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The Fall and Rise of Political Scientific Jurisprudence: It's Relevance to Contemporary Legal Concerns

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THE FALL AND RISE OF POLITICAL SCIENTIFIC JURISPRUDENCE: ITS RELEVANCE TO CONTEMPORARY LEGAL CONCERNS*

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We like to believe that our knowledge increases with the passage of time. Still, there is probably less truth in this than we care to admit, even to ourselves. Certainly our vocabulary has become more complex as our technology has grown. And, concomitantly, we tend to accept the proposition that the proliferation of the lexicon reflects some expansion in knowledge. Unfortunately, though, this has a good deal of truth in it only as it concerns the natural sciences; there is less reason to believe it is true elsewhere. In the social sciences and the law, for instance, we think we have gained much of what we believe is knowledge, but the validity of it or even the usefulness of it remains to be seen.

In academic circles, this inflation of words, concepts, and labels is linked (at least partially) with the steady development of more and more schools of thought and research in the various disciplines and professions. Moreover, there has come to be a good deal of interdisciplinary and interprofessional interaction in Academia, and the law schools and the social sciences are no exception to the rule. For example, as the social sciences have come into their own over the last several decades, this has been reflected by newer conceptualizations that have come to be attached to various schools of thought in law circles. As sociology developed, for instance, legal or judicial realism became associated with research and thinking characterized as sociological jurisprudence or the sociology of law. Subsequently, as the socal sciences began emphasizing the refinement of their methods and techniques, jurisprudence came into some association with what is now called "jurimetrics."[1] Recently, as the development of the judicial behavioral movement in political science

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[1] See *Jurimetrics*, 1 LAW & CONTEMP. PROB. 28 (1963).

reached the point of birth, Martin Shapiro of the Stanford University Department of Political Science took it upon himself to baptize the emergent infant as "political jurisprudence."[2] But Shapiro is neither a lawyer nor a law professor—he is a political scientist. And as far as I know, "political jurisprudence" has not yet found itself adopted by legal educational circles. The law is, in this case, hardly a jealous master.

Perhaps out of its so-called traditional conservatism or perhaps because of a crassness implied in the new name, the law schools have been (by and large) reluctant to admit to a siring of young "political jurisprudence." So I propose to change its name to one more descriptive of the theory and the methods composing the school of thought—"political scientific jurisprudence." It isn't very euphonious, but it is more accurate. Of course, new garb does not legitimize a bastard nor does it serve to convince a dubious father of its paternity. Adoption implies an acceptance of certain responsibilities. And one does not accept such responsibilities lightly. Thus this article, besides changing labels, is designed to persuade. In it, I intend to explicate and elaborate on that which Shapiro has already discussed. I also intend to survey and supplement the field of political scientific jurisprudence. For by doing this I think it will become clear that this newest of the social scientific perspectives (empirical and "normative") of the courts and law deserves a prominent place in the law school curriculum (being implicit in even the "bread and butter" course work). In other words, by ignoring its natural child, the law school has been neglecting its family.

The relationship between political science, political theory, the sociology of law, and jurisprudence has been well stated by Shapiro on several occasions. In coining the phrase "political jurisprudence" he stated:

> Political jurisprudence is in one sense an attempt to advance sociological jurisprudence by greater specialization. It seeks to overcome the rather nebulous and over general propositions of the earlier movement by concentrating on the specifically political aspects of law's interaction with society and describing the concrete impact of legal arrangements on the distribution of power and rewards among the various elements in a given society . . . .
>
> Moreover, the new jurisprudence shares with all modern American thinking about law, the premise that judges make rather

[2] Shapiro, *Political Jurisprudence*, 52 Ky. L.J. 294 (1964).

> than simply discover law. Without this premise there could be no political jurisprudence, for one of the central concerns of politics is power and power implies choice . . . 'Political' can only be linked with 'jurisprudence' when it is realized that choices inhere in those phases of human endeavor that have traditionally been the object of jurisprudence study.[3]

It is hardly surprising that legal realism has led to this. Extrapolating from the writings of Holmes, Cardozo, Pound, Frank and Llewellyn, among others, it should amaze no one that political scientists would come to see the courts as political agencies. It should come as no surprise that political scientists would begin to develop theory that would attempt to explain and evaluate the behavior of judges and courts from a political context.

