What Should Public Lawyers Do?  

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When political victory is the desired goal, public lawyers have an important role to play. In many cases, the political victories of public lawyers are achieved by legal means, and often, the public lawyers themselves have a direct stake in the outcomes. The role of public lawyers is not only to provide legal advice and assistance, but also to influence the political process by promoting the interests of their clients. The role of public lawyers is to be an advocate for their clients and to help shape the political landscape. The role of public lawyers is to be an advocate for their clients and to help shape the political landscape.

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participatory democracy (represented by Benjamin Barber and Roberto Unger). The book therefore has four distinct blocs of discussion which focus on: Dickey on administrative and constitutional law, the present debate about constitutional reform in the UK; pluralist theories of the liberal democratic state, and contemporary normative theories of (social) justice and the good society. I shall treat each of these blocs of discussion separately below, but first I shall raise some general difficulties with Craig’s approach.

II

Craig does not elaborate on what background political theories are, although he tells us that no background theory is normatively perfect. It is apparent that no background theory will provide neat answers for hard judicial cases, but Craig does not draw the obvious inference that knowledge of such background theories may not help judges, lawyers or law students very much. Instead he maintains that the articulation of the relevant background theory of democracy and its legal implications could be doubly enlightening: public lawyers may revise their legal views when the relevant background theory is fully elaborated, or conversely, when faced with legal difficulties they may be moved to revise the background theory. He does not of course claim to deal exhaustively with all possible democratic theories of relevance to public law. He explicitly and sensibly rules out of consideration ‘originalism’, the strange Usanian belief that constitutional law should be interpreted through divining the original intent of the constitutional designers.1 However, as I shall maintain below, he mishandles pluralist thinking on democracy, and he nowhere explains why he rules out of consideration those democratic theories of (social) justice and the good society which embrace a positivist understanding of constitutional and legal systems.2 Indeed legal positivism appears to be the unmentioned and unmentionable theory against which the entire book is constructed.

Yet a standard (if not the major) tacit or explicit understanding of public law, and one which is actually espoused in many liberal democracies by theorists, practitioners and citizens, is resolutely positivist. Readers of the Oxford Journal of Legal Studies do not need to be told what legal positivism is. However, some of them may assume erroneously that it was something finished off by Dworkin in the late 1960s. If so, they are mistaken. Legal positivism is not dead, and having read some of the theorists discussed by Craig, notably Roberto Unger, one can

1 Ideological problems that the transatlantic transport of this doctrine would pose for contemporary UK constitutional law are not mentioned. The fundamental doctrines of the designers of the 1689-98 constitutional settlement are known with such confidence as historians could possibly muster: they wanted to create an established Protestant and aristocratic state order.


Craig maintains in the last paragraph of the introductory chapter that the particular theories on which he has chosen to concentrate have largely been regarded as ‘ideological’ in the debate concerning the scope and legitimacy of public law. He says: ‘It is sometimes claimed that those who have anti-positivism in their common law traditions are the exceptions to the general rule of excluding consideration of the relations between democratic theories and legal positivism.”
only remark that its full-scale resurrection is a consummation devoutly to be wished. Whether in its modern Hartian or Kelsenian variations the key ideas of legal positivism are straightforward. Legal systems are sets of rules (interpreted in a broad sense) applied by judges as part of societal regulation by states. Laws are laws by virtue of their form, rather than of their moral or political content. The legal system in any state worthy of the name operates under an extra-legal Grundnorm (Kelsen) or ‘rule of recognition’ (Hart). The validity of laws is determined within the empirically relevant Grundnorm or rule of recognition. Applied to liberal democracies, legal positivism is a two-part proposition. First, that the formal role of the judicial system is to determine the laws established by the constitution and validly made by the democratically authorized law-makers. It establishes whether or not any given judicial system fulfils that role: whether or not judges subvert the laws because of their class, ethnic, religious, gender or ideological backgrounds; whether or not judges defer to (or obstruct) the executive, public agencies, minorities or other: and then upholds or invalidates not judges are competent, trained and recruited for the tasks they are required to perform. Second, for legal positivism the relevant operational background theory for judges is that of the democratic state, which establishes the extra-legal source of valid laws. In the case of the USA the relevant theory is that the (validly amended) Constitution provides the Grundnorm; in the case of the UK the relevant theory is that the Grundnorm is provided by the doctrine of parliamentary sovereignty (qualified, perhaps, by the UK’s membership of the European Community). Such background theories, while important, may, of course, be of much help in deciding hard cases. However, legal positivists do not and need not maintain that legal systems are perfectly integrated hierarchies in which there is no role for debate and argument about the meaning and interpretation of laws; nor need they maintain that there will be no gaps or contradictions in legal systems; actions; finally, they need them to be as a matter of fact. Decisions are not, when interpreting the law, to recourse to normative principles. Indeed one merit of legal positivism is that it recognizes that there may be no coherence of a moral or political kind in a given constitutional or administrative order, that rival judicial doctrines may be competing to influence hard judicial decisions, while still maintaining that there is a definite legal system. Perhaps the strongest merit of legal positivism is precisely that it helps define the limits of the extra-legal determinacy of legal systems, including its technical interpretation by judges and lawyers, and discussions of the extra-legal determination of law. This demarcation has negative consequences in so far as it apparently established intellectual barriers to enquiry on either side of this division. However there is no logical reason why

