

From Public Law to Public Policy, or The “Public” in “Public Law” *

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In a self-consciously forward looking survey recently published in *PS*, Glendon Schubert continues to employ the phrase “public law” as roughly synonymous with the legal concerns of political science.¹ The recent publication of Murphy and Tanenhaus’ *The Study of Public Law*² also reaffirms that, in spite of the movement toward “judicial behavior,” which it might have been anticipated would change the boundaries of the field, the “public” in public law is still very much with those political scientists particularly concerned with things legal. There does not seem to me to be any valid reason why political scientists should maintain the public law—private law distinction and then proceed to exclude themselves from the “private” law sphere.

Anthropology of Law

From the perspective of legal ethnography it is clear that the distinction between public and private law is far from universally applicable. For one thing it rests on a clear and exclusive sorting of all legal relationships as either those between person and person or those between state and person. Yet we encounter law in societies that have no states.³ To say that such societies have only private law, that is that no interests other than those of the two disputants were considered in arriving at a resolution of their conflict, would be obviously untrue. More important anthropologists have increasingly come to recognize that even very simple societies typically have a number of levels of law.⁴ In such societies not all disputes involve either one man versus another or one man versus the public, how-

ever defined. Many involve one clan or family against another or one lodge against another. It is true that by pulling and hauling very hard, and making liberal analogical use of theories of corporate personality, much of this social interaction can be sandwiched into Romanist notions of private law. But to do so would obscure the very palpable reality that many societies simply do not believe that the only units of conflict are persons or states. The employment of such concepts as “spoiling the tjar” or “bloodying the arrows”, the offense of witchcraft, the use of banishment as punishment and the conduct of trials with the whole or a major portion of the populace in attendance all indicate the judgment of simple societies that some acts both concern two antagonists and the society as a whole.⁵

It may of course be responded, particularly from the criminal law perspective to be discussed shortly, that nearly all societies, including those in which the public-private law distinction is most obviously alive, recognize that both public and private conflicts or consequences may arise from a single act. Thus the intentional injury of one human being by another or the taking of property may be pursued on either the criminal or the civil side in both common and Roman law countries. Perhaps all we have noted in the anthropological materials is that simple societies too recognize this phenomenon. If so the public-private distinction may be as applicable to them as to the German legal system. The difficulty is, of course, that most of these simpler societies do not articulate the distinction, and do not construct their legal procedures to reflect it. We might indeed be able to go through a primitive legal process and, from a purely exterior analytical perspective, say at one moment the case was in

* A longer version of this paper was presented at the meeting of the Canadian Political Science Association, June 2-5, 1972.
1. Winter “Judicial Process and Behavior during the Sixties,” *P.S.* 5 (1972) 6-15.

2. Walter Murphy and Joseph Tanenhaus, *The Study of Public Law* (New York: Random House, 1972). See also Joel Grossman and Joseph Tanenhaus, “Toward a Renaissance of Public Law” in their *Frontiers of Judicial Research* (New York: John Wiley and Sons, 1969) 3-25.

3. John Middleton and David Tait, eds., *Tribes Without Rulers* (London: Routledge and Kegan Paul, 1958).

4. Along one dimension we observe levels in the sense of one law for the family, another for the village etc. See Leopold Pospisil, *Kapauku Papuans and Their Law*, Yale University Publications in Anthropology No. 54 (New Haven: Yale University Department of Anthropology, 1958). Along another we note legal structures following the boundaries of lineage structures. See Michael Barkin, *Law Without Sanctions* (New Haven: Yale University Press, 1968) Ch. 2 and works cited there.

