LAW VS. PUBLIC POLICY: A CRITICAL EXPLORATION

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To prepare for this keynote, I went back through some issues of the *Cornell Journal of Law & Public Policy*. I was delighted by the variety of topics, the consistently high level of scholarship and, for law journals, the lively and often sparkling use of the English language. But one question became increasingly prominent: why the coupling of law with public policy, especially in a law school journal? I hope that I can produce some useful insights through my pursuit of this question as a foreigner to the law school, just as Tocqueville, Bryce, and others brought us insights as foreigners to the American democracy or the American commonwealth.

Actually, no one is a foreigner to law. Law is as universal and almost as old as civilization itself. But where does "public policy" come from? And when? And why? With an Italian colleague, I recently made a survey of political science dictionaries in five countries (United States, Britain, France, Germany, and Italy) and four languages (English, French, German and Italian). I supplemented our survey with personal questions that I addressed, albeit unsystematically, to European, Japanese, Korean, Russian and other colleagues during my several years of service as an officer of the International Political Science Association. From this, I discovered that "public policy" is an established concept only in the English language. As the term became popular during the twentieth century, and as more and more scholars were translating American public policy writings, French and Italian translators at first tried to adjust with the use of mere *politique* and *politche*, or with a French version of "*politique publique*." Others used multiple words and circumlocutions rather than literal translation. For example, the chief of the transition team of my 1969–79 book, *The End of Liberalism*,[1] confided to me that he had great difficulty with "policy" and "public policy," and said that he actually tried two or three circumlocutions before settling on

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[1] THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY (1969); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE U.S. (1979).

one, which I will not try here to retranslate. In recent years, most scholars in non-English speaking countries simply gave up and adopted "public policy" as an international, non-translatable concept, like "commuter," "babysitter" and "drugstore," as Americans had done with "coup d'etat," "á la mode," and (the always atrociously pronounced) "déja vu."

Even in the United States, the idea of public policy is relatively recent. Law was *the word* in the American founding, concerned as it was with "a government of laws and not of men."[2] There was, of course, the common law, whose continuation after independence was never questioned even by the most radical anti-British revolutionaries. The Constitution was more modern, however, in its grounding of law in legislation. Article I provided that "[a]ll legislative Powers . . . shall be vested in . . . Congress,"[3] which in effect made the legislature through legislation "the state." The all-important Section 8 of Article I went on to list the specific powers of Congress (therefore the national state) and at the end provided that "the Congress shall have power . . . [t]o make all the Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."[4] Therefore, law equals legislation. Article II reinforces this by providing in stark and precise terms that the president "shall take Care that the Laws be *faithfully executed.*"[5]

Public policy had no place in any of this. Public policy did not enter the picture at all until well into the nineteenth century and far from law or legislation. As far as I have been able to determine, its infrequent usage was more in the nature of a soft synonym for public opinion or general will or consensus. Oliver Wendell Holmes, Jr. is a good case in point. Although his great book, *The Common Law*,[6] was published in 1881, it was the product of at least twenty years of work, and it embodied prevailing usages despite the novelty of some of his arguments. Lecture I of *The Common Law* opens with a refreshingly modern point of view, that "the life of the law has not been logic; it has been experience."[7] Immediately, Holmes goes on to the following proposition:

> The felt necessities of the time, the prevalent moral and political theories, *intuitions of public policy*, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do

[2] *See* JOHN BARTLETT, FAMILIAR QUOTATIONS 337 (16th ed. 1992). Bartlett credits this quote to John Adams, 1774, and Adams credits his formulation to James Harrington in his historic work *The Commonwealth of Oceana*, 1656. *Id.*

[3] U.S. CONST. art. I, § 1.

[4] *Id.* at § 8.

[5] *Id.* at art. II, § 3 (emphasis added).

[6] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

[7] *Id.* at 1.