Political science's traditional counterpart to the law school has been a subfield called "public law." Up to quite recently, this has amounted to little more than legal analysis of case opinions, constitutional history, and structural descriptions of the American judicial system. But early in the 1950's a revolution that had been long in forming in political science finally gained a strong foothold.[4] The new revolutionaries came to be known as "political behavioralists."[5] In fact, they were simply political scientists who desired to apply social scientific theory and methods to the study of political phenomena. Now that revolution has succeeded—insofar as behavioralists now compose a substantial segment of the political science discipline.[6] Nonetheless, one of the last fields to feel a substantial impact of this revolt was public law. For although there were some early forays into the public law bastion,[7] the major as-

[3] *Id.* at 294-5.

[4] The forerunners to what is now called the "political behavior" movement were Charles Merriam, Harold Gosnell and Harold Lasswell of the University of Chicago school of the late 1920's. Merriam is undoubtedly the father and Lasswell the prodigal (and prodigious) son. Some people say, if one book should be singled out as the "first," it would be: LASSWELL, PSYCHOPATHOLOGY AND POLITICS (1930).

[5] Some feel that the forerunner and most directly seminal book of the behavioral movement is EASTON, THE POLITICAL SYSTEM (1953). EASTON, FRAMEWORK FOR POLITICAL ANALYSIS (1964) is of similar effect and contains a very good definition of "political behavioralism" in the first chapter.

[6] Dahl, *The Behavioral Approach of Political Science: Epitaph for a Monument to a Successful Protest,* 55 AM. POL. SCI. REV. 763 (1961).

[7] *E.g.,* PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS (1955); PRITCHETT, THE ROOSEVELT COURT (1948); ROSENBLUM, LAW AS A POLITICAL INSTRUMENT (1955).

sault was delayed until a book by Schubert in 1959 provided a breach.[8] The earlier works of Pritchett, Rosenblum and Peltason provided a theoretical inroad while the approaches outlined by Schubert became the basis for a large number of subsequent studies.[9] However, many of these studies were emulative of Schubert's work up until recently and by and large characterized the political science "judicial behavioral movement" to political scientists as well as to others. But today there is a rapidly widening study of the courts by political scientists—the survey questionnaire is coming into ever greater use and far more sophisticated theories are being put to test.

Perhaps the most familiar political behavioral focus on courts and law to the legal scholar (particularly those who teach courses in what might be called "modern jurisprudence") is that on the judicial decision-making process. The principal question posed is: what factors account for patterns of decisions made by judges—or by a court or by courts? The political behavioralists have used many different statistical techniques and approaches and methods to describe such patterns accordingly and to explain them particularly as they might occur in the Supreme Court of the United States. Partial explanations afforded thusfar have been: the social background of the judge,[10] political party preferences,[11] the attitudes of the judges,[12] judicial values and ideologies,[13] the clarity of precedent,[14] judicial personality,[15] the homeostatic tendencies of courts as a small group,[16] and the perception of role by the Chief Justice.[17] These are but a few. But as far as theory goes, legal scholars have

[8] SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959).

[9] The footnotes contained in Shapiro, *Political Jurisprudence,* 52 KY. L.J. 294 (1964) contain a fairly complete bibliography of the work in the judicial behavior movement up to late 1964.

[10] SCHMIDHAUSER, THE SUPREME COURT, ITS POLITICS, PERSONALITIES, AND PROCEDURES (1960).

[11] Nagel, *Political Party Affiliation and Judges Decisions,* 55 AM. POL. SCI. REV. 843 (1961).

[12] Spaeth, *Unidimensionality and Item Invariance in Judicial Scaling,* 10 BEHAVIORAL SCIENCE 290 (1965).

[13] SCHUBERT, THE JUDICIAL MIND (1965); Schubert, *Jackson's Judicial Philosophy: An Exploration in Value Analysis,* 59 AM. POL. SCI. REV. 940 (1965).

[14] BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE 9 (1964).

[15] SCHUBERT, THE JUDICIAL MIND (1965).

[16] ULMER, INTRODUCTION TO POLITICAL BEHAVIOR (1960).

[17] Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court,* in COURTS, JUDGES, AND POLITICS 497 (Murphy & Pritchett ed. 1961).

been prone to shrug all of this off with a "So what, we knew that before." In all candor, the "new" theories of the political behavioralists have added little to the store of knowledge already held by the jurisprudents. The new studies have been highly jargonated, crammed with barely understandable technology, and *unable to explain how these various elements or factors actually interacted under varying conditions.* And this last mentioned point, if anything, is what they had to promise in order to gain any sympathy from legal scholars who already knew what the factors were. In addition to this, the assumption of the theory and of the methods used has been, on the whole, anti-judicial.