5. These terms are reported by Paul J. Bohannan, *Justice and Judgment Among the Tiv* (London: Oxford University Press, 1957) and Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (Norman, Oklahoma: University of Oklahoma Press, 1941) respectively. On witchcraft see E. E. Evans-Pritchard, *Witchcraft, Oracles and Magic Among the Azande* (Oxford: The Clarendon Press, 1937); H. Ian Hogbin, “Sorcery and Administration,” *Oceania* 6 (1935) 1-32. The most extensive treatment of banishment in a single society is to be found in Llewellyn and Hoebel, *op. cit.* On the public conduct of trials Cf. Bohannan, *op. cit.* with Max Gluckman, *The Judicial Process Among the Barotses of Northern Rhodesia* (Manchester: Manchester University Press, 1955).

public law, at the next it popped into private law and that two steps further on it popped back into public law. But the very fact that the living legal process rolls on uninterruptedly, blithely mixing private and public elements, belies the reality of such analysis.

The Common Law Tradition

From a common law perspective similar conclusions follow. At the level of conscious articulation, the public law—private law distinction is almost completely absent from the language of common lawyers.⁶ Indeed the central thrust of English law runs strongly against the distinction. The core of English law is the law of real property. English land law is feudal in origin, and the feudal tenures remain essentially intact at least until the reforms of the late 19th and early 20th century.⁷ Feudal law represents the very antithesis of public law—private law thought. For under feudal law tenure conveys both public office and private property. One of the most central of the ancient writs is trespass. Yet trespass lumps together many conflicts that we would assign purely to private law with others that today we should label criminal and thus public law. It is quite impossible to treat the medieval law of trespass as either wholly criminal or civil, or to put the matter another way, criminal and civil procedures and remedies are inextricably mixed in the medieval law of torts.⁸ Moreover “pleas of the crown” do not become “criminal law” until at least the 18th century.⁹ And what was or was not a plea of the crown depended upon a melange of statutory and judicial decisions that were not made and cannot be rationalized on the basis of the private versus public law distinction.

This is not to deny that some legal phenomena parallel to Romanist notions of public law are

to be found in England. The doctrines of prerogative powers and sovereign immunity do duty in England for the special legal weight given to the governing authority under continental public law doctrines. The prerogative is feudal in foundation and can hardly be viewed as based on the public-private distinction. And the doctrine of sovereign immunity must be invented precisely because of the English tendency to submit conflicts between the citizen and his government under the normal procedures for settling disputes between man and man. Indeed before the rise of British administrative law in the 20th century, most of what a continental lawyer would call public law disputes were handled by civil suits in the form of private actions of one man against another, one of whom was incidentally acknowledged to be a responsible official of the government. Much of the procedural form survives even now.

On the whole then the public law—private law distinction appears to be foreign to English lawyers and English law.

Comparative Legal Systems

While it is true that many public law disputes are cognizable in the civil courts of the continent, there is also a rough correspondence between the division of law into public and private segments and the organization of courts. Most European states have an elaborate structure of administrative courts parallel to the civil courts. These administrative courts are the focus of the judicial development of public law.¹⁰ Most of these same nations erected monumental civil codes set apart from the criminal, administrative, education etc. codes. These civil or private law codes were not only formally set apart but were built up from theoretical premises of governmental neutrality and the autonomy of individual wills which were consciously at odds with the premises of the public law codes.¹¹

6 John Henry Merryman, “The Public Law—Private Law Distinction in European and American Law,” *Journal of Public Law*, 17 (1968) 3-19.

7 See A. W. B. Simpson, *An Introduction to the History of the Land Law* (Oxford: Oxford University Press, 1961).

8 Perch H. Winfield, *Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931) 190ff.

9 Cf. Matthew Hale, *Pleas of the Crown* (London: 1678) with James Stephen, *History of the Criminal Law of England* (London: MacMillan, 1883).

10 See Charles J. Hanson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (London: Stevens, 1954); Serio Galeotti, *The Judicial Control of Public Authorities in England and in Italy* (London: Stevens, 1954).

11 Merryman, *op. cit.*, 11-12.

In England on the other hand administrative courts have been, at least until very recently, an anomaly. Exchequer, which might have become the English Conseil d'Etat, developed instead into another common law court as did King's Bench. Star Chamber carried on so many kinds of business that even at its height it can hardly be viewed as a purely or even largely administrative court.¹² We need hardly trouble to register again the victory of the common law and its courts over their rivals.