> than the syllogism in determining the rules by which men should be governed.[8]

This point is emphasized later in the same Lecture:

> In form [the growth of the law] . . . is logical. The official theory is that each new decision follows syllogistically from existing precedents. . . . On the other hand, in substance the growth of the law is legislative. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of *what is expedient for the community concerned*. Every important principle which is developed by litigation is in fact and at bottom the result of more or less *definitely understood views of public policy*; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.[9]

Law maintained its majesty beyond 1881 with the help of early political scientists who believed there should be a strict and formal separation between "politics" and "administration." Political scientist Professor Woodrow Wilson led this, after he returned from Germany and his doctoral studies imbued with the spirit that Prussia, under Frederick the Great, had produced a governmental system in which "administration has been most studied and most nearly perfected."[10] Although Wilson conceded that "[i]t is better to be untrained and free than to be servile and systematic,"[11] he went on to assert that "it would be better yet to be both free in spirit and proficient in practice."[12] Yet how was this to be accomplished? Wilson insisted that we study the administrative systems of Germany (and France) with full awareness that "we are not in search of *political* principles."[13] He then stated:

> If I see a murderous fellow sharpening a knife cleverly, I can borrow his way of sharpening the knife without borrowing his probable intention to commit murder with it; and so, if I see a monarchist . . . managing a public bu-

[8] *Id.* (emphasis added).
[9] *Id.* at 35-36 (emphasis added).
[10] Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 204 (1887).
[11] *Id.* at 207.
[12] *Id.*
[13] *Id.* at 220 (emphasis in original).

> reau well, I can learn his business methods without changing one of my republican spots.[14]

On this basis, he developed the ideal of the "neutral civil servant" who could be loyal "always . . . to the interest of the public officer to serve, not his superior alone but to the community also."[15]

It was during the next two decades that the meaning of public policy transformed from a synonym for public opinion to a reference to statements about "what the government does." Thirteen years after Woodrow Wilson's famous article, his insistence on the distinction between politics and administration was picked up and formalized as "two functions of government," with politics as "policies or expressions of state will" and administration taken as "the execution of these policies."[16] This is, to the best of my inspection, the first time when policies and politics conjoined. In effect, "policies," defined as "expressions of state will," was essentially a definition of "policy," as a description of "what *legislators* do," followed by "administration" as "what governments do." As the twentieth century wore on, and governments, especially the national government, grew larger and more highly differentiated, there were two parallel developments of relevance: (1) the politics/administration dichotomy was rejected in favor of a sustained political process, a "seamless web," with law (or policy) being made at every step of the way; and (2) the law/policy divide was also erased, with the two, for all practical purposes, becoming synonymous.

During the 1930s and beyond, in response to the dramatic growth of government, political science began in earnest to study policy. The word probably slipped easily into the political science vocabulary because "law" to political scientists still tended to mean "public law," which concentrated most intensely upon "constitutional law" (where the main question was whether the national or state government had the power and authority to do what its legislation proposed). Once Congress adopted the legislation, political scientists concentrated on how and why, which took the form of case studies galore—detailed narratives of what came to be called "the policy-making process."[17] Dissertations or first articles based on one or more case studies launched the careers of some of the most illustrious political scientists (along with some economists and lawyers). The following are a few examples of scholars who did their apprenticeships with policy case studies: Stephen K. Bailey, James

[14] *Id.*

[15] *Id.* at 221.

[16] FRANK GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 18 (1900).

[17] Sometimes the two words are put together as policymaking, and at other times kept completely separate as policy making.

MacGregor Burns, Robert Cushman, Robert Dahl, Paul Douglas, E. Pendleton Herring, Samuel Huntington, V.O. Key, Harold Lasswell, Grant McConnell, E.E. Schattschneider, Phillip Selznick, Herbert Simon, David B. Truman, Edwin Witte, and former Harvard Law Dean James Landis.[18] I must add immediately, however, that in none of these cases was the policy's *substance* important. The policy (or "policy decision") was the hook on which to hang the narrative, on the basis of which the process, the *policymaking* process, would be analyzed.[19] The "seamless web" of the policymaking process was materialized as "how a bill becomes a bill," "how a bill becomes a law," and "how the law (as policy) is implemented." In fact, "implementation" became such an important aspect of the policymaking process that it almost displaced "public administration" as the name of that sub-discipline.

What was virtually lost in all this was *the substance*, even when part of the narrative of the case study provided many of the substantive details of the policies.[20] One could lament, but no one could deny, the validity of Holmes' 1880s contention that "in substance the growth of the law is legislative."[21] One prominent voice of lament was Friedrich Hayek who, as late as 1973, could cry out that law had once been "regarded as . . . something to be discovered, not made," and that "the conception that law could be deliberately made or altered seemed almost sacrilegious."[22] Later in the same volume, he observed: "During the last hundred years it has been chiefly in the service of so-called 'social' aims that the distinction between rules of just conduct and rules for the organization of the services of government has been progressively obliterated."[23] Obviously his reference to "rules of just conduct" can be considered an intentional definition of "law."

