sup>

In the judicial act the reflective intelligence "operates to unify the ideal constructs of speculation with the experimental aspects of fact as defined in administration."<sup>6</sup> The speculative intelligence merely sketches in outline a plan of action; this is as far as it can go because the values with which it deals do not have full existential status until after the administrative attempt to realize them.

[B]ut given the speculative idealization of values, and the experimental determination of object forms adequate to the embodiment of those values, and the conditions are met in full for the creative act of judgment through which the conditions are transformable into the incorporate or impersonate whole which constitutes an element of valid law.<sup>7</sup>

The judicial process is the "final" stage of the legislative process in that "it completes and corrects the speculative process by adjudging it consistent and compatible with the activities of life. . . ."<sup>8</sup> Legislation as reflection "is speculation taking a second thought after administration has furnished it with tested data."<sup>9</sup>

This view of the judicial process obviously casts it

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<sup>5</sup>Ibid., p. 106.

<sup>6</sup>Ibid., p. 445.

<sup>7</sup>Ibid., p. 451.

<sup>8</sup>Ibid., p. 298.

<sup>9</sup>Ibid.

in a larger role than that provided in the theory of majoritarian liberalism. Thus, by way of contrast, Mr. Justice Frankfurter has written that

a judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation.<sup>10</sup>

Professor Jordan, on the other hand, holds that law is finally made, in the sense of receiving ultimate approval as to the "mutual compossibility" of end and means as these are embodied in concrete fact during administrative action, in the judicial process; "the decision of the court is a legislative function in pretty much the same sense that passing a statute is a legislative function, and the law-making process is the same in each."<sup>11</sup>

Professor Jordan shares, in this regard, the viewpoint of the legal "realists." His assertion that "the statute is not law until properly adjudged so by reflective decision"<sup>12</sup> corresponds with Judge Frank's assertion that

for any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts. . . . Until a court has

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<sup>10</sup>Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Columbia Law Review 527, 533 (1947). Cf. the statement of Dean Pound, quoted supra, p. 237n.

<sup>11</sup>Jordan, Theory of Legislation, op. cit., p. 449.

<sup>12</sup>Ibid., p. 450.

passed on those facts no law on that subject is yet in existence.<sup>13</sup>

It must be kept in mind, of course, that Professor Jordan does not have in mind the realists' narrow concept of the law as "positive"; to him, all intelligence reflecting upon the results of action to embody ends is engaged in the making of public law; such intelligence is giving its approval to the order in life. In a city where, and to the extent that final reflection upon and approval of action resides, practically, in the chamber of commerce, the chamber of commerce is the effective "judiciary" of the city.<sup>14</sup> Just as one cannot possibly understand the "order" of the middle ages without attention to the Church and its contribution thereto, it is impossible to understand the "order" of the contemporary world without attention to the agencies which contribute to this "order." The quality of the order, or the validity of law, will depend largely upon the extent to which objective, non-"interested" intelligence is available to guide, speculatively and reflectively, the corporate institutions capable of action.

Both speculation and reflection, then, are essential to the successful completion of the legislative process.

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<sup>13</sup>Jerome Frank, Law and the Modern Mind (New York: Brentano's, 1930), p. 125.

<sup>14</sup>Professor Jordan would maintain, of course, that the chamber of commerce reflects "interest" and therefore is not capable of making "good" or "valid" law.

Speculation necessarily will err since it is dealing with unknowns--that is, with values not yet realized in full as part of the order of life. Adjudication "curbs the imaginative freedom of speculation by making it consistent with the plodding necessities of experiment."<sup>15</sup> The speculative function "spies out" purposes to be realized in actual fact; the ends thus stated must be viewed as permissive for the administrative process, and in this sense "the legislature decides what is lawful [but] the court decides what is law."<sup>16</sup>

Law-making as a judicial function is "the harmonizing

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<sup>15</sup>Jordan, Theory of Legislation, op. cit., p. 90.

<sup>16</sup>Ibid., p. 450. Professor Jordan's use of the term "court" is, in part, figurative, referring to the reflective act of judgment wherever it occurs. In so far as it refers to the abstract machinery of government--i.e., to actual courts--the term implies both courts as presently constituted and courts as they would be organized and function under more ideal conditions. This view is possible through his concept of life as natural-cultural, continually evolving in both aspects. Extant courts, that is, are embodiments of life as natural-cultural, containing certain elements of value within their organization. That they do not embody all possible values, or that they operate under the dominance of interest, is an index to their quality but does not alter their status as "courts."

In this regard some "realists"--e.g., Judge Frank--advocate less "realism" than their commentators would have us believe. Few jurists are more concerned with legal reform than Judge Frank, despite his rejection of "natural law." His realism resembles in substance Professor Jordan's position; he writes that "we should not speak of 'natural rights' but of 'ideal rights,' since nature knows nothing of rights, which appear only in the thought of man." Jerome Frank, Courts on Trial (Princeton: Princeton University Press, 1959), p. 355. In Professor Jordan's theory, culture is the source of freedom, including the freedom to visualize better courts than now are present in fact. The content of ideas is culture, which is an evolutionary continuation of nature.

of the administrative rules and maxims of the swiftly moving social process with the more staid and ponderous movement of reflection. . . ."17 The administrative process, as has been shown, creates order of a concrete variety, but it creates this order blindly and as an implicate of action--as, e.g., in rules and regulations issued to facilitate the accomplishment of a policy objective. In administration, emphasis is upon action, and action is always particular and local in its impact; action, that is, concerns the manipulation of this particular fact at this particular time and place to achieve this immediate objective. In action, the speculative ideals of policy are making contact with life in the concrete, involving life's aspects of both freedom and necessity; such adjustments as are made tend to be made on the basis of expediency in relation to the immediate goals of policy. The judicial process, on the other hand, looks toward a synthesis of speculation and experimentation in which an attempt is made "to make the thought life and the life of action consistent with each other. . . ."18

This synthesis means that the speculative ideals of policy must be evaluated in light of the administrative attempt to embody these ideals in fact, that the resultant administrative "order" must be evaluated in terms of the spec-

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<sup>17</sup>Jordan, Theory of Legislation, op. cit., p. 458.

<sup>18</sup>Ibid., p. 445.

ulative ideals of policy, and that both must be evaluated in terms of the requirements of the "good life."<sup>19</sup> This latter and ultimate requirement is similar, in legal theory, to the "jurisprudence of welfare" of the late Alexander Pekelis:

The real test is not by whom an order is given, or whether it is given in a general and impersonal form or on the occasion of particular litigation. The test is whether or not the order is predicated upon a maxim capable of acquiring that universality which characterizes law in its highest sense. Welfare jurisprudence should never attempt to escape this fundamental requirement.<sup>20</sup>

Both concepts are objective, legal applications of the Kantian principle that "I am never to act otherwise than so that I could also will that my maxim should become a universal law."<sup>21</sup>

To Professor Jordan, both the life of thought and the life of action must have identical ends, and the consistency which results from the judicial process will be expressed in a "system of practical maxims or rules which shall serve as patterns for further thought and action."<sup>22</sup> The legislative

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<sup>19</sup>This conception is not materially different from Dewey's view that "social conditions should be such that all individuals can exercise their initiative in a social medium which will develop their personal capacities and reward their efforts." John Dewey and James H. Tufts, Ethics, rev. ed. (New York: Henry Holt & Co., 1932), p. 276.

<sup>20</sup>Alexander H. Pekelis, Law and Social Action, ed. by Milton R. Konvitz (Ithaca and New York: Cornell University Press, 1950), p. 20.

<sup>21</sup>Immanuel Kant, Fundamental Principles of the Metaphysics of Morals, trans. by T. K. Abbott (London: Longmans, Green & Co., 1927), p. 18.

<sup>22</sup>Jordan, Theory of Legislation, op. cit., p. 445. This

act "becomes completed in the reflective process by which order is made immediately applicable to the facts of experience by having been reflectively reduced to the form of concrete maxims."<sup>23</sup> This order, the mind of the corporate whole, becomes the raw data for further speculation and experimentation as the legislative process continues in the evolution of natural-cultural life.