Nor, in spite of the plethora of 19th century social legislation and legal reform in England, did the English develop anything parallel to the elaborate structure of European codes which have tended to freeze the distinction between public and private law on the continent.¹³ The piecemeal form of English legislation and law reform was hardly suitable for drawing firm analytical boundaries.

A comparative analysis of English and continental experience, like the viewpoint to be gained from anthropology and English legal history, must suggest that the public-private distinction is hardly one of universal applicability.

The Legal System

If political scientists think they ought to be students of the legal system or the judicial system of at least those nations which are in the common law tradition, then limiting themselves to public law is quite indefensible. Very few English, American or Commonwealth courts or judges handle exclusively public or private law matters. Such major bodies of law as bankruptcy, corporate regulation, securities, and labor intimately mix "public" and "private" law concerns. Imagine, for instance trying to make sense of zoning laws (public) without taking into account patterns of fee simple and term possession created by the law of real property (private). More

fundamentally, of course, how is one to understand a legal system by looking at only part of it.

Everyone familiar with systems analysis, of course, knows about the boundary problem. Would it not be possible to say that the particular subsystem that one chose to study was the public law subsystem of the legal system or the judicial system. I have already indicated that, at least for those studying societies that do not themselves employ the public-private distinction as a fundamental principle of legal discourse and organization, I think the answer is no. In any event if the answer is to be yes, the burden of proof lies upon those who propose to cut the pie in a way fundamentally at odds with the culture of the bakers. Indeed, for reasons that will appear shortly, I think that the burden of proof lies as heavily on public-lawyer political scientists studying continental legal systems and their Asian, African and Latin American derivatives as on the rest of us.

Political Science

This becomes clear if we adopt the general perspectives of political science. The orthodoxy of the profession today is surely that the political scientist is primarily concerned with the authoritative allocation of values. It would then seem to follow that those involved in the law sub-field of political science would be concerned with that portion of the whole body of law that contributed to the authoritative allocation of values and unconcerned with all other law.

If we sought to divide the body of law in this way, would our division correspond to the distinction between public and private law even in those legal systems that actively employ the distinction, let alone those that do not? The answer is clearly and obviously no. It is almost impossible to discover any body of law that does not authoritatively allocate values.

I am certainly not arguing that all societies do most of their value allocation by law, but I am arguing that nearly all law is an instrument of value allocation. For those political scientists

¹² There is as yet no complete scholarly treatment of Star Chamber. See the numerous references in William Holdsworth, *History of English Law* (London: Methuen & Co. 1903-66).

¹³ See Arthur von Mehren, *The Civil Law System* (Boston: Little Brown and Co., 1957) 3-80.

accustomed to group analysis, I offer creditor-debtor, landlord-tenant, seller-purchaser and a host of other areas of law that set the balance of economic power between competing segments of a society. For instance the development by courts of the doctrine of implied warranty anticipated by many years the current rash of consumer protection politicking.

This example points the way to a curious paradox. As long as the judges were making the law protecting consumers, no political scientist was allowed to study it, because it was private law they were making; but as soon as the legislature passes statutes requiring the manufacturer to build in greater consumer protection, then some political scientist could study them, because these are public laws and "government regulation of business." The ultimate paradox is that once the statute is passed, the judicial specialist could study court decisions interpreting the statute because those are public law decisions. Thus as public lawyer, the judicial specialist requires a legislative intervention to allow him to study courts.

If public law and judicial behavior are locked together, then political scientists are forbidden to study major areas of judicial allocation of values, areas which will somehow magically be opened to political science investigation as soon as legislators or administrators do the allocation. This is a curious hangover of the older view that courts were apolitical. It is most curious because it is, I believe, a quite unintended consequence of the concentration on things judicial. If those contemporary political scientists concerned with things jurisprudential had been more concerned with law and less with courts, they might not have so uncritically, almost absentmindedly, retained the rubric "public law". As it is, precisely because they were too busy with courts to worry about what adjective had been traditionally attached to law, they excluded themselves from major areas of judicial activity.

Contemporary American Law

This point can be made more clearly from the perspective of contemporary American law.