I call up Hayek not to agree with, or apply, his appeal to return to the mystification of law, but only to point out (and sympathize with) his underlying argument. That somewhere during the rise of the modern liberal state, law lost its autonomy and its integrity as an institution—albeit a man-made, human-scale, fallible, changeable institution. If Hayek can be considered the first, I have to count myself the second to insist that the distinction between law and policy has been obliterated. But the agree-

[18] For a comprehensive, but by no means exhaustive, list of policy-making studies, see DAVID B. TRUMAN, THE GOVERNMENT PROCESS 538–44 (V.O. Key, Jr. ed., 1951).

[19] This emptying of substance from policy went so far that by the 1950s, the eminent professor David Easton, in his "systems analysis" of the political process, treated policy simply as "outcomes." *See* DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965).

[20] Sometimes the substance of the statute was part of the introduction, called "the setting" or the context of the narrative.

[21] HOLMES, *supra* note 6, at 35.

[22] 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 83 (1973).

[23] *Id.* at 132.

ment or sympathy between us goes no further. Hayek has gone too far and has become downright ideological by the suggestion that legislatures cannot enact just rules of conduct.[24] And he misrepresents and sentimentalizes as well as overstates the role of the common law courts, whose rules are most often not "laid down" at all but have to be reasoned out from the holdings of cases through the rulings and arguments of appellate decisions.[25] Here we not only have the wisdom of Holmes, but also of John Locke, who said, "[W]hoever has the Legislative or Supreme Power of any Common-wealth, is bound to govern by established standing laws, promulgated and known to the People, and not by Extemporary Decrees. . . ."[26]

This is where Locke not only has the better argument but has practicality on his side, because no liberalized, secularized, de-mystified society (except perhaps for Justice Thomas and a small cult of believers in natural law) can ever return to a belief that the only good law is one that was always there waiting to be discovered. The key to Locke and the problem of law versus policy (or policy versus law, depending on the appellant) is Locke's insistence on "established standing laws . . . known to the people, and not by extemporary decrees."[27] In effect, I have revived Hayek's very timely warning against statutes that are merely "instructions to administrators."[28]

Now we can turn at last to an explanation of how "public policy" fused with "law" and became the "reference of preference." In good lecture fashion, my argument is laid out in five points. The first point is a reiteration of the fact that law and policy had become more or less synonymous. Just about the time the aging Holmes was about to die, the laws had become, as he predicted, mainly legislative, and legislation had become, as Hayek predicted, mere "instructions to administrators."[29] This was a comfortable formulation for an increasingly behaviorist political science as well as for an increasingly realist, behavioralist, economistic legal scholarship. Process over substance may be a scientific necessity, but is also a liberal predilection.[30] (I will leave until later another aspect of this, which is the denigration of law as an autonomous, discrete, non-processual aspect of politics.)

24 *Id.* at 134–35.

25 *Id.* at 88–91, 135.

26 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 371 (Peter Laslett, ed., Cambridge Univ. Press 1960) (1690).

27 *Id.*

28 *See* THEODORE LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 144 (1969) (discussing Hayek's hypothesis).

29 *See id.*

30 In an early formulation, I dubbed this practice "[p]olicy without law." *Id.* at 126.

The second point is that democratization favored public policy in the choice between the two terms. In a democracy, "law" sounded too official, unilateral, hierarchical, authoritative, and bordered on authoritarian. Policy appeared softer, more human, and not as divine. Public policy as an expression of public opinion in the nineteenth century seems to have had a renaissance in the democratizing twentieth century.

Third, "law" seems not only too authoritarian for a democracy, but also too close to permanent for a liberal state. Even though de-mystified and no longer considered something that was forever and waiting to be discovered, law still gave off the impression that, although a human product, it was inaccessible once produced. In contrast, "policy," being the product of a process, remains a continual part of the process, a never-ending phenomenon. If the legislature is a continuing body, then its product is legisla*tion*, and T-I-O-N is a suffix indicating that the root word is not fixed but is in a state of becoming.[31]