### Judgment as Conscious Experience

As has been stressed repeatedly, the legislative process in Professor Jordan's theory is the process by which life is ordered. It is not an artificial process, nor is it peculiar to the level of individuality termed "state." All of the forms of individuality are engaged in the making of public law,<sup>24</sup> and the process differs among the various instances only in the range of fact comprehended and the complexity of the order. Thus, "any form of life, which . . . objectifies in the form of experience, is both formally and materially an act of legislating will. . . ." <sup>25</sup>

As the speculative and administrative functions are identical in all the forms of individuality, so is reflective

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limits the "universality of maxims" temporally; i.e., they are "universal" at a given evolutionary stage.

<sup>23</sup>Ibid., p. 478.

<sup>24</sup>Supra, pp. 227-9.

<sup>25</sup>Jordan, Theory of Legislation, op. cit., p. 465.

adjudication the same function whether it occurs in the least or most comprehensive of these. As speculation is always the attempt to objectify purposes prior to their being experienced in the administrative process, adjudication is always intelligence reflecting upon the "meaning" of the experience. Professor Jordan argues, that is, that in so far as experience becomes conscious--in so far as we think about our activities--it characteristically is manifested in the reflective act of judgment.<sup>26</sup>

Judgment in any form of individuality, then, is experience manifested in consciousness as reflection. Professor Jordan feels that this functional statement of the act of judgment, divorced from such formal considerations as the structure of "courts," etc., has two implications that are important for the legislative process as a whole: (1) It provides a synthesis of the subjective and objective factors involved in that process, and (2) it furnishes conclusive evidence as to the continuity of nature (as including culture).

In the first case, Professor Jordan does not deny, as it may have seemed, the reality and importance of the sub-

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<sup>26</sup>This conception of reflection follows that of Dewey. Dewey viewed experience as ordinarily controlled by habit, which means experience is unconscious. "The function of reflective thought is to transform a situation in which there is experienced obscurity, doubt, conflict, disturbance of some sort, into a situation that is clear, coherent, settled, harmonious. . . ." John Dewey, How We Think, rev. ed. (Boston" D. C. Heath & Co., 1933), p. 100.



jective factor--passion, interest, etc.--in the legislative process. What he does deny is that these subjective factors are adequate as the ground of public order, as, for example, in a "compromise of interests." He admits that "justice always implies interests,"<sup>27</sup> but he emphasizes that "interests are never matters of principle, but merely the content of the law which orders them into a functioning system."<sup>28</sup> Interests, that is, are, as in the case at law, the "rights" of the litigants; the objective in the case is to do justice to these rights. Doing justice to rights presupposes, however, not compromise or the victory of one at the expense of the other, but the statement of the larger, public "right" which offers to both an opportunity of fulfillment.

Having justice done me or getting my right consists merely in having the locus of my characteristic function determined from the point of view of the objective whole. And the interest to be satisfied is the interest of the whole, the ultimate principle which governs the quality of an act and is at the same time the end in which the act is realized.<sup>29</sup>

The subjective factors, then, are the divergent viewpoints of the conflicting systems of fact. These may be expressed in the experience of the human individual as, for example, contrary motivations; in the case at law they are rep-

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<sup>27</sup>Elijah Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 360.

<sup>28</sup>Ibid., p. 361.

<sup>29</sup>Ibid.

resented by the litigants. The objective factor is "the comprehensible order of objective fact which must be there to give experience substance."<sup>30</sup> In the case at law, these factors are synthesized, ideally, in the verdict or ruling of the court. The court, that is, states the objective relations which are to prevail among and between systems of fact, and it is thus that the "reflective process as judicial is finally constitutive of and constitutional to reality as such."<sup>31</sup> The statement of these relations is the statement of the law; ultimately, then, as noted by Dean Pound, law "is neither wholly reason nor wholly experience. It is experience developed by reason, and reason checked and directed by experience."<sup>32</sup>

The second implication of judgment--experience manifested in consciousness as reflection--that is important for an understanding of legislation is its evidence of the continuity of nature. The act of judgment reveals that

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<sup>30</sup>Jordan, Theory of Legislation, op. cit., p. 468. This "comprehensible order of objective fact" must "be there" because the assumption of the intelligibility of experience --an assumption which the practical man makes without question--presupposes an ordered whole within which particular experiences can be made intelligible. The contrary assumption would be to accept contradiction as the law of life. While certain philosophers--as, e.g., Reinhold Niebuhr--have claimed to do this, the practical man never does and cannot.

<sup>31</sup>Ibid., p. 469.

<sup>32</sup>Roscoe Pound, quoted in Carl A. Auerbach, et al., The Legal Process (San Francisco: Chandler Publishing Co., 1961), p. 75.

the continuity of experience maintains itself while its reorganization is going on, and in working out the technique which renders this apparently contradictory situation possible, creates space and time and cause as the instruments to both continuity and growth, and order as the ground of reality as such.<sup>33</sup>

This is important, practically, for its demonstration that order does not depend upon a blind obedience to the past, as reflected in Anglo-Saxon jurisprudence in the rule of stare decisis. Thus, "adjudication is not simply a case of 'the law and the evidence' as repeated to infinity in precedent."<sup>34</sup> Adjudication is rather the evaluation of the purposes speculatively objectified in light of concrete circumstances as evidenced in the results of experimental attempts to embody these in fact. The administration of justice, in such situations, "is the determination of what is just,"<sup>35</sup> and the

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<sup>33</sup>Jordan, Theory of Legislation, op. cit., p. 468. Space, time and cause are categories derived from experience in its conscious manifestation in reflective thought, which categories become the grounds of order--i.e., they "furnish the substance of the vantage ground from which the whole of experience is seen as an order. . . ." Ibid. They are not, however, categories innate to the mind, but are derived from the consciousness of experience in reflection in the course of natural-cultural evolution. As life continues to evolve, these categories may be replaced by other categories (as, e.g., space-time) which will make possible a more comprehensive order. Indeed, in his last work, incomplete at the time of his death, Professor Jordan was engaged in an attempt to formulate categories of greater comprehension to subsume, among others, space, time and cause. Cf. Elijah Jordan, Metaphysics, ed. by Max H. Fisch (Evanston: Principia Press of Illinois, 1952), and supra, p. 123n. Highly tentative and incomplete, this work was not made an object of special concern in the preparation of this dissertation.

<sup>34</sup>Jordan, Theory of Legislation, op. cit., p. 455.

<sup>35</sup>Jordan, Forms of Individuality, op. cit., p. 316.

courts cannot evade their public obligation for achieving and maintaining justice by a blind obedience to precedent. In any case, the attempt to preserve "order" through subservience to precedent is self-defeating, because will is effective, and the result would be disorder rather than order. Change must be accommodated, either rationally or in chaos.

The desirability of strict obedience to the rule of stare decisis has been questioned, of course, by many others. While practicing attorneys tend to beatify strict adherence, probably only a minority of American jurists and jurisprudents would advocate such a policy on the part of the courts. As one jurisprudent has written,

the federal decisions under the Erie [Railroad Company v. Tompkins, 304 U.S. 64 (1938)] rule, of which several hundred have now been reported, show the difficulties of determining what the rule of stare decisis means with enough precision to apply it without the traditional safety valve, the authority of courts to create law interstitially.<sup>37</sup>

Mr. Justice Douglas has suggested that, in constitutional law, at least, "stare decisis must give way before the dynamic component of history,"<sup>38</sup> and Pekelis wrote that

it is too late in the day to advance the claim that no

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<sup>36</sup>With regards to the obligation of the courts to the policy of the legislature, see Dean Pound's essay and the comment thereon in re Professor Jordan, supra, p. 273n.

<sup>37</sup>Edwin W. Patterson, Jurisprudence: Men and Ideas of the Law (Brooklyn: The Foundation Press, 1953), p. 304.