For at least the last twenty, some might say the last forty, years a new style of theory building and rationalization has been growing in the "private law" areas until, in some at least, it has reached the position of quasi-orthodoxy. It is clearest and most deeply entrenched in tort.¹⁴ In brief this style either purports to find or seeks to inject overall benefits to the social system rather than or in addition to fairness and justice as between two disputants as an underlying goal or organizing principle of various common law areas. In tort we seem to be rapidly acquiring an academic school which, at least in the area of negligence, is anxious to define justice between man and man almost exclusively in terms of what treatment of individual litigants will best achieve preferred public goals.¹⁵ This school has come so close to dominance that it is now engendering a heated reaction, but the reaction itself is far from abandoning a broadly social perspective.¹⁶ This introduction of public interest considerations has been so striking that it has occasionally led common lawyers to trot out the public law label to provide a kind of poetic emphasis for the new movement, as in Blum and Kalvin's *Public Law Perspectives on a Private Law Problem*¹⁷ and Professor Green's "Tort Law, Public Law in Disguise."¹⁸ Here we have the irony that about the only time contemporary American lawyers resort to the public law—private law distinction is when they wish to show that one of the granddaddies of "private" law isn't private after all or anymore.

14 See Guido Calabresi, *The Costs of Accidents* (New Haven: Yale University Press, 1970); W. G. Friedman, "Social Insurance and the Principles of Tort Liability," *Harvard Law Review*, 63 (1949) 241-265; Clarence Morris, "Hazardous Enterprises and Risk Bearing Capacity," *Yale Law Journal* 61 (1952) 1172 → John G. Fleming, "The Role of Negligence in Modern Tort Law," *Virginia Law Review* 53 (1967) 815-846.

15 → Bruce Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement," *Virginia Law Review*, 53 (1967) 774-814.

16 → George P. Fletcher, "Fairness and Utility in Tort Theory," *Harvard Law Review* 85 (1972) 537-573.

17 Walter J. Blum and Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem: Auto Compensation Plans* (Boston: Little Brown and Co. 1965).

18 Leon Green, "Tort Law Public Law in Disguise," *Texas Law Review* 38 (1959-60) 1-13, 257-69.

Public Policy Analysis

I have been a bit cryptic about public benefit theory because much of what the lawyers are doing political scientists are more familiar with as policy analysis. Thus the new tort school has been concerned with whether the traditional structure of negligence law provided a development subsidy to industry by shifting the cost of accidents to the workers or whether, on the contrary, it provided incentives for rational investment in accident prevention.¹⁹

Even without the new movement within the legal profession, however, a public policy analysis perspective makes the self-limitation of political scientists to “public law” untenable. As we noted earlier, while the public-private distinction is a very one old in Roman law, its greatest flowering was in the development of the great civil codes in the 19th century. That development reflected the ideological development of the times. Given a laissez-faire ideology combined with a certain statist strain in continental thought, it is quite natural and realistic to divide the law into two mutually exclusive categories. The first involves the relations between the individual and the state and presupposes the dominance of the latter. The second involves relations between one individual and another and presupposes the neutrality of the state which is to confine its role to providing juridical facilities for protecting the rights and effectuating the will of the parties.²⁰

Contemporary policy analysis, however, has at least partially abandoned the laissez-faire foundation on which the neat public-private law disjunction rests. We are now sensitive to the “externalities” of what once might have been viewed as purely private transactions. And surely few contemporary policy analysts would be content with the view that all the relations between producers and consumers, landlords and tenants, buyers and

sellers and landowners and users are purely private matters of no concern to public policy.²¹

Certainly anyone who began from the perspective of using law as an instrument of public policy would, upon being told that he must limit himself to public law, throw up his hands in disbelief.