2. Indeed Hart laughs at the disparagement which he has found that rule (not law) should be in a formalist’s heaven (Hart, at 155).

legal positivism had to have these consequences. Jules Coleman’s Markets, Morals and the Law shows that legal positivism need not be an obstruction to the fruitful intermarriage of law, economics and political science. One other general methodological query is in order before considering the substantive content of Public Law and Democracy. Why does Craig confine his attention to the USA and the UK? He disarmingly warns that he his book is not ‘a formal study in comparative law’. Indeed he maintains that ‘differences of an historical, social, economic, and political nature render such an exercise impractical’ (9). He is wholly correct that his text is not a formal study in comparative law, but is entirely unjustified in drawing the conclusion that any such enterprise would be ‘impractical’. The lucid, impressive and pioneering work of P. S. Atiyah and R. S. Summers demonstrates that plausible ventures in comparative law can be executed, even if they are not always as rigorous as social scientific ideals might dictate. Craig’s idea that historical, social, economic and political differences between the USA and the UK render comparative public law an implausible venture may rely on the false notion, refused by Papwosky and Teune, that comparative research cannot be undertaken for the ‘most different systems’ and can only be undertaken for the ‘most similar systems.’ Even if one conceded Craig’s idea that the USA’s and the UK’s systems of public law are very different from one another there are research designs in political science for comparing very different systems. In any case the merits of any comparative enquiry depend upon the questions being asked, and Craig’s unwillingness to spell out a theoretical rationale for his discussions of UK US political and legal history and thought, and his defensive denial that he is carrying out an exercise in formal comparative law, create the impression that the author had no sharp questions to address to his knowledge of the USA and the UK. Craig does maintain that there are a number of reasons for focusing on the UK and the USA (10). I counted four. First, from the ‘United Kingdom perspective the time seems ripe for a more theoretical appraisal of our system, and one which attempts to pursue the public law implications of a given theoretical system in some detail’ (10) (my italics). Second, the USA exemplifies a system in which public law is discussed and debated as Craig would like it; ‘with resort to divergent background political theories in the search for the most appropriate interpretation of constitutional and administrative law’ (10). Third, UK lawyers ‘have much to gain’ by reflecting upon the UK experience, which shows that existence of a written constitution does not end constitutional controversy, and provides a ‘plethora of more particular lessons’ (10-11). Finally, US public lawyers ‘hopefully have something to learn from the experience in the United


3. Are the USA’s and UK’s public laws more different from one another than each of them is from all non-Anglo-American liberal democratic legal systems, or from all non-Anglo-American authoritarian legal systems? I don’t pretend to know the answer, but I suspect that it to answer ‘yes’ would be regarded as ‘impractical’.
Knowledge of comparative political science, as opposed to more abstract political philosophy, might also have helped Craig avoid the very dull and restricted legislative procedures of the UK. Since no one is better placed than any other member of the British Parliament to give this wisdom and experience to the new institution of the House of Lords, its members may be contrasted with the American Supreme Court justices, or with the British members of the House of Lords, who are appointed for life.

But instead of fulfilling his declared role of expounding the background political philosophy to which the report is devoted, it was to be the author of the report's background philosophy who was to be the one to expound the background political philosophy to which the report is devoted.

The British political system is based on the principle that the government is elected by the people and that the government is responsible to the people. This principle is embodied in the Constitution of the United Kingdom, which states that the sovereign power is vested in the Crown, and that the government is responsible to Parliament.

The Constitution of the United Kingdom is set out in the several acts of Parliament, which are known as statutes. The statutes are made by the House of Commons and the House of Lords, and are enforced by the Court of Session and the Court of Session in Scotland.