On the other hand, the statistical analysis of cases which might yield legal factors enabling practitioners to predict case outcomes more precisely did, and still does, interest the law schools and the legal profession—*but* only from the standpoint of making "the law more certain" and getting at cases faster.[18] But, it should be clear enough, there is little in this that is *political* in nature (barring, of course, the politics of judicial reform). By and large, as far as most law schools are concerned, "political jurisprudence" or "political scientific jurisprudence" can only serve this limited purpose. But this type of case quantification may be best described as brute empiricism—it is not related to anything—it is simply the quantification of past events in order to predict similar future ones. There is no pretense made to understand any theory, i.e., cause and effect relationships. Yet, ironically enough, this material would find itself relegated to courses in jurisprudence—as a part thereof—or to sociological jurisprudence courses (as a part thereof) or to a seminar in decision-making (as a part thereof) which are all grounded in theory. And frankly, since this has been a large part of the political science contribution thus far, the law schools have been wise in giving it little visibility. But there are certain movements in the development of political scientific jurisprudence that warrant a new

[18] Nagel is probably the best known political scientist in this area. Three recent articles on this are: Nagel, *Applying Correlation Analysis to Case Prediction,* 42 TEXAS L. REV. 1006 (1964); Nagel, *Judicial Prediction and Analysis from Empirical Probability Tables,* 41 IND. L.J. 403 (1966); Nagel, *Predicting Court Cases Quantitatively,* 63 MICH. L. REV. 1411 (1965). One's attention should be drawn to the fact that the Jury Verdict Research Service of Cleveland now compiles empirical probability tables for lawyers to help them calculate their chances at trial. But Nagel notes that, "[t]he use of quantitative prediction of court cases *plus* traditional prediction techniques is probably better than the use of the latter alone." *Id.* at 1422.

look and a different and more prominent treatment by jurists and jurisprudents as well. For there is a rapidly widening study of the courts by political scientists in both the methods employed and a theoretical re-orientation to a judicial perspective. The remainder of this article will be devoted to demonstrating that this is true.

Shapiro noted, and I think quite correctly, that the major assumption of political scientific jurisprudence has been that courts are *political* in nature. The general political science theory that holds this to be particularly true about the American system begins most conspicuously with Madison and runs through the likes of de Tocqueville and Brooks Adams. The more modern institutional-process type of political scientist who has followed their lead, has seen fit to stress the *likenesses* between courts and other political agencies and judges and other governmental decision-makers. An extreme along these lines, but a view which has received more than a little support from political scientists, is Peltason's: ". . . to recognize that *judges participate in the political process as legislators do,* is not to assert that judges necessarily represent the same *interests* as legislators or that the consequences of *judicial representation* are the same as the consequences of legislative representation."[19] This kind of emphasis and rhetoric has been highly unpalatable to legal scholars and has made the political science stress on politics seem far greater than I believe it was meant to be. In addition to this type of theorizing and conceptualization, that of the more statistically oriented political scientists also is capable of leading legal scholars into believing that there is little concern for the judicial aspects of political studies of courts. Some of the statements by judicial behavioralists over the last several years have been, to say the least, beyond the limits of the case that their own research could possibly support. For instance, we find Schubert stating that this research has "debunked" the judicial process[20] and Spaeth claiming that all of judicial decision-making is reducible to a set of "attitudes."[21] Clearly, this intemperateness was no more likely to endear this theory

[19] PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 5 (1955). (Emphasis added.)

[20] Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court,* 28 LAW & CONTEMP. PROB. 100 (1963). Therein, *id.* at 104, Schubert stated that judicial behavioral research had "debunked legal principles as factors controlling decisions"—which, of course, it had not done.