Policy analysis that had to neglect “private” law would be a terribly sporadic proposition. It could deal with that part of 19th century accident prevention and compensation policy incorporated in state and federal safety law but not the part determined by the fellow servant rule and the doctrine of assumed risk. After 1900 it suddenly would be allowed to look at all of industrial accident policy as workmen’s compensation statutes were passed. (Even these are not always clearly public law.) The policy analyst would, however, be strictly forbidden to look at traffic accident policy until the growth of no-fault insurance proposals in the 1960s. And in the 1970s he would be forbidden to look at accidents in the home. In short if he is confined to public law, he must treat the state as having no policy at all in all those areas of human relations it chooses to regulate by common law or civil statute. The argument that common law judges do not make public policy is too silly even to put in the mouth of a straw man. If we admit that political science is the study of public policy then the public in public law automatically disappears.

Why

Why have political scientists confined themselves to public law? At the risk of sounding like the new politics, the answer is to be found basically in power relationships. At the time political science was established as a discipline, law schools already flourished and had behind them resources in money, prestige and professional self-interest which political science did not then and never will rival. The law schools taught law, and the basic decision had already been made not to teach law to

19 → Richard A. Posner, “A Theory of Negligence,” *Journal of Legal Studies* 1 (1972) 29-96.

20 Mauro Cappelletti, John Henry Merryman, Joseph M. Perillo, *The Italian Legal System* (Stanford, Calif.: Stanford University Press, 1967) 208-9. It might be noted in passing that Taney was groping toward a similar distinction in *The Charles River Bridge Case*.

21 See Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1964).

undergraduates. But law obviously had something to do with government and politics. What law was to be left to the political scientists? In the late 19th and early 20th centuries American universities were much fascinated with their great German counterparts. Of course, the distinction between public law and private law was reflected in European curricula and in that era of formalism and laissez-faire, public law certainly looked like it was somehow the part of law most connected to government. Thus a simple and intellectually viable compromise could be reached. The new political science faculties could teach something called public law, some academic stuff derived from European political philosophy, while the law schools of course would teach the real law.²²

We encounter this phenomenon at the semantic level even today. If asked what we teach we cannot reply "law." That would be the false claim that we were lawyers and taught in law schools. We say "*public law*" precisely because the "public" tells our auditors that we do not really teach law but political science. The judicial behavior tag is popular for the same reason. Everyone knows that the law schools study judges but not behavior.

The dead giveaway is criminal law. Here was a preeminently public area of law, but the law schools already taught it, and it was of importance to practitioners. Thus it could not be, and was not, taught in political science departments. It is extremely instructive that the real discovery of criminal trial courts by political science came only in the 1960s. It came partially from urban politics specialists who, beginning from a genuine political science or public policy perspective, saw criminal law as a major and obvious facet of local governance—something so obvious that it could only be missed by the public law specialists rigorously disciplined to ignore it.²³

22 See Hans J. Morgenthau, "Power as a Political Concept," in Roland Young, *Approaches to the Study of Politics* (Evanston, Ill.: Northwestern University Press, 1958) 67.

23 See → Martin A. Levin, "Urban Politics and Judicial Behavior," *Journal of Legal Studies* 1 (1972) 193-221; "Policy Evaluation and Recidivism," *Law and Society Review* 6 (1971) 17 → Harlan Hahn, "Ghetto Assessments of Police Protection," *Law and Society Review* 6 (1971) 183-195.

Where public law specialists did finally move toward criminal law, it was because the Supreme Court pushed them into it by constitutionalizing the whole area. If the Court had kept the fair trial rule, I suppose public law political scientists would still be forbidden to study criminal law.

It might be argued that constitutional law undercuts my power hypothesis. After all when political science departments were founded the law schools did teach constitutional law, and it was of some interest to practitioners. In a political culture so constitution ridden as that of the United States, however, no matter what one's power it would have been quite impossible to deny things constitutional to a faculty concerned with government and politics. So the law schools perforce yielded a bit of constitutional law to political science.

The position of public law political science would not have been so bad if it had actually pursued all or even most of public law. It did not. In a nation that was expanding what a European would have called its public law extremely rapidly, public law political scientists confined themselves to constitutional law, administrative law and international law. Indeed one of the major reasons for the survival of the public law rubric was no doubt the need to provide some catalog heading to this disparate bag of courses.