<sup>38</sup>William O. Douglas, "Stare Decisis," 49 Columbia Law Review 735 (1949).

precedent should be overruled. As the Chief Justice of the United States has recently put it, "to give blind adherence to a rule of policy that no decision of this court is to be overruled would be itself to overrule many decisions of the court which do not accept that view." The real problem is not whether, but when, precedents should be overruled.<sup>39</sup>

And yet another student of the law has stated that each doubtful case, at least, requires an evaluation "of the advantages of adherence to precedent and the necessity for judicially planned social and economic progress to supplement legislative progress."<sup>40</sup>

Professor Jordan's view in this regard is not as extreme as it may at first seem. He recognizes, for example, that the law which results from the judicial process "is necessarily conservative in its outlook, since it is the instrument of the conservation of values of public life."<sup>41</sup> To be able actually to conserve these values, however, the courts must "allow conduct to develop flexible norms through successive adaptations to changing fact."<sup>42</sup> He would agree, then, that "judges make law by evolution rather than by revolution,"<sup>43</sup> but the law that evolves, as the order of the cor-

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<sup>39</sup>Pekelis, op. cit., pp. 22-3.

<sup>40</sup>Robert A. Sprecher, "The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied," 31 American Bar Association Journal 501 (1945).

<sup>41</sup>Jordan, Theory of Legislation, op. cit., p. 454.

<sup>42</sup>Ibid., p. 445.

<sup>43</sup>Patterson, op. cit., p. 575.

porate whole, must allow sufficient opportunity for action by all the forms of individuality. "[T]he special problem of the judiciary is to maintain the procedural compossibility of all persons in a system of conditions which permits of the fullest practical development of each."<sup>44</sup>

Professor Jordan felt that the fact that experience is reflectively manifested in consciousness demonstrates the possibility, and even the necessity, of order persisting through change, even as it assists in its progress. The judiciary, as the locus of the reflective consciousness of the corporate whole, or state, has thus a vital role to play in the continual ordering of the facts of life. Before this function can be discharged adequately, however, the judiciary must be freed from the domination of interest and reconstituted in keeping with the true nature of the judicial function. This implies a recognition of the status of this function within the corporate whole.

#### Judgment as Corporate

While it is obvious that the reflective intelligence that is active in the judicial process has its locus in human individuals (in the case of the courts, the judges), Professor Jordan argues that judgment either is or should be corporate in at least three respects.<sup>45</sup>

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<sup>44</sup>Jordan, Theory of Legislation, op. cit., p. 300.

<sup>45</sup>Professor Llewellyn, in an "afterword" to his ser-

In the first place, the "mind" of the judge is "made up" of the objective order of fact of which he is a constituent part. His intelligence can function only through the ideas and concepts--the categories--which are derived from the ordered fact of natural-cultural life. The fact is that the structure of the human "mind" is largely a reflection of the order that exists within life--a concept that is as old as Plato and as new as Erich Fromm.<sup>46</sup> The quality of judgment will be, in some degree, a reflection of the order that prevails in natural-cultural life. It is true, of course, that intelligence can envision a better order, but only speculatively; the reflective intelligence is limited largely to

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ies of lectures famous as The Bramble Bush, wrote in re appellate judges: "But lacking right consciousness of duty and above all of method, an appellate court is tempted into seeing the job primarily as one between the parties. Lacking full realization of the duty and the method, the law of leeways tends to lose its hold because it is not better guidance for the future but only disposition of the present case that is in the . . . judge's mind. Lacking full realization of the duty, the method, the traditions, the appellate judge can come . . . to see himself as free--and that way lies disaster. The bar, in its non-comprehension, has been shouting and cursing at the courts for twenty years now as 'departing from precedent' and 'without control' and 'with no sense of continuity.' With time, men can come to take seriously what they are told. For . . . the appellate judges know they move, they know the leeways in the accepted doctrinal system which they make use of. More, they know that they must make such use. What they therefore need, as well, is what the bar denies them: a sound consciousness of duty, limits, and high goal in the moving, and a sound consciousness of solid method." K. N. Llewellyn, The Bramble Bush (New York: Oceana Publications, 1951), p. 159. Professor Jordan would assert that this "duty" consists in an awareness of the corporate nature of judgment.

<sup>46</sup>Erich Fromm, The Sane Society (New York: Rinehart & Co., 1955).

the materials at hand--the ideals of policy and the concrete facts that have resulted from the active attempt to embody these goals in the actual order of life.

According to Professor Jordan, "nature [as including culture] is the mind's objectivity. . . ." <sup>47</sup> Its subjectivity--also "natural"--is its capacity for thought. Thus, "the thought process is the process of nature operating within and among the facts" of natural-cultural life. <sup>48</sup> It is in this sense that

a judicial decision is not a personal matter, when "person" refers to the natural individual. . . . The decision is a corporate synthesis of a great many factors, and often it is not possible to enumerate all the important elements that enter into it. <sup>49</sup>

The fact that his synthesis occurs within the "mind" of the judge does not alter its basic corporate nature. This is in close agreement with Judge Frank's contention that "in the last push, a judge's decisions are the outcome of his entire life-history," <sup>50</sup> including the facts as found in the trial.

<sup>47</sup> Jordan, Theory of Legislation, op. cit., p. 470.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., p. 456.

<sup>50</sup> Frank, Law and the Modern Mind, op. cit., p. 115. Judge Frank's view on this point is so near that of Professor Jordan as to justify quoting the passage that precedes the above. He asserts that the most important factors in a judge's decision "are the most obscure, and are the least easily discoverable--by anyone but the judge himself. They are tied up with the intimate experiences which no biographer, however sedulous, is likely to ferret out, and the emotional significance of which no one but the judge, or a psychologist



The second respect in which judgment is or should be corporate lies in the fact that the public function of the judge obligates him to the corporate whole. Even in civil suits, the judge appears not as the arbiter of interests, but as the agent of the corporate whole to represent the "interest" of the whole with regard to the particular controversy. In the words of one professor of law,

while public policy is the basis of all law, it is sometimes forgotten that it lies at the base of every judicial decision. All that it means is that "we the people" are a third party to every case in litigation.<sup>51</sup>

Professor Jordan argues that the justice which the judge presumably dispenses "is a type of order in personal relations considered objectively, and not a private property of those who can get their interests satisfied."<sup>52</sup> To the extent that the judge is influenced by considerations of subjective interest, either his own or of others, he fails to discharge his public obligation.<sup>53</sup>

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in the closest contact, could comprehend." Ibid., pp. 114-5.

The Freudian overtones are more apparent than real; actually, his psychological views are much closer to Fromm than to Freud, as is increasingly apparent in his later work, Courts on Trial, op. cit.

<sup>51</sup>Leon Green, "The Study and Teaching of Tort Law,"  
34 Texas Law Review 15 (1956).

<sup>52</sup>Jordan, Forms of Individuality, op. cit., p. 361.

<sup>53</sup>This could be stated as the need for objectivity on the part of the judges, based upon an understanding of the public interest. While recognized by most jurisprudents, few have any panaceas for achieving it. Professor Jordan's solution, primarily, is to improve the order of the natural-cultural world that "makes up" the mind of the judge, particu-

As the agent of the corporate whole, the act of the judge which characterizes his function is

the synoptic judgment in which an institution is given full reality within the system of institutions, the act which apportions and appropriates institutions as wholes of life to complete consistency with each other in the political body.<sup>54</sup>

The purpose of the corporate whole, of which the judge is the agent, is just this ordering of institutions. To deny full reality to an institution that embodies a significant purpose or value damages the order of the whole by depriving it of this value to assist in the further development of natural-cultural life. As Professor Patterson has written, "every law . . . is an attempt to control the future,"<sup>55</sup> and the future cannot be controlled successfully by protecting past privileges.

This leads to what is by far the most important way in which judgment is corporate: the law that results is the order of the corporate whole. In Professor Jordan's view, "the judicial process is one of the 'making up' of the corporate mind. . . ." <sup>56</sup> The order of the natural-cultural

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larly through the elimination of property as "private"--a solution not entirely peculiar to Professor Jordan.

<sup>54</sup>Jordan, Theory of Legislation, op. cit., p. 148.