[21] Spaeth, *Unidimensionality and Item Invariance in Judicial Scaling,* 10 BEHAVIORAL SCIENCE 290 (1965).

or the methodology to legal scholars than that used by Rodell in stating that the law was a "high class racket."[22] In short, there has been enough said by political scientists to reinforce deeply held suspicions among jurisprudents and other legal scholars that the political scientists fail to see courts as anything other than political agencies, and fail to see judges as anything other than political decision-making units. In other words, legal circles could only see this material as *political* theory (and strictly empirical, non-normative theory at that). It has been perceived as being only tangentially related to the study of courts, law and jurisprudence. But this perspective is due to confusing the emphasis and zeal of a new, hotly opposed minority with the very fiber of a lasting, successful movement—and its process of growth. For the theoretical and methodological trend in the political science judicial behavior and judicial process movements is to describe, examine and analyze peculiarly legal and judicial aspects of the political process.

For instance, one of the major emphases of the second wave of political-judicial behavioral work is on judicial role. The stress is to find out what it is, not what it is not. Surely this is not new subject matter to the men of jurisprudence. But, on the other hand, through administering interview schedules and questionnaires to judiciaries, the political behavioralists can do something more than simply "systematize and confirm the insights of judicial realism through techniques borrowed from the social sciences."[23] They can find out quite precisely what factors judges themselves think are important, and how this might relate to decisions. One type of hypothesis which was tested recently and found to resist disconfirmation was: "Judges who do not consider clear, directly relevant precedent to be either solely the most or modally a most influential factor (in contrast to 'common sense,' 'what the public needs,' 'what the public demands,' 'justice') are more likely to decide subjectively than judges who do not."[24] Vines is currently at work on an extensive study of the Supreme Courts of four states and received almost unanimous cooperation from the justices in his exploration of their concepts of decision-making role.[25]

[22] RODELL, WOE UNTO YOU, LAWYERS 15 (1939).

[23] Shapiro, *Political Jurisprudence*, 52 KY L.J. 294, 309 (1964).

[24] Becker, *A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variation*, 60 AM. POL. SCI. REV. 677, 679 (1966).

[25] Judicial cooperation has been extraordinary for modern social scientific judicial role studies. Eighty-seven per cent of the Hawaiian judiciary

Legal realists have long believed that many factors are present in the judicial decision, but they have never clearly posited the precise interaction patterns. This can now be done and it is indicative of the complementary nature between legal realism and political scientific jurisprudence. Moreover, several other political scientists are currently exploring the relationship between public attitudes toward judges and courts (which they are measuring) and various aspects of judicial behavior.[26] This too, though mentioned in traditional legal realist jurisprudential literature, is incapable of intensive study without the use of various political scientific theories and polling methods (which are adaptations of other social scientific methods), and is also indicative of the complementary nature of these two fields of jurisprudence.

In addition to these research perspectives, political scientists like Murphy and Danelski are currently attempting to apply behavioral scientific theories to the study of the United States Supreme Court. Their approaches are based upon the structural peculiarities of the court. Murphy has formulated an interesting set of strategic and tactical propositions about Supreme Court decision-making which is incredibly sensitive to the multiplicity of roles a justice must play —as a justice of the supreme court, not as a politician.[27] And Danelski is currently sifting through much data from judicial notes, memos, diaries, etc., in an effort to assess the degree to which modern reference-group theory can illuminate judicial decision-making in the United States Supreme Court.

The political science approach, then, in its data, methods, its current leanings and theories is coming closer to that which is the scope of concern of judges and legal scholars in general—and to jurisprudence in particular as it is concerned with *the judicial decision-making process.* But this is equally true in other substantive areas as well.

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was most receptive to my very lengthy and complex questionnaire. But Kenneth Vines has done even better. See Becker, *Surveys and Judiciaries, or Who's Afraid of the Purple Curtain?,* 1 LAW & SOC. REV. (Fall 1966). Also Gene Mason of the University of Kentucky and Joel Grossman of the University of Wisconsin (both political scientists) are currently at work on judicial role studies and Professor Richard Johnston (of LSU) is at work in trying to replicate my Hawaiian data.

[26] Political scientists Joseph Tanenhaus of the University of Iowa and Walter Murphy of Princeton are embarked on a wide study of American attitudes towards the courts. The study is sponsored by the National Science Foundation.