The Court of Session is the highest court of civil jurisdiction in Scotland, and the Court of Session in Scotland is the highest court of criminal jurisdiction in Scotland. The Court of Session is also the highest court of appeal in Scotland, and the Court of Session in Scotland is the highest court of appeal in Scotland.

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transpires that such judges will 'necessarily' (218) be involved in reasoning processes which resemble those found *inter alia* in the works of Rawls, Laski and Gewirth.

Item 2: Legitimacy and accountability. Here it is claimed that 'certain themes within the literature [on the meaning of legitimacy] are particularly relevant for the present discussion' (219). Learned references to Habermas and the idea of 'spelling out that knowledge of background political theories is very important.'

Item 3: The EC. 'The present evidence concerning the EC and its impact on sovereignty is not entirely clear' (226), but the 'longer that we remain within the Community the more likely it is that the courts will adopt' the rule of construction that Parliament is presumed not to intend statutes to override EC law, preserving 'the formal veneer of Diceyan orthodoxy while undermining its substance' (227). Democratic deficit of the EC are said to have received relatively scant attention from UK public lawyers (224). A discussion of the EC's democratic deficit follows, and we are advised that 'a) we are members of the EC and are likely to remain so;' (233); 'an undemocratic federal Europe is not acceptable'; and (c) whether or not a democratized and federal Europe could survive 'remains to be seen' (234).

Item 4: The impact of nationalism. There have been various arguments advanced for Scottish nationalism and Scottish devolution, which are very briefly sketched, and we are informed that they would have constitutional consequences if implemented. There is no discussion of Northern Ireland and its constitutional and administrative law implications, or of the role of the Crown.

These items appear like parodies, but they are the core propositions of chapter 7. They lead Craig to the conclusion that the unitary conception of the UK state represented 'is the immediate and primitive temporal, and its prescriptive foundations are questionable.' A very courageous conclusion indeed! Perhaps, we are told, the major role of public lawyers in the UK is to replace the Diceyan thesis with 'constructs which accord better with reality, and which may be more desirable.' What is immediately noticeable, however, is that the reasoning is not based on any empirical data.

V

One of the two larger blouses of the book is Craig's discussion of pluralist theories of democracy. His analysis is organized around a chapter summarizing pluralist thought in the USA, followed by a chapter-length discussion of its ramifications for constitutional and administrative law, and a repeat performance for pluralist thought in the UK. In each case he would have been far better to have avoided the detailed literature review—which looks a little too much like Oxford's Political Sociology reading list for PPE (circa 1979-80)—and referred his readers to the appropriate literature in political science and political sociology texts. These summaries would have been quite sufficient, and made it much easier to focus on the public law implications of the relevant theories.

Craig claims to find three distinctive models of pluralism, at least in the USA: the public choice model, modified pluralism and the process model (89-136). There are several problems with this categorization and what follows from it. First, there are good grounds for maintaining that the methodological and normative assumptions of public choice theorists are so incompatible with those of pluralists that it is inappropriate to treat them as a sub-set of the same type of explanatory theory. Public choice writers have been consistent methodological individualists, and contingent (but not universally or necessarily) display a conservative decision-making value bias which has made their thinking part and parcel of the 'right' in the political agenda of the New Right. Craig disappointingly does not treat the public choice agenda for constitutional and administrative law with the detail one might expect. New Right public choice theorists have very clear ideas of what they would like to do with the open-ended nature of pluralist democratic bargaining and demands upon the the modern state. They would like to bind Leviathan against the pressures of demands driven by voters, interest groups and political parties seeking to externalize the costs of free market competition, demands which lead to lax and inflationary Keynesian macroeconomic policies, distributive welfare measures, and discretionary micro-economic policies. They aim to curtail budget-maximizing bureaucracies by privatization and a range of quasi-market strategies, ranging from user-fees to de-professionalization of public sector producer groups. The New Right, both those of a public choice bent and those who take their gospel from Hayek and the Austrian school, would like to increase the constitutional review power of judges, who for some reason they see as more disinterested than vote-maximizing politicians or budget-maximizing bureaucrats. Their aim is simple: to strengthen economic liberalism against the 'imperial' economic consequences of democracy. One would have expected the public choice literary on how to break the growth of big government and send it into reverse, all of which has very decided public law implications, to have been thoroughly explored. Richard Posner, one public choice legal scholar to whom Craig does refer, albeit briefly (81-2), has a well-

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1. Ibid., p. 218. Craig discusses the cases of pluralism which he shall not elaborate. (Although it acknowledges that DAltis, in my view correctly, has conceived the idea that classical pluralism held that all groups were of equal strength 180 Craig, pp. in 2005, Craig was not among the cases that pluralists pictured society as populated by competing groups which bring it together, and which are mutually exclusive and unitary. 214) He means the social scientific terms equivalent and cumulative by treating them as synonyms for 'social classes' and 'social class'.