<sup>55</sup>Patterson, op. cit., p. 98.

<sup>56</sup>Jordan, Theory of Legislation, op. cit., p. 456. His concept of law as corporate mind is discussed in detail, supra, pp. 116-54.

world is corporate, and not the "possession" of any given individual or interest. It is in reflection that intelligence, will we nill we, gives its approval to this order of life. Thus, "the legislative act operating as the corporate judgment is the principle of unity and order in experience--such unity and order, that is, as there is."<sup>57</sup> Its result is law.

The degree of unity and order in experience, therefore, is the degree to which life has been brought under law--municipal, international, or whatever. Professor Jordan would agree with Professor Kelsen, for example, that there should be a "theory of law" broad enough to comprehend international law along with domestic or municipal; he would disagree with the latter's attempt to base this law on conflict.<sup>58</sup> In Professor Jordan's view, this is equivalent to basing the theory upon its exceptions--that is, upon the instances in which the dynamic order which the law represents has not been perfected. As has been observed by other students of international relations, the "balance of power" is a poor substitute for the order of law. To Professor Jordan,

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<sup>57</sup>Jordan, Theory of Legislation, op. cit., p. 478.

<sup>58</sup>Hans Kelsen, General Theory of Law and State (Cambridge: Harvard University Press, 1945). Professor Kelsen seems primarily to be attempting to find a basis for international law in the absence of effective sanctions--an essential element of law in the positivistic conception. Professor Jordan denies that sanctions are any part of law; to him, law carries its own "authority," and the use of sanctions is testimony to the quality of the law.

power should be expended in the realization of human purposes --that is, in the development of natural-cultural life--and not in the negative attempt to "check" power.

Under the control of subjective interest the judicial capacity has little chance to perform its proper function. This is true whether the law in question be "international," and the interest a national one, or domestic, and the interests economic, religious, etc. Ultimately, of course, law is all of one piece, and without distinctions such as "international" and "domestic."

With reference to economic interests, the one he sees as dominant in the modern world, Professor Jordan writes that "all the courts can do under economic domination . . . is to interpret and clarify for the economic motive the principles of policy which that motive has legislated in its own interest."<sup>59</sup> Rather than an order of life, the result is merely the use of public agencies--in this instance, the courts--to protect and defend the status quo; maintaining the status quo yields not order but--ultimately, because will is effective--chaos. The truth is that the acts of persons in conflict represent the "will tendencies" of the persons involved, so

no solution short of one which promises complete realization for all the acts will effect the equilibrium necessary to the continuance of modern social life. It is in this sense that peace, as a static condition of 'law

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<sup>59</sup>Jordan, Theory of Legislation, op. cit., p. 433.

and order,' is the ultimate goal of legislation from the judicial point of view, for the special problem of the judiciary is to maintain the procedural compossibility of all persons in a system of conditions which permits of the fullest practical development of each.<sup>60</sup>

Interest, of course, operates in a negative manner to restrict and restrain rather than positively to fulfill purposes. It is private and exclusive, and cannot serve as an adequate substitute for legal principle.

Judgment is corporate, then, because relations among persons are public relations. For this reason, conflicts to be adjudicated between persons are best stated in terms of the functions of the persons involved. Thus he writes that "the derivation of justice is . . . the determination of the characters of personalities as personalities function with reference to each other and to objective circumstances in civil and legal relations."<sup>61</sup> But because of the "objective circumstances," the function of a person toward some other person is ultimately a function within the whole, so that, as noted earlier, "having justice done me or getting my right consists merely in having the locus of my characteristic function determined from the point of view of the objective whole."<sup>62</sup>

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<sup>60</sup>Ibid., p. 300.

<sup>61</sup>Jordan, Forms of Individuality, op. cit., p. 407. The term "persons" is not, of course, restricted to natural persons, but applies to other forms of individuality as well.

<sup>62</sup>Ibid., p. 361.

Judgment is corporate, then, in that (1) the mind of the judge obtains its content from the objective, corporate world, (2) the judge is the agent of the corporate whole, and (3) the judge determines the order that will prevail within the corporate whole. The analysis applies, of course, to all of the forms of individuality.

The quality of the results of the judicial process will depend largely upon the quality of the order that prevails--i.e., as given and as the result of action to achieve new purposes, objectified as ends by the speculative intelligence. This order operates through and is mediated by the reflective intelligence, however, making the qualifications of judicial officers an important factor in the result.

#### The Qualifications of Judicial Officers

The qualifications of the judicial officer are all implicit in the statement of his function: the judicial function is the reflective intelligence operating upon and among the facts to evaluate the order therein. Thus, "the judicial act in its highest form is the act of the thinker,"<sup>63</sup> so the first requirement is a high degree of intelligence.

The capacity of a person as a thinker--that is, the "free-ness" of his intelligence--is not, however, merely a function of his innate mental capacity; the chief limiting

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<sup>63</sup>Jordan, Theory of Legislation, op. cit., p. 478.

factor is blindness caused by the dominance of subjective factors such as interest, passion, etc. The judge must reflect the law--the objective order of reality--including therein those elements of fact that are given immediately in experience, the ideals of policy, and the ultimate ideal of the "good life." Professor Jordan argues, with most other students of the law, that "in order appropriately to impersonate the law and thus to become effective for justice, the jurist must depersonalize himself."<sup>64</sup> Failure to do so allows interest to become dominant in the judicial process, leaving "justice" as the Thrasymachian "interest of the stronger." The net result of such a development, in a period when the economic interest is the stronger, has been depicted in the late Benjamin Twiss' portrayal of "How Laissez-Faire Came to the Supreme Court."<sup>65</sup>

Ultimately, of course, ignorance is the source of inadequate thought. The implication of this is that, for the judge as well as for the speculative legislator, the necessity of making law becomes the obligation to know. In Professor Carpenter's words,

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<sup>64</sup>Ibid., p. 459.

<sup>65</sup>Benjamin R. Twiss, Lawyers and the Constitution (Princeton: Princeton University Press, 1942), quotation from the subtitle. He demonstrated the affinity of lawyers--particularly the American Bar Association--for the dominant business interests, and then proceeded to show how these interest came eventually to dominate the Supreme Court in the latter years of the 19th century.

jurisprudence, as the social science which deals primarily with the law is under special obligation to avail itself of all the help it can obtain from the other social sciences. Without co-operative effort among the social sciences, the aims and purposes of the law at any particular time cannot be formulated intelligently.<sup>66</sup>

As Professor Jordan phrased it, "the great judge is then the judge whose mind comprehends all the factors of social, political, economic, religious, in short, all the practical factors of experience that are involved in the case as presented."<sup>67</sup>

In the final analysis, then, the qualifications of the judge must be such as will enable him to dispense justice. And, in this regard,

law as policy, law as administrative utility, law as reflective refinement and test in the judicial process, all must in the end square with the ideal order of welfare, which, as psychological experience, is the felt aequitas of experience present in possibility whenever there is an experience of any type or any degree.<sup>68</sup>

But because our sense of rightness is based largely upon the prevailing order of life,<sup>69</sup> the mind of the judge must be one that is amenable to change, one that appreciates the evolutionary aspects of life, one, in short, that is well-

<sup>66</sup>William Seal Carpenter, Foundations of Modern Jurisprudence (New York: Appleton-Century-Crofts, 1958), p. 223.

<sup>67</sup>Jordan, Theory of Legislation, op. cit., p. 457.

<sup>68</sup>Ibid., p. 142. The similarity of Pekelis' "jurisprudence of welfare," noted supra, p. 324, is especially apparent here.

<sup>69</sup>Jordan, Theory of Legislation, op. cit., p. 140.



versed in all the facets of life as presented in experience.