The fourth point moves the argument over into the executive branch, where "policy" is even more at home. "Agency law making" sounds like an accusation that the government is about to violate the separation of powers principle. Back in the late nineteenth and early twentieth centuries, when Congress first began delegating a considerable degree of discretion to one agency or department after another, the separation of powers alarm bell began to ring. For a brief moment it awakened the Supreme Court, which responded approvingly that if the legislation embodied some kind of guidelines or standards, then the agency or department was not making law but had the authority "to fill up the details" of the legislation.[32] Recognizing, nevertheless, that the executive branch was in fact creating a new domain with the oxymoronic title "administrative law," the judges and their epigone in law schools softened it with a "quasi." Better to call this "policy," even though violations of rules set forth by, in this case, the Secretary of Agriculture involved criminal offenses.[33]

31 The story is told that when a person asked Gandhi, "What do you think of modern civilization?", he answered, "I think it would be a very good idea." E.F. SCHUMACHER, GOOD WORK 62 (1979) (quoting Ghandi). That is an example of a state of becoming!

32 United States v. Grimaud, 220 U.S. 506, 517 (1911) (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

33 *Id.* at 514. Only once in the twentieth century did the Court turn down an important delegation of such broad discretion to agencies and departments to make rules, and in that case the faulty provisions in the statute were so incredibly broad that Congress actually labeled them "Declaration of Policy," in which the only guidelines were that the purpose of the rules the new agency (the National Recovery Administration) had authority to make would-be rules "to remove obstructions to the free flow of interstate and foreign commerce" and to promote "the organization of industry for the purpose of cooperative action among trade groups," by approving "codes of fair competition" by trade associations. Panama Refining Co. v. Ryan, 293 U.S. 388, 416–17 (1935); Schechter Poultry Co. v. U.S., 295 U.S. 495, 534–35 (1935).

Fifth and finally, policy has been attractive because it holds out hope that government will be more participatory, not only at election time and not only in Congress where only the wealthy and the organized participate, but all along the line. Policy satisfies the need to eliminate the formality of government, as implied by the hope of making government "closer to the people." Americans have always put a lot of stock in not being fooled or put off by the formal, seeking to pierce through to the informal, the real—as in being able to bargain with power before power is applied. Law is formal; policy is real. The ultimate expression of this comes out in an apocryphal story about President Grover Cleveland who refused to support the bill of a certain lobbyist on the grounds that it was unconstitutional.[34] To this refusal the lobbyist replied, "What's the Constitution between friends?"[35]

All of this is true and has been widely endorsed, especially by moderates of all ideological and partisan persuasions. I accept this fact, but I am drawn passionately to the opposite conclusion, that policy, as understood within all five rubrics, is a danger, not a boon. Tocqueville put the case too well for me to offer my own formulation:

> Men living in democratic ages do not readily comprehend the utility of forms. . . . Forms excite their contempt and often their hatred; as they commonly aspire to none but easy and present gratifications, they rush onwards to the object of their desires, and the slightest delay exasperates them. This same temper [carries] with them into political life. . . .
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> Yet this objection which the men of democracies make to forms is the very thing which renders form so useful to freedom; for their chief merit is to serve as a barrier between the strong and weak, the ruler and the people, to retard the one, and give the other time to look about him. Forms become more necessary in proportion as the government becomes more active and more powerful. . . . Thus democratic nations naturally stand more in need of forms than other nations. . . .[36]

[34] LOUIS FISHER, THE CONSTITUTION BETWEEN FRIENDS v (1978). Although Fisher's footnote attributes this anecdote to President Theodore Roosevelt, notwithstanding that it is most often attributed to President Cleveland, other sources attribute it to an exchange between President Cleveland and Timothy J. Campbell, a member of the House of Representatives. *E.g.*, BARTLETT, *supra* note 2, at 539. *See also* THE HOME BOOK OF QUOTATIONS 307 (Burton Stevenson, ed., 10th ed. 1967) (attributing the quote to an exchange between Cleveland and Campbell).

[35] FISHER, *supra* note 34.

[36] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 346 (Henry Reeve, trans., Arlington House 1966) (1840).

This permits me to conclude with dispatch. There will always be some degree of distance between the formal and the real—in bureaucracies public and private, in families and all other forms of contractual obligations, in sports and other contests, including elections, and all aspects of governing. But in all those matters, most of all in democratic governments, the distance between the formal and the real can be taken as an operational definition of illegitimacy. Policy is the informal side of government, the real statement of what government actually does. But policy should be tolerated, not embraced, and even so, tolerated only as long as it knows its place: as the servant of the formal rule of law.