[27] MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

Law schools and legal scholars traditionally have accepted the judicial hierarchy as it formally represents itself. Law schools have concentrated attention upon judicial hierarchy as it is used on-the-way-up, i.e., on the right and strategy of appeal. But there does not seem to have been much interest in the politics of hierarchy (federal and/or state) or in politico-legal theories studying cases on-the-way-down and into enforcement, deference and compliance. Once a case is decided, or leaves the court system, the law school appears to feel little more than a compulsion to yawn. But surely, whether from the viewpoint of prospective attorneys or philosophers of the law, it is important to know what actual interactions exist among members of the judiciary at different levels or between judges and other political actors and how this interaction is related to other political decision-makers. "Probably the most pressing of all the tasks of political jurisprudence is the development of a systematic description and analysis of the relation between lower and higher appellate courts in terms of power, influence and differentiation of function."[28] For what affects judges (whether it be other judges, congressmen, etc.) affects the living law, and what affects the law is of substantial importance to modern jurisprudence. And it is here that significant strides have begun to be made by practitioners of political scientific jurisprudence. It is this type of material, in fact, that is directly related to that called for by Professor Miller of the George Washington Law School: ". . . adequate legal criticism, at the barest minimum, must look to the consequences of law and of judicial decisions . . . ."[29]

Peltason, for one, conducted an exhaustive study of the federal circuit and district courts in the South in the execution of the will of the Supreme Court on school integration.[30] From this pioneering work, one can readily derive the proposition that when the Supreme Court's prescriptive verbiage is highly ambiguous ("with all deliberate speed"), under conditions of great political and social pressures, circuit court judges are far more likely to adhere to the spirit of the Court's mandate than judges in the district courts.[31] In a

[28] Shapiro, *Political Jurisprudence,* 52 KY. L.J. 294, 319 (1964).

[29] Miller, *On the Need for Impact Analysis of Supreme Court Decisions,* 53 GEO. L.J. 365, 368 (1965).

[30] PELTASON, FIFTY EIGHT LONELY MEN (1961).

[31] However, of course, this is not to say that the lower courts have not also been put to the votes—political attitudes studies of judicial behavioralism. See Goldman, *Voting Behavior of the United States Courts of Appeals, 1961-64,* 60 AM. POL. SCI. REV. 374 (1966). On the other hand, in just

sense, then, in order to insulate the local judge against the heat of local pressures, the mandate must be clear. Surely lawyers and judges interested in actual application of a higher court decision, rather than simply in the formal, verbal outcome of a supreme court decision (federal or state), must be concerned with what will maximize the chances of an accurate carrying out of that decision by the lower courts. Is this type of study unrelated to law school concerns? Legal strategies are based on such stuff, and legal strategies are not without manifestation in legal briefs.

Another example of such work in contemporary political scientific jurisprudential study is Shapiro's hypothesizing on circuit court specialization. He asks "To what extent does specialization and the resultant expertise of certain circuit courts cause them to adopt different views than their more generalized counterparts and resist or seize policy leadership from the Supreme Court in those areas that especially interest them?"[32] Should this be ignored in law school?

Murphy on the other hand is interested in applying modern organizational theory to the study of judicial hierarchical relations—so he is in the process of determining the type of personal relations that exist between judges at varying court levels. Such relations may be either positive or negative—each having potentially significant impact on the determination of which cases are to be heard and of their outcomes. For it seems true enough that: "As in all organizations, there is a danger in the judicial process of conflict not only between the formal strata of authority but also between formal and informal hierarchies."[33] But political science has not turned its sociological eye solely to the impact of intra-judicial relations upon the law and its applications at lower levels, for it is now well on its way towards an initial theorization of the impact of judicial decisions on *other* political decision-makers.

For instance, in the last several years, political science has turned

describing the voting patterns systematically and rigorously (without any inferences as to attitudes, personality, and the like), we do learn that "The eleven United States Courts of Appeals, as we have seen, differ in their rates of dissension and intracircuit conflict as well as the sources of judicial conflict." *Id.* at 382. *Cf.* Vines, *Federal District Judges and Race Relations cases in the South,* 26 J. POL. 337 (1964). Goldman's footnotes are an excellent bibliography for all political science work done on the lower courts to the middle of 1966.

[32] Shapiro, *Political Jurisprudence,* 52 KY. L.J. 294, 319 (1964).