Professor Jordan seemed skeptical that present legal training will be able to provide this type of intelligence. He wrote, for example, that

the lengths to which the injunction is carried is a confession of the inadequacy of the substance of the law and of the unimaginativeness of the judge and his [in]-ability to make up in discretion in application of law what is wanting in its substance.<sup>70</sup>

But the judiciary is limited, by the nature of its function within the legislative process, as to the positive contribution it can make directly to the improvement of the order of life. What it can do, and what is the fundamental problem of constitutional law for the present, is to find a new legislative agent to replace the "owner," the present legislative agent,<sup>71</sup> "for a constitution or polity in which the principle of property has been superseded. . . ." <sup>72</sup>

#### Notes on Judicial Procedure

Professor Jordan's entire argument, with reference to the political process, is that it is not an artificial process; the legislative process is inherent in the process of natural-cultural life.

[T]he mere fact of creative activity sets the problem of legislative control, that is, the problem of the deriva-

<sup>70</sup>Jordan, Forms of Individuality, op. cit., p. 305.

<sup>71</sup>Jordan, Theory of Legislation, op. cit., p. 476.

<sup>72</sup>Ibid.

tion and definition of law in situations of alternatives or choice, and raises the question as to whether or not the capacities which recognize the problem through the processes of definition, may not also be directed toward its realization.<sup>73</sup>

That is, life itself requires "what is recognized as a deliberate and formal effort at a synthesis of the principles of the recognized laws of life with the actualities of life in experience, as the facts of experience are rationalized in the 'case' at court."<sup>74</sup>

Thus, the judicial procedure, the reflective evaluation of experimental action seeking to embody ends, is a necessity of nature. Its highly formalized institutionalization at the level of corporeity termed "state" is merely the necessary result of the range of fact comprehended within that order and the complexity of the order.

Professor Jordan compares the legislative process with a scientific experiment. The speculative phase is the deriving of hypotheses, the experimental action is the testing process, and the judicial phase is the evaluation of the results. In the more formalized machinery of government, the reflective intelligence institutionalized as the "court" is not present at every stage of the experiment, as it would be in a laboratory, so the judicial procedure here is largely

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<sup>73</sup>Ibid., p. 452.

<sup>74</sup>Ibid.

an attempt to recreate the experiment in the abstract to determine inadequacies therein, and otherwise to synthesize ideal with action. Or, again,

in its fullest meaning the court process is a dynamic representation or re-enactment of a system of social relations which serves to enable the judge and jury the more readily to visualize the "state of fact productive of legal consequences" pretty much in the same way that the "conditions" of a geometrical problem may be formulated that the law or principle of its solution becomes obvious as the relation that holds the conditions together and gives them unity of meaning.<sup>75</sup>

Thus it is that the judicial mind "continues and extends the hypothetical attitude until it as the act of judgment makes contact with the speculative act as engaged in the systematizing of ends."<sup>76</sup>

Since the judicial process is so important in Professor Jordan's theory--in some ways even more so than the other phases of his legislative process--one legitimately could expect to find a detailed critique of the process as presently constituted, after the manner, e.g., of Judge Frank. One actually finds, on the contrary, the assertion that "the formal court procedure is nevertheless a highly effective technique for the definition and clarification of facts."<sup>77</sup> Where the stage is set for a devastating critique of, for example, the adversary system of procedure, one finds

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<sup>75</sup>Ibid., p. 448.

<sup>76</sup>Ibid., p. 455.

<sup>77</sup>Ibid., p. 446.

instead the acceptance of a highly idealized version of the contemporary judicial process, to wit:

the effect of the layout of the various court functionaries, judge, jury, witness, attorney, etc., together with the formalities in language and address, in general what one might call the custom of the institution, tend to add to the type of judgment arrived at a sort of aesthetic influence which perhaps has much to do with the quality of justice.<sup>78</sup>

Judge Frank, on the contrary, makes a convincing argument that the present judicial process, and particularly the adversary system, is a relic of laissez-faire individualism, which Professor Jordan certainly did not endorse, and that "the partisanship of opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it."<sup>79</sup>

Professor Jordan nowhere denies the reality of "interest"; his objection is that subjective interest has replaced objective principle as the grounds of order in human relations--i.e., in law. Judge Frank's analysis supports the view, first, that the present system made it possible for interest to assume this dominant position, and, second, that interest--primarily the economic--has reworked the system to conform to its own demands upon the process. Judge Frank's analysis of present judicial procedures, in light of Professor Jordan's critique of interest, leads to the conclusion

<sup>78</sup>Ibid., p. 448.

<sup>79</sup>Frank, Courts on Trial, op. cit., p. 81.

that these procedures, as well as if not moreso than the theory of legislative representation, have yielded the dominance of the stronger interest rather than the realization of the public welfare.

This shortcoming, of course, does not affect Professor Jordan's functional analysis of the judicial process, at the level of abstraction at which it usually was conducted. It does suggest, however, that he should have left it at that level, leaving it to others more familiar with actual judicial procedures to draw out the implications of his functional approach for the organization and procedures of the judiciary.

His analysis does contain such implications. Besides the adversary system, he lays also the foundation for a critique similar to the other prong of Judge Frank's attack; the jury system. This system, it seems, rests primarily upon the distinction between "facts" and "law." In Professor Jordan's view, it is logically erroneous to attempt to separate facts and values in evidence; "psychology finds the two elements combined in all aspects of the subjective life, with the almost perfect instance of their unity in perception, the capacity upon which the 'evidence' rests."<sup>80</sup> Attempts to exclude value-facts, according to his analysis, merely with-

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<sup>80</sup>Jordan, Theory of Legislation, op. cit., p. 446.

draws them from the realm wherein they may be examined critically; it does not prevent their operation in the decision-process.

Professor Jordan's abolition of the negative concept of law--its use primarily to penalize--also would seem to support the abolition or extreme modification of the jury system, as would his contention that "facts, when they become evidences which justify conclusions, are active as ideas. The reflective process thus deals throughout with ideas."<sup>81</sup> The question, then, would seem to be one of relative competence to deal with ideas, but Professor Jordan does not raise the question.

Because facts occur in the judicial process as "ideas," furthermore, "the analysis and distinction that are necessary have to be done . . . as a process of inference."<sup>82</sup> Inference, of course, is an art in itself, but this would seem to have, for Professor Jordan, no impact upon the organization of the judicial machinery.

The reflective intelligence requires a milieu that facilitates the quiet deliberation necessary to the successful completion of its task, yet there is no mention by Professor Jordan of the manner in which the glare of public

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<sup>81</sup>Ibid., p. 464.

<sup>82</sup>Ibid., p. 449.

opinion, which he condemns in other instances,<sup>83</sup> is focused upon contemporary court proceedings. It almost could be argued, for example, that the attempt to prevent the use of the court to wreak the vengeance of the king has led to its use as an instrument for the venting of the frustrations of the masses. Such an argument would have been consistent with Professor Jordan's general approach, but he nowhere suggests such a line of judicial criticism.

It must be noted, however, that Professor Jordan does not emphasize the organizational implications of any of the three phases of the legislative process. Such comments as he makes upon the organization and procedures of the judicial phase are, probably, unfortunate. But his uncritical acceptance of extant judicial procedures does not damage the functional analysis. In all fairness, furthermore, it should be noted that he looked upon such matters as the organization and procedures of the judicial institution as proper matter for the experimental method.

#### Conclusion

In terms of function, and divorced from organizational and procedural considerations, "the judicial process is the process of testing the principles of policy as worked out by the speculative motive in legislation, in their relations

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<sup>83</sup>Ibid., p. 458.

to maxims of action as established experimentally in administration."<sup>84</sup> Since each reflective act gives, by implication, intelligent approval to the resulting order of life, every such decision is a decision of constitutional law.

In the judicial process the law appears therefore as a perfected and mature agent of the authority which functions as will in the public life, since it is the soul of purpose as conceived in speculation and as given corporeity through the implementation which it gets in the administrative process.<sup>85</sup>

Thus law in its final form--that is, as it results from the process of reflective adjudication--represents the wholeness and unity of life.

The disunity which actually characterizes life is testimony to the poor quality of the law. The fact is that "men can live by the law when the law is, as it should be, their natural way of life."<sup>86</sup> He feels, further, that the disunity of life is largely "a product of mal-administration, since the larger aspects of policy have been pretty thoroughly worked out and accepted as final in form since Plato."<sup>87</sup>

This mal-administration is, in turn, the result of a faulty political and legal theory; the theory is faulty because, in a rational order, "men do not act naturally upon

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<sup>84</sup>Ibid., p. 441.