The last piece of the book is devoted to the discussion of various contemporary normative theories of political philosophy and jurisprudence. The competing theories are addressed and compared, but it is not clear where the author stands in the debate. From the discussion, it is not clear whether the author's position is closer to Rawls or to Nozick, or whether he is more sympathetic to American or British theories. The book is rich in ideas and arguments, but lacks a clear theoretical framework and some of the chapters are repetitive. Overall, the book provides a valuable contribution to the debate on contemporary political philosophy.
price it is not addressed to the hardpressed undergraduate in need of a crisp summary of contemporary debates in jurisprudence and political philosophy. If it is addressed to lawyers, then I imagine they might feel rather like I do: the relevance of the entire enterprise for an understanding of the role of public law in contemporary democracies is not obvious. If it is addressed to political scientists and public administrators, as opposed to philosophers, then they’re also likely to react as I have done. And if it is addressed to philosophers then that defeats the enterprise of interdisciplinary enquiry: Craig has trespassed and gone native in another jurisdiction. The problem of who is being addressed is compounded by the fact that Public Law and Democracy has at least two different books struggling to emerge from it, one dealing with explanatory and empirical theories of democracy and public law, the other with normative political philosophy and public law (as well as being burdened by two extraneous essays on Dicey and the British debate over constitutional reform).

The study of public law has a fundamental role in academic enquiry within liberal democratic states. Like all the other branches of the social sciences it stands to gain from cross-fertilization with other disciplines. However, public law will not gain if lone authors graze as indolently in other domains as Craig has done in this book. Public Law and Democracy persuades me that if cross-disciplinary fertilization is to work well for both public law and political science then it is not done best by lone scholars trying to hoover up everything of importance in another subject, and dumping the output on their colleagues. Twinned individuals or teams of people working to address rather tightly controlled projects will produce better work, as will individuals seeking to address narrower and sharper questions.

Editor’s Note: A response to Paul Craig to this Review Article will appear in Volume 12, Issue No. 4 of the Journal.

The Duel and the English Law of Homicide

It is impossible to define in terms the proper feelings of a gentleman; but their existence has supported this country for many years, and she might perish if they were lost.¹

In England the practice of duelling, private combat and a duel upon a point of honour,² was engaged in with more or less vigour from the latter part of the sixteenth until well into the nineteenth century. These were also the critical formative years for the law of homicide. Yet despite the fact that many duels ended in death, the precise relationship between killing in the course of a duel and the development of the English law of homicide has received scant attention from legal and social historians. In this article, I will be trying to do two things. I will first try to correct an interesting historical oversight concerning the complexity of the relationship between duel and the English law of homicide. Secondly, I want to discuss a puzzle about the historical relationship between these two that raises broader questions, still of considerable importance today, concerning the theoretical basis for what should count as mitigation and aggravation in the law of homicide.

Murder, Chance Medley Manslaughter and The Duel

The historical oversight arises in this way. Received wisdom among social historians has it that the law of homicide’s attitude to the duel of honour, formally at least, was one of unyielding hostility.¹ Duels of honour did exist, of course, always end in the death of one or both of the participants; the infliction of some lesser injury might suffice as ‘satisfaction’ in a particular instance.³ If, however, such a duel did end in the death of one of the participants and prosecution followed, there could be theory in no other result in law than a murderer verdict; although of course a merciful jury might see things differently on the facts of an individual case, and often did.⁴

¹ The words of Captain Massnet, speaking in his defence at his trial for murder in 1801. The killing took place in the course of a duel. He was acquitted of both murder and manslaughter: see Bullock, The Duel: A History of Dueling (London, 1965), 10-4.
² I will not be concerned here with the literal duel, whereby disputed claims were formally resolved by single combat or judicial arbitration. On opposition to this kind of duel, see John Scrik, 'Apostle of London Duelling' (1980) 9 Criminal Justice History 99, 121-5.
⁴ See ibid, at 312-13 and 315-16, and also see iter alia, Crime and the Courts in England 1667-1837 (Oxford, 1982), 38-40.