Constitutional law and international law kept political scientists at suitably ethereal levels, although it must be admitted that the Supreme Court's immodesty up to the 1940's allowed political scientists to occasionally dip into the heart of public policy as the Court sporadically did so. It was a curious kind of adventure though. The public law—constitutional law—political scientist could know something of anti-trust from 1895 to about 1905, of railroad regulation from 1886 to 1914 and again briefly in 1935 and 1945 and so on. Trying to glimpse the development of American politics or public policy through the constitutional law slide show was an odd game.²⁴

24 Martin Shapiro, *Law and Politics in the Supreme Court* (New York: Free Press, 1964) *passim*

Administrative law might have been quite a different story. If we mean by administrative law, the law made by administrative agencies, then the public law political scientist might at least have been at the heart of modern public law development. Here again, however, the intellectual dominance of the law schools raises its head. Because English and American academic lawyers and practitioners rejected continental theories of public law, they came to define administrative law not as the law made by administrators for the governance of the citizenry, but as the law made by courts for the judicial review of administrative proceedings and the internal rules by which the agencies govern themselves.²⁵ Administrative law—public law—political scientists tended to adopt this bounding of their subject matter. Glendon Schubert long ago pointed out that administrative law dwindled in political science faculties. It dwindled because on the one hand it turned itself into a set of esoteric doctrines on standing, exhaustion etc. which seemed very far from the heart of politics, and on the other became a minor branch of public personnel administration. As a result, instead of standing ready to become an integral part of the blossoming fields of administrative and bureaucratic theory and behavior, it was simply bowled over and disappeared. With a boundary excluding government regulation from administrative law, a political scientist investigating administrative law simply found nothing of interest to him.

It would appear then that the drive of law-oriented political scientists to confine themselves to an increasingly empty sub-set is a result of certain accidents of American intellectual, professional and academic history that should no longer bind political science. The public law—private law distinction is not universally persuasive in the light of anthropological and comparative historical materials. It is not even a distinction that is recognized or operationalized by the legal systems that the vast majority of political scientists study. It is at odds with the contemporary policy thrust

of political science. It eventually tends to confine the law-oriented political scientist to constitutional law which for the past twenty years has been an immensely challenging body of law in the United States but is, in either general social or comparative perspective, a very small share of the world's politically relevant body of law.

Judicial Behavior

We noted earlier that the movement from public law to judicial behavior might well have the short run effect of unintentionally preserving the “public” in public law as preoccupation with judges distracted scholars from rethinking their views of law. In the longer run, however, a true commitment to judicial behavioral study should lead first to a wider ranging treatment of the nonconstitutional areas of public law and then on to “private” law. For if the judges and the courts studied routinely intermix public and private law decisions, as they generally do in at least the English speaking world, then the student of judicial behavior will inevitably see that he must follow where the behavior leads.²⁶

A long term difficulty, however, is posed by the growing conversion of “public law” into judicial behavior. What appears to be, and I believe is, a progressive step may have several major, unanticipated and quite regressive consequences. With few exceptions political scientists at large have left law exclusively to their public law brethren. If “public law” becomes “judicial behavior” then all of law except judge made law is likely to drop out of political science. Perhaps this is too gloomy a forecast because the movement toward policy analysis, with its emphasis on

²⁵ Martin Shapiro, *The Supreme Court and Administrative Agencies* (New York: Free Press, 1968) 104-109.

²⁶ See e.g. Herbert Jacob, *Justice in America* (2nd ed., Boston: Little Brown and Co., 1972); *Debtors in Court* (Chicago: Rand McNally, 1971); Kenneth Dolbeare, *Trial Courts in Urban Politics* (New York: John Wiley and Sons, 1967); Martin Shapiro “Decentralized Decision-Making in the Law of Torts” in S. Sidney Ulmer, ed., *Political Decision-Making* (New York: Van Nostrand Reinhold 1970). I am acutely aware of the standard criticism that the best way to persuade others to do something is by example not injunction. I can only offer my preliminary excursion into torts noted here.

the output side, may bring a wide range of political scientists to a greater interest in law.