<sup>85</sup>Ibid.

<sup>86</sup>Jordan, Forms of Individuality, op. cit., p. 293.

<sup>87</sup>Jordan, Theory of Legislation, op. cit., p. 441.



objects and against persons."<sup>88</sup> The assumption that they do led to the conception of property as "private," and the status of property is the one important principle of policy that has yet to be given final speculative determination. With the status of property rescued from the notion of "privacy," and reduced to constitutional principle, it will be possible to perceive that, in a rational state, which is to say under law, "men act with each other for things."<sup>89</sup>

The judgment that wills the unity of the social order, the legislative act issuing in a judicial decree, declaring the law of the order of the whole, is the ultimate of the practical life and the ground condition of all rational experience and of all significant existence. As such a judgment, the ultimate act of practice has its origin in speculative hypothecation [sic] of policy or polity; it has its reality progressively embodied and incorporated as objectivity in the administrative or experimental process; and its issue as end in law valid of the whole with the reflective comprehension of its instance in the universal in the constitutional decision. The practical act is thus the wholeness of life asserting its authority over the fragmentariness of experience and subjecting it to order under law.<sup>90</sup>

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<sup>88</sup>Jordan, Forms of Individuality, op. cit., p. 293.

<sup>89</sup>Ibid.

<sup>90</sup>Jordan, Theory of Legislation, op. cit., pp. 481-2.  
Italics added.

## CHAPTER XI

### CONCLUSION

Whatever may be said of the philosophy of Professor Jordan, it at least must be admitted that, despite his difficult language, he was attempting to deal with the problems of the work-a-day world. Not angels on the points of needles, but the process of production, the mechanism of distribution, politics and law--these and other phases of the life experience were his concern. More basic, however, was his concern for life itself, in both its natural and cultural aspects, within this mechanism and this process. The time had come, he felt, to ask whether the modern world, as in a certain period during the middle ages, had "allowed the institutional conditions of life to languish almost beyond recovery."<sup>1</sup> He clearly felt that it had.

The fact that these conditions of life had been allowed to languish does not mean that institutional factors have ceased to be important. On the contrary, this had been the assumption of the individualists, and practice based up-

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<sup>1</sup>Elijah Jordan, Theory of Legislation, 2d ed. (Chicago: University of Chicago Press, 1952), p. 265.

on this assumption had allowed institutional forms to "grow up" without attention, control, or direction, in a world where man's capacity for intelligent thought was limited by the dominance of subjective "interests." Life, that is, had crystallized into an organizational existence without adequate concern for the nature and function of the organizations. The fact, according to Professor Jordan, is that life does become embodied in institutions; the question is whether man retains the capacity to control these institutions, or becomes himself merely a part of their content. It is the perennial question concerning institutions: Is the sabbath made for man, or man for the sabbath?

He believed, then, that the point had been reached where human control, which means intelligent control, over the forces of life had to be asserted--if, indeed, it ever was to be asserted. In fact, he was by no means certain that the point had not been passed; he at times seems to suggest that the only answer lies in a destruction of the old institutions. By and large, however, his approach was what political scientists would term "reformist": he was appealing to men to assert their control over the institutional forces of life.

Before this control can be asserted, however, he suggests that the forces themselves must be identified and understood. John Bowle, an English historian of thought writes:

modern research, as well as political experience, sees human society heavily controlled by forces atavistic, instinctive, to logical analysis often blind, yet for that reason perhaps more in harmony with the mysterious tides of life.<sup>2</sup>

Professor Jordan would agree with all of this statement except the concluding faith--unless the "mysterious tides of life" be taken to include the "death" or dissolution of society and the culture that is both the society's creation and the condition of its continuance. His approach was to attempt to reduce the degree of atavism and blindness through the construction of more adequate categories to be used in logical analysis, since the results of analysis can be no better than the categories which are utilized as its beginning point. If, therefore, the forces of life are blind to logical analysis, the positive answer is to reconstitute either the logic or the categories of the logic. While admitting the desirability of the former from the point of view of the requirements of ultimate intelligibility, Professor Jordan chose to attempt the latter. As he was the first to admit, this procedure does not eliminate the atavism for the simple reason that the facts of growth cannot be comprehended within the categories of logic as presently constituted. What is true of growth is true also of action; Professor Jordan seems to accept the Parmenidean demonstration, supplemented by the Humean critique of causality, as conclusive.

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<sup>2</sup>John Bowle, Western Political Thought (London: Methuen & Co., 1961), p. 3.

Rationalism in an Age of Relativity

In the first instance, then, Professor Jordan's philosophy may be characterized as an attempt to reconstitute rationalism under the objective conditions of an age of relativity. It would seem to require only a minimum of reflection to realize that the developments in modern physics have been paralleled, and we think preceded, by similar developments in social theory. The "human nature" which seemed at least potentially discoverable in the time of Newton has been fairly well identified as culture. "Human nature" is, therefore, increasingly defined in terms of the culture concerned when this nature is supposed to mean something other than the structure and function of the biological organism. The problem has been, in social theory as well as in modern physics, one of establishing new foundations for a more accurate view of reality.

In some respects the problem facing contemporary social theory is similar to that which faced the Greeks following the breakdown of the more-or-less stable and seemingly understandable milieu of the city-state. Professor Jordan actually approaches the problem in a manner reminiscent of the Early Stoa, assuming, as did the Stoics, that "the universe behaves in accordance with laws the human mind can fathom."<sup>3</sup> But where the Stoics viewed this universe as a closed

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<sup>3</sup>W. T. Jones, A History of Western Philosophy (New

system, Professor Jordan does not. The French proverb, "le plus ça change, le plus c'est même chose," is essentially a Stoic attitude. Professor Jordan accepts change, as evidenced in the growth-process of evolution theory, as a fundamental fact of life.

But change is manifested not only, or even primarily, in life as organism. Change is also a characteristic fact of life as cultural, and this includes the attributes of life which customarily are termed "civilization." It includes, for example, the various forms of social organization--the family, the state, the industrial corporation. The attempt to understand human nature must be, at bottom, an effort to understand culture and cultural change.

Since he accepts the fact of change as basic, and views the categories of logic as not adequate to comprehend change, it may be said that he also accepts what one political theorist has described as the "logical gulf" between "is" and "ought."<sup>4</sup> The logical gulf, in Professor Jordan's view, is the act, or evolution, or growth, or change. But the fact that the act is a "logical gulf" between present fact ("is") and ended fact ("ought")--which means merely that action cannot be comprehended within the categories of logic--does not

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York: Harcourt, Brace & Co., 1952), p. 268.

<sup>4</sup>Arnold Brecht, Political Theory (Princeton: Princeton University Press, 1959), pp. 126-8.

mean that logical method is legitimate only on the "is" side of the gulf. It does mean that life is denied the certainty which certain rationalists--notably the Thomists, the Marxists, and the laissez-faire individualists--would like it to have.

Professor Jordan attempts to construct logical categories for both sides of the gulf; he uses, for example, "purpose" for the "is" side and "end" for the "ought" side. But more basic than this, he attempts to construct categories to explain the conditions of getting from one side to the other. These conditions he refers to as the "logical grounds of action," or will.

Will, then, is the logical category which refers to a system of fact incorporating within itself a purpose. When this purpose is objectified as an end, and becomes the organizing principle of the system of fact, a form of individuality results, which means that the will--the system of fact incorporating within itself an efficaciousness--has been identified in terms of its function within the corporate whole. This corporate whole is ultimately the universe, postulated as ordered.

The identification of will, which presupposes the objectification of purpose, is the crucial factor. Existing only in potential, purpose can be known only through the

speculative intelligence. This speculative intelligence is then the will of the natural person. That is, the "mind" of the individual is "made up" of the objective system of fact which includes the individual as organism; but one of the attributes of the individual as organism is intelligence--the capacity to envision a "better" order among the objects which furnish the content of his mind. The identification of will, then, occurs through the synthesis of the individual will--as intelligence--with the institutional will--as efficaciousness.