[33] MURPHY, ELEMENTS OF JUDICIAL STRATEGY 121 (1964). See also, ABRAHAM, THE JUDICIAL PROCESS 297-98 (1962).

its newly acquired social scientific skills towards analyzing the degree to which local political figures really agree with and implement (or fail to implement) Supreme Court decisions, e.g., on school prayers (county school supervisors),[34] or on illegally obtained evidence (police chiefs).[35] In the latter study, for instance, a political scientist demonstrated that an increase in police education on the holding of the *Mapp* case correlated strongly with an increase in police actions in accord with Mapp (+.56). Another political scientist recently content analyzed the floor debates in Congress to test legislative invocation of judicial/court symbols (using the prestige of the court to protect the court from its detractors) in order to see if such a tactic was effectual in stemming anti-court tides.[36] He found no such relationship. Nevertheless, this study is an excellent example of the new type of methodology in political science's arsenal being put to use in studying the growing field of legislative-judicial interaction.[37] The field of the impact of judicial decisions on politics is growing rapidly enough for political scientist Samuel Krislov to have ventured forth with a working theory:

> [W]e may say that in any policy hierarchy general statements of intent are transmitted downward and are intended to be obeyed. Subordinates accept and obey such statements—assuming first they can understand the message—for a variety of reasons. They may implement the policy they agree with or reap advantage from it. On the other hand, even if they have reasons to oppose the policy, they may be moved to support it because of practical considerations, including the costs of opposition. . . .
>
> We can therefore distinguish several areas of possible motivations for compliance—personal utilities, organizational utilities, and psychological utilities—and can create a matrix or possibilities of combinations of advantages and disadvantages. . . .[38]

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[34] Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777 (1959).

[35] Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283.

[36] Stumpf, *The Political Efficacy of Judicial Sumbolism*, 19 W. POL. Q. 293 (1966).

[37] MURPHY, CONGRESS AND THE COURT (1961); MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964). See also, PRITCHETT, CONGRESS VERSES THE SUPREME COURT (1962); *cf.* SCHUBERT, CONSTITUTIONAL POLITICS (1960).

[38] KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 135-36 (1965).

He then goes on to try and apply this to the court system and concludes that, in fact, the judicial structure presents "additional" problems. For instance, he states as an example of this:

> Patent administrators have refused to respond to cues from the Court to raise their standards of originality in the granting of patents. Of course, they do comply in specific cases to avoid defying the Court directly, but they have made no move to change their general policy. An active Court concerned with more pressing problems than the Patent Office has necessarily conceded the *de facto* power of the agency to pursue its own course; the Court simply cannot give this question sufficient priority to force its own will. Reliance upon legitimacy and psychological factors of authority here having proven inadequate, the Court has not chosen to exercise its authority to intensify the effects of the sanctions involved and increase the costs of defiance.[39]

The extra problem being that in the court system, sanctions against subordinates can only occur subsequently and indirectly—when, and if, a case is started and appealed.

While there is still much to be done in this area, the door is ajar and political science is on its way in.

The major thrust of this section has been an attempt to demonstrate that political analysis of judicial phenomena is (1) not antagonistic to law school presuppositions about the judicial process and the law and, indeed, is (2) helpful to guide the modern lawyer in his understanding of his role as a lawyer and of the court's role in the political system. To avoid coping with this type of material is to avoid focussing upon an important aspect of the courts' operations, problems and functions in modern society.

Finally, there is a newly emergent field in the political scientific study of the judiciary which should be of interest to those engaged in general legal education and to those engaged in the study of jurisprudence. This new area might be termed "comparative judicial politics." It is simply an attempt to broaden our understanding of the interactions between courts and politics to something beyond a limited comprehension of the American variation. In addition, one can question seriously the ability of anyone to comprehend any single phenomenon without an opportunity to compare it with dissimilar ones within its own class. After all, it is precisely the assumption that comparison is prerequisite for fuller and better understanding

[39] *Id.* at 137.

that justifies interests in comparative law and in the comparison of diverse jurisprudential systems of thought.

Moreover, this particular phase in the development of political scientific jurisprudence is most closely related to the normative heart of traditional legal philosophy. Concomitantly, it is this work which is most apt to raise the dander of some jurisprudents. It is doubtful that the practitioners of comparative judicial politics can escape the fate of having their study (whether simple description or the testing of multiple hypotheses) related to structural-functional analysis. And this is, of course, unabashed positivism; it is the asking of the social scientific "ought question," i.e., whether a particular variable (court system, court procedure, law, etc.) is functional; whether it contributes towards growth or maintenance of the living, developing social system. But although there is similarity, then, in some of the higher level concerns of jurisprudence and comparative judicial politics insofar as they discuss what ought to be, there is still an exclusive normative preserve for jurisprudence and a definite empirical use to which the scientists can be put by jurisprudents. As Shapiro has observed:

> Until political philosophy revives sufficiently to provide us with a set of ultimate truths or a reasonable facsimile thereof, jurisprudence is likely to concern itself with more immediate questions. There is a whole range of intermediate ought problems that we must solve now even though our ultimates are shaky. Ought property owners be forced to sell to Negroes? Ought competitive sectors of the economy be allowed to become oligopolistic? Ought the jurisdiction of juvenile courts be extended? If political jurisprudence provides us with some information on the functions of lawmakers in our society, and in the process prods those lawmakers into conscious political evaluation of their own governmental roles and the role of government in general, it will have contributed as much and perhaps more to the valuational aspects of jurisprudence as its contemporaries.[40]

At this point, a quick rundown as to what has been done, is being done, and what will probably be done in due course in comparative judicial politics might be helpful.

Unfortunately, the total output of work of comparative judicial politics to date is not very impressive. Purists might wish to trace the start of the movement to Wigmore's classic work on legal sys-

[40] Shapiro, *Political Jurisprudence,* 52 Ky. L.J. 294, 343 (1964).

tems.[41] However, there are significant differences between those tomes and the new political scientific studies along these general lines. Mainly, the contemporary work attempts to frame and test hypotheses—and there are efforts made to make the conceptualization precise and to seek data subjectable to statistical analysis and inter-subjective verification.

Two of the first theoretical works appeared in 1962. One, an article by Nagel, was an attempt to formulate a conceptual scheme that included some general cultural and adjudication characteristics of ten societies.[42] More specifically, he was trying to see whether any relationship exists between "cultural characteristics" such as (1) manufacturing economy vs. non-manufacturing economy; (2) mainly dictatorial political system vs. mainly democratic political system; and (3) collective property system vs. individualistic property system; and "adjudication characteristics" such as (1) presence of professional judges or dispute settlers; (2) mainly rigid precedent following vs. mainly case individualization; and (3) mainly defense oriented criminal procedure vs. mainly prosecution oriented procedure. The other, a book by Abraham, was far more descriptive and historical in its approach than the Nagel work, nonetheless it too set forth many hypotheses that begged for further cross-cultural study along the lines of the functions of judicial independence, and the like.[43] The common bond between these two works is a certain heurism resulting from the formulation of their categories and their open-ended, research oriented cross-cultural approach.

Almost simultaneously, but from across the Pacific, came the first published attempt on the part of a non-American scholar to carry out a political behavioral study of a non-American court.[44] Hayakawa's study is a Guttman Scalogram analysis of the Japanese Supreme Court which was stimulated directly by Schubert's early work. And, unfortunately, Hayakawa makes the same basic error in interpretation of the data that is frequently made and that is often irksome to legal scholars.[45] However, several other highly

[41] WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1936).

[42] Nagel, *Culture Patterns and Judicial Systems,* 16 VAND. L. REV. 147 (1962).

[43] ABRAHAM, THE JUDICIAL PROCESS (1962).

[44] Hayakawa, *Legal Systems and Judicial Behavior—With Particular Reference to Civil Liberties in the Japanese Supreme Court,* 2 KOBE U.L. REV. 1 (1962).

[45] After all, Hayakawa states, *id.* at 22, that "A glance at the [Scalogram] Table is sufficient to discover the impressive consistency of judicial atti-

quantitative studies of foreign courts by foreign scholars (also attributable to Schubertian influence) have been characterized by designs that avoid such an analytic pitfall and that simply attempt to correlate various extra-judicial factors with certain types of judicial decisions. They have avoided the temptation to rely exclusively on the judicial vote as a data source. In 1963, for instance, Aubert studied the relationship between geographic, religious and occupational variations and either conviction or acquittal of conscientious objectors in Norway.[46] His major finding was that the study suggested "that different judges' dissimilar views of a problem can lead to varying court decisions."[47] This seems to be Samonte's conclusion as well in a comparative study done on the Philippine Supreme Court.[48] And, in essence this is a similar finding in Danelski's exploration of the Japanese Supreme Court, where he stated: "In interviews with retired justices and high court judges the importance of this period of modern Japanese history often came up, especially in regard to the genesis of their liberal ideas which, in some cases, they wrote in Supreme Court opinions."[49]

Thus, it should be clear that most of the political behavioral work done up to now on foreign courts has been concerned chiefly with the psychic components of the decision-making process—with little emphasis on judicial role aspects of the process.[50] But I think that a

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tudinal patterns." But, as I (and others) have observed elsewhere, the Guttman Scalogram is interpretable as manifesting attitudinal patterns *only* as responses to attitude questionnaires (from where the technique was developed). A judicial opinion can hardly be considered to be the equivalent of an answer (a response) to a questionnaire. See BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE (1964). Also, for a most recent example of the irritations felt by some legal scholars at the Schubert approach, see Rosenthal Book Review, 81 POL. SCI. Q. 448 (1966).