I am more concerned with a second consequence. One of the earlier steps in the progress of public law was the scholarly integration of judges and judicial law-making into the broader aspects of the law-making and political processes.²⁷ This integration is now being carried downward from the Supreme Court to the local trial courts.²⁸ Yet if public law becomes essentially judicial behavior, there will be a natural tendency to reisolate the judge, to fragment the legal process, or at best to treat legislative and administrative law-making and implementation as only epicycles in a judiciocentric legal universe. Tendencies in this direction are already evident.²⁹ It would be ironic indeed if the law fraternity in political science fell back into this position now that the lawyers are rapidly emerging from it to actively confront the interplay of legislators, judges and administrators in the legal process.

So long as law oriented political science was little or no more than constitutional law, the incipient strain between the study of law and the study of judges was insignificant. Constitutional law and the Supreme Court went together like a horse and carriage. If judicial studies broaden on the one hand into the analysis of the total behavior of all judges, and, as I have argued here, public law studies broaden to the study of all law, we may have a package that is just too big to handle. This is true not only because of the sheer bulk of materials but because those who study law, particularly from a policy making perspective suitable to political science, will not rest content with the study of courts but will move

where the policy takes them across the whole range of lawmakers and implementers.

All of this is not to argue against judicial behavior studies but to suggest that we should not move from one excessive self-limitation called public law to another called judicial behavior, although I admit the centrifugal dangers of doing otherwise. I am not prepared to worry about whether political science ultimately requires one sub-field called judicial behavior and another called law and public policy or whether somehow the law oriented among us can stay together. For the moment, however, I think certain practical steps are in order particularly in the training of graduate students and the initiation of exploratory research.

First, as I have now argued at length, we should throw off the "public" limitation and follow a policy-oriented analysis of law wherever it takes us. Since at least in common law countries it is likely to take us into the vast fields of common law like tort and property, we need not yet finally cross the law versus courts bridge. For, conveniently enough, the new areas are heavily freighted with judicial law-making.

On the other hand as we expand our concerns to the whole body of legal outputs, ironically enough particularly in the public law fields which we have claimed but not in fact tilled, certain wrenches are inevitable. Law oriented political science students ought not view the legislative and administrative processes as incidental, accidental or peripheral interests. For instance, most "public law" graduate students know their way around at least the federal reports, but the U. S. Code and the Federal Register are a great mystery. It would pay to get ready for the policy movement now by at least making "public law" students sufficiently expert at the whole range of legal materials to do policy analysis eventually or at least to provide specialized assistance in legal materials to those political scientists who do.³⁰ Even the judicial behavior specialist

27 What Glendon Schubert calls the "conventional" approach. See his *Judicial Policy-Making* (Glenview, Ill.: Scott, Foresman and Co. 1965) 161 and bibliographic note, 205.

28 See Sheldon Goldman and Thomas Jahnige, *The Federal Courts as a Political System* (New York: Harper and Row, 1971); Thomas Jahnige and Sheldon Goldman, eds., *The Federal Judicial System* (New York: Holt, Reinhart and Winston, 1968); Herbert Jacob, ed., *Law, Politics and the Federal Courts* (Boston: Little Brown and Co., 1967); James Klonoski and Robert Mendelson, eds., *The Politics of Local Justice* (Boston: Little Brown and Co., 1970).

29 See Jay Sigler, *An Introduction to the Legal System* (Homewood, Ill.: Dorsey Press, 1968).

30 See Foster Sherwood, "The Role of Public Law in Political Science," in Young, *op. cit.*

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should preserve his options by acquiring a more general expertise in legal materials.

Finally the growing political science field of comparative law should not be prematurely infected with the tunnel visions of either public law or judicial behavior but allowed to grow freely in all directions. This point is particularly important because the public law political scientist moving into comparative studies will quickly encounter continental materials where the public law—private law distinction is relatively real. Thus in this particular instance there is the danger that superficial comparative studies will confirm old, parochial categories rather than yielding broader perspectives.