In a changing world, men can participate in this change--as opposed to being the raw matter of the process--only through some conception of where the world is going. The engineer would have a difficult time designing a street without some conception of what the end, "street," would be. The street now exists only in the active contemplation of the engineer, and is separated from the street as it will be actualized in the end by the gulf of action. The construction process cannot be comprehended within the categories of logic; but the speculative intelligence can specify the "grounds" of the process--that is, specify the number of men, the amount and kind of material, and propose an arrangement of these that will accomplish the end, or construct the street.

But, it may be said, "street" is an end which the engineer has experienced in his contact with other streets, etc.



So, Professor Jordan replies, are other ends. Ends are not manufactured out of nothingness. Rather, they are values emergent within a culture which are seized upon as conducive to the further development of natural-cultural life. They are arranged, by relating them to the whole of End (the "good life"), as a system of ends conceived as the objectives of human striving.

To build a street, or to achieve the end, the instruments to action--human and material--must be ordered in a certain manner; the will, that is, must be identified as a form of individuality. This is the only possible factual link--itself not certain--between purpose and end. Thus it is that "the individuality [is] the real within which the distinctions between purpose and end, law and subject or legislator, and all other distinctions are real."<sup>5</sup>

Where logic cannot span the gulf between is and ought, therefore, the active intelligence can work on both sides of the gulf. It can analyze present fact to discover emergent purposes as values in natural-cultural life; it can locate these purposes as ends within a system of ends--the End of the corporate whole; it can then determine the arrangement of fact (the grounds of action) most conducive to the realization of the end in fact. This ordering of fact toward ends

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<sup>5</sup>Elijah Jordan, Forms of Individuality. (Indianapolis: Progress Publishing Co., 1927), p. 433.

is the political process, and it is the political process whether it is done for the social whole through the formal agencies of "government" or by governments called "corporations" or "families" or "churches" or "bosses."

The important thing, of course, is to assure that all wills are performing, or are at least free to perform, their public functions. In individuals, this means the freedom to think, with all that this implies; in institutions, it means the freedom to act. In both cases, freedom requires the elimination of interest as the guide for behavior--verbal or material. In Professor Jordan's view, the chief obstacle to the elimination of interest is the doctrine of "private" property.

#### Description or Prescription?

A question which seemingly is raised about any theory of the political process is whether the theory is descriptive or normative. That is, does it attempt merely to explain what does happen, or does it prescribe what "ought" to happen? In social theory, this question frequently becomes: Does the theory offer a means of analysis only, or does it pretend to offer a guide for human practice?

From Plato and Aristotle, to Thomism, to individualism, to Marxism, most "great" theories of the political process have attempted to do both. These theories assumed, in

other words, that what does in fact happen can be explained only upon the basis of an understanding of what "ought" to happen. The value question in political science reflects this controversy; here the question is whether the political scientist merely should describe social reality or whether he ought also to prescribe.

From the point of view of cultural philosophy, the answer to this question would seem to be that successful theories necessarily do both. The theory, that is, must offer an adequate explanation of reality to merit consideration; if its explanation is more reliable than previous theories, it eventually will displace them and become part of the cultural symbolism through which reality is interpreted. As such, it necessarily will affect the realm of practice. The political scientist's disavowal of concern with the realm of practice may or may not be legitimate; what he cannot disavow, from this point of view, is his responsibility for the theories which he has fashioned. The extent to which Bentley's attempt "to fashion a tool" has become normative offers support for this view.<sup>6</sup>

Professor Jordan frankly attempted to both prescribe and describe. This is but to say that he attempted to build an adequate practical philosophy as well as an adequate so-

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<sup>6</sup>Cf. supra, pp. 254-5.

cial theory. This was necessary, in his view, because the concepts of individualism, which still dominate the realm of practice, are no longer sufficiently reliable guides to the nature of social reality. The attempt to act in the present upon the basis of theories from the past he regarded as dangerous in the extreme.

But while it can be argued, from the point of view of cultural philosophy, that theory ultimately functions in both capacities, these two functions can be distinguished for the purpose of evaluation. Thus, while Plato and Aristotle had little effect upon the development of the city-state, they are important as instruments to use in the analysis of that system. St. Thomas may offer an explanation of his social milieu even though the system he envisioned never existed in fact and was to be further disrupted by the beginnings of nationalism and individualism. By the same token, Professor Jordan's system may have an importance that cannot be measured by the extent to which his work will serve as a handbook for statesmen, nor even by the extent to which it becomes part of the cultural symbolism upon the basis of which these statesmen act.

It is this importance that we have tried to suggest throughout our analysis. He offers a systematic framework consistent with much that is being done by other, more specialized analysts of society and social processes. This, it

seems, is far more important as a means of establishing the validity of his analysis than, for example, attempts to trace his ideas to their sources.

### A New Synthesis?

The first chapter of this study began with a quotation from Professor Jones to the effect that there is no modern synthesis of the problems with which philosophy historically has concerned itself. Whether Professor Jordan offers such a synthesis depends, in large part, upon one's conception of the views that must be included within the synthesis, and whether the synthesis is required to be a closed system. Professor Jordan seems to accept, for example, the idea that the classical mind-matter problem has been pretty well resolved by modern science. There seems little question, furthermore, but that his synthesis would be rejected by most theologians.

He does offer, nonetheless, a meaningful framework within which many of the dominant interpretations of reality can be encompassed. The element of risk, which has been emphasized by the existentialists, is clearly apparent in his interpretation of action. The epistemological concerns of the logical positivists are more or less assumed by his approach. These are only elements within the system, however, which runs counter to their exclusionist claims. Even more basic than the element of risk, in other words, is the fact

that risk is encountered in action. Since, in Professor Jordan's analysis, the possibility of action presupposes an end, without which it is mere movement, the risk occurs within a framework that is rational and therefore knowable.

From our reading of Professor Jordan, we conclude that his basic assumption is that which we have termed, in this study, the concept of nature-culture. As life has evolved, it has evolved instruments to facilitate the co-adaptation of organism to environment and environment to organism. One such instrument is intelligence, the means by which man becomes a culture-building animal. Culture, then, is natural, evolving with life. The intelligence builds culture through its attempt to understand the universe and the status of man within it, and then to fashion tools to facilitate the further development of life. The concepts of evolution and nature-culture are, indeed, such tools; the most recent essay in philosophy is the descendant of primitive man's first effort to shape his environment to his own uses.

Professor Jordan must, we suppose, be classed as a rationalist, but so to classify him strains the term almost to the breaking point. He assumes only, that is, that the assumption of an ordered universe is preferable to the contrary assumption, which, indeed, is fatal. The assumption of order is more consistent with the experience of man, and, indeed, it is in this experience, reflected in intelligence

as consciousness, that man has derived the (cultural) canons of rationality. When and if better, because more reliable, canons are derived, they, too, will be derived through intelligent reflection upon experience.

The order which he assumes, then, is of an "ideal" sort. Just as the order assumed by the biologist presupposes the organism's use of the characters evolved by the organism to facilitate the co-adaptation of organism and environment, so the order in human life presupposes the fullest practical use of the intelligence characteristic of this form of life. Until such time as intelligence is utilized in its full capacity to assist in the ordering of life, order must remain ideal. Intelligence, as the means to life for the human species in that survival requires its use in some degree, is also the means to the "good life."

Within this basic framework, Professor Jordan sets out to build a philosophy that will incorporate the best of what nature-culture--science, philosophy, art, etc.--has to offer in a consistent system. In a manner reminiscent of Plato and Aristotle he places the content of life squarely within the political process; the polity is ordered life, and the political process is the ordering of life.