[46] Aubert, *Conscientious Objectors Before Norwegian Military Courts,* in JUDICIAL DECISION MAKING 201 (Schubert ed. 1963).

[47] *Id.* at 218.

[48] Paper by Abelardo Samonte, "The Philippines and the American Supreme Courts," presented APSA National Convention in New York City, Sept. 1966.

[49] Paper by David J. Danelski, "The Supreme Court of Japan: An Exploratory Study," presented APSA National Convention in New York City, Sept. 1966.

[50] But, Victor E. Flango is currently evaluating data gathered on some 55 Philippine judges in a study based on the questionnaire used in my study of the Hawaiian judiciary. Donald Kommers is also emphasizing the concept of the judicial role in his current study of the German Constitutional Court. Danelski has also collected much information on the Japanese judges' conception of judicial role, but that too has yet to be published, though it will be discussed in the relevant sections of my forthcoming book, *Comparative Judicial Politics.*

breakthrough is imminent into a new surge of judicial behavioral research on foreign judiciaries that will be based on and spurred by a reliance upon a structural/functional analytic framework. Questions along the lines of: the political functions, judicial review, degrees of judicial independence, variations in allowing popular participation in judicial proceedings (the jury vs. the Soviet obchestvennost), etc. can be studied in a new light from this perspective. By this we will be returning to the attempt to find answers to the key questions of the justification of our court system and procedures. This time, however, we will have empirical information gathered with system and rigor. It would be a shame if the law schools felt that this information was of no concern to them—because, once again, it is of so much concern to the entire political and legal system.

There is scarcely a wide gap, if indeed any at all, between materials relevant to political scientists interested in courts and those materials relevant to legal scholars in general and jurisprudents in particular.[51] Yet, this kinship of interest has not been accurately perceived by those travelling in the legal circles. On the other hand, some in those circles seem to feel that it is the behavioral scientists who are missing the connection. For instance, Judge Santo recently wrote in the newsletter of the Law and Society Association:

> . . . but the lawyers need a scientific inquiry into the tensions and strains leading to change within the judicial system, as well as an evaluation of accomplished change, and some predictability as to contemplated change. I have heretofore detected resistence to entering this field of inquiry on behalf of the behavioral sciences. . . .[52]

No matter who is to blame, past misunderstandings need not be perpetuated.

I have tried to identify the community of interest. In other words, I have tried to show that a field aptly called Political Scientific Jurisprudence exists. Thus I suggest that a course by this name belongs in the curriculum of law schools. This course would include the growing body of knowledge as well as a methodology of

[51] This is the general drift of the argument in Nagel, "Jurisprudence, Sociology of Law, and Political Science: Some Comments on Jones' 'View from the Bridge,'" Newsletter of the Law and Society Association (July 1966).

[52] Santo, "Sociology of the Law and the Judicial System," Newsletter of the Law and Society Association 30 (July 1966).

research and analysis. I am suggesting that it belongs in the law school curriculum *explicitly*. But I am suggesting as well that law students also be trained implicitly to think in terms of the interaction of courts, politics, and law, and be further exposed to social scientific methods and techniques. This would be consistent with, and supplementary to, the students' training to think of the social and economic causes of the changes in law they study through their case materials—and of the effect of such laws upon the social system. I submit that there is no less reason to make potential lawyers aware of the political causes and effects of litigation and judicial decisions. To think otherwise would be to assert that feigned ignorance of politics is good for the development of case law. We have certainly advanced beyond the point of believing that the randomized, uncontrolled, and misunderstood forces of society are better for the development of law than systematizing our knowledge about it. Why any less for the political factor? We can never assess the role of politics in the practice of law or judgeship by avoiding systematic inquiry and study. Such is the need for Political Scientific Jurisprudence in the modern law school curriculum.