He accepts evolution as the scientific concept referring to change or growth in natural-cultural life (recog-

nizing that physics may offer, at least potentially, a more fundamental explanation). Evolution occurs, however, only within a system of fact--i.e., fact evolves. Therefore he uses the term will to refer to a system of fact incorporating a propulsive tendency (purpose). This will, or system of fact incorporating a purpose, is a form of life--a form in which life incorporates itself during the evolutionary process. There are three kinds, or levels, of these forms, each of which he refers to by a different term. The first, referring to that form which incorporates the smallest range of fact, is the human individual; the second, which is most comprehensive, is the state; the third, referring to all intermediate forms, he calls simply the corporate institution. Purposes, or growth-tendencies, may and customarily do have their locus in any and all of these forms.

The function of intelligence, in the ordering of natural-cultural life, is to objectify these purposes as ends, and order the fact in such a manner that the efficaciousness of will may result in their achievement as additions to the fact ordered within the polity. Because objectification is speculative, and because of the risk involved in action, these must be followed by reflective evaluation. This is the political process, occurring in all of the forms of life.

The process of ordering systems of fact to the accomplishment of ends Professor Jordan terms individuation. It is



in terms of its function within the whole of fact that a particular system of fact is identified as an individual. The administrative process is carried on by these active forms of individuality--the corporate institutions.

Such agencies, then, as armies, police forces, "regulatory commissions," and the like, are no part of the political process, but a testimony to the inadequacy of the order which results from that process. The law should be its own authority, as it would be in a rational state.

Such negative enforcement agencies are necessary, in Professor Jordan's view, only because the purposes which emerge during the course of the evolutionary process are blocked by the faulty order which prevails in life, whether this order be embodied in custom, statute, or "constitution." Law should be permissive in all of these manifestations; it presently takes the form, all too often, "Thou shalt not." This is to say that the order of life should be dynamic, an ordering toward the ends of life. The primary reason why this is not presently true, in Professor Jordan's view, is the dominance of interest in the political process. As reflected in the notion of property as "private," interest prevents the rational, because natural, implementation of purposes, and causes the efficaciousness of will to issue in acts that must be termed irrational.

The chief obstacle, then, to a rational order in life

is the notion of property as private. Property as private has enslaved more persons than ever in the days of Athens. The subjectivity of reference dictated by the notion of private property effectively blinds the intelligence,<sup>7</sup> and while the Apostle Paul could perhaps be free when his body was in chains, the person whose intelligence is shackled for whatever reasons can never be free. All human freedom is, at bottom, a freedom to think.

The implications of Professor Jordan's theory are far-reaching. As he himself notes,

at certain points the very fundamentals upon which life itself rests have been called in question in the interest of objectivity, on the strength of the truth that life of the spirit is maintained only at and through the risk of its loss. I am well aware, for example, that the existence of human society is perhaps jeopardized in the changes which seem necessary in order to derive a human good from property as that institution at present stands; but the risk seems to me preferable to the assurance that humanity shall not have that good, which is something near the present meaning of property. I believe that I am aware also of what is negatively implied in the abandonment of the concept of authority; but the significance of the fulness of freedom which can only come through the positive cooperative organization of men on other lines than those of a hierarchy seems to me preferable. So long as there exists the possibility of a general war, or the necessity that one man should live and work for another, there is all the refutation that can be required of the principles of organization upon which human life rests; and humanity might better risk its destiny in an intelligent effort at reconstruction than in the blind carnage that is inevitably its alternative.<sup>8</sup>

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<sup>7</sup>A possible example, drawn from contemporary practical life, is presented by the civil rights advocate confronted with the potential integration of "his block."

<sup>8</sup>Jordan, Forms of Individuality, op. cit., p. 40.

The events since 1927, when this passage was written, would not, seemingly, affect his conclusion.

The final determination of the question with which this section began--i.e., whether Professor Jordan's philosophy offers a satisfactory synthesis of the major problems of philosophy in our time--is beyond the scope of our present concern with the system as well as beyond our competence to decide. In any event, as indicated earlier, this depends in large degree upon the views which one insists must be included within the synthesis. But while we are content to leave this question to other, more competent students of philosophy, its possibilities in this regard seemed at least to merit passing mention.

On other aspects of the system our own convictions are stronger. Sharing Professor Jordan's discontent with most of what passes for "social science," which is based in our case, as in his, upon a reading of Aristotle, we feel that the study of human behavior must be one that will encompass within its framework the facts of value. Nor are we satisfied, as students of philosophy, with the divorcement of such facts from the practical world, especially as this world is manifested in the phenomena of the political process.

With its concepts of "equilibrium," "balance of power," and the like, political science still is immersed in the

world of Newton, when, as indicated in the question of "national purpose," it needs desperately to move beyond the world of Einstein to a view in which, as Professor Jordan advocated, values can be treated as facts even as facts that are valid (in terms of a reliable and consistent theory) are treated as values.

### Conclusion

Professor Jordan's analysis of the political process, in one sense, decidedly is not merely an effort to describe social reality. In this sense, his analysis relates the political process to the process of life itself, in that politics is the ordering of life. If the future of natural-cultural life is to be regarded with optimism, emergent purposes must be stated as ends of the whole, the instruments must be arranged in such a manner as to make possible action toward their actualization, and the total result must be evaluated reflectively to insure the mutual compatibility of end and means.

The very fact of society, in his view, is sufficient to establish the idea that the purpose of the component of the society always looks to the good of the corporate whole. As a corporate whole, then, the purpose of the "state" is to establish and maintain this good.

In the world as presently constituted, however, each

"state" is only part of a larger whole. In this world, as Professor Rossiter commented in the discussion of national purpose, "a sense of national purpose is at bottom a sense of international purpose. . . ." <sup>9</sup> Not only is a worldwide community ideally possible today, it increasingly is dictated by the facts of existence in the middle of the twentieth century. Economic interdependence points in this direction, as do the technological revolutions in communications and transportation. The technology of warfare, particularly, points toward the necessity of such a community, since, as Professor Morgenthau commented in his argument for supranational control of atomic energy, "the nation state is too small and weak a mold to contain atomic energy." <sup>10</sup>

The most elementary function of the nation state is the defense of the life of its citizens and of their civilization. A political organization that is no longer able to defend these values and even puts them in jeopardy must yield, either through peaceful transformation or violent destruction, to one capable of that defense. . . .

The feasibility of all-out atomic war has completely destroyed this protective function of the nation-state. <sup>11</sup>

The logic of our situation compels us to extend our goals in- to the international arena. In Professor Jordan's words, "there exists a 'state' which is natural and of which states organized along geographical and political lines are perver-

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<sup>9</sup>Clinton Rossiter, "We Must Show the Way to Enduring Peace," Life, III (June 13, 1960), p. 116.

<sup>10</sup>Hans J. Morgenthau, The Purpose of American Politics (New York: Alfred A. Knopf, 1960), p. 175.

<sup>11</sup>Ibid., pp. 169-70.

sions."<sup>12</sup> As the purpose of any form of individuality must find fulfillment in the good of the larger whole within which it is individuated, the "national" purpose must seek its completion as an end in the "international" good.

Thus Professor Rossiter's paraphrase, "What shall it profit a nation if it shall solve all its social problems and lose the character that made it a nation in the first place?"<sup>13</sup> properly must be prefaced, as it was in the original, with the question implicit in the analyses of Professors Morgenthau and Jordan, and, elsewhere, of Professor Rossiter himself:<sup>14</sup> "For whatsoever nation shall rely upon its own resources to save its life, the same shall lose it; but whatsoever nation shall lose its life for the sake of life, the same shall save it."<sup>15</sup> Such a remark, which expressed only the idealistic "federation of man, the parliament of the world" of yesterday, becomes the stark realism of the Common Market and the International Atomic Energy Commission of today.

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<sup>12</sup>Jordan, Theory of Legislation, op. cit., p. 232.

<sup>13</sup>Clinton Rossiter, "The Democratic Process," Goals for Americans, by the President's Commission on National Goals (Englewood Cliffs, N.J.: Prentice-Hall, 1960), p. 78. After Mark 8:36.

<sup>14</sup>Rossiter, "We Must Show the Way to Enduring Peace," op. cit., pp. 115-8.

<sup>15</sup>After Mark 8:35.

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