What Should Public Lawyers Do?†

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When a political scientist is asked to review a book by a legal scholar he or she typically reacts with trepidation. In much of the political-science trade lawyers are still believed to be empiricist, case-centred, pedantic and quarrelsome. They are also rumoured to be litigious. Lawyers return the compliment, often regarding political scientists as members of a profession for which no preparation or thought is necessary, or as a slightly less vulgar species of journalist. These stereotypical characterizations of the two professions are never inhibited by mutual ignorance of one another's work.

In the last decade numerous British public lawyers have ventured well beyond the traditional confines of their disciplinary *laager* and addressed issues which their predecessors were more content to leave to other social scientists or to political advocates. For example, McAuslan and McEldowney's edited collection on *Law, Legitimacy and the Constitution* (1985) and Baldwin and McCrudden's treatment of *Regulation and Public Law* (1987) were widely and favourably read by public administrators and political scientists. The intellectual ambition to combine legal and interdisciplinary social science thinking has been pushed furthest and most successfully in the 'Law in Context' series published by Weidenfeld and Nicolson, and many of its titles have deservedly found a wide audience amongst political scientists. However, the endeavour to go beyond narrow public law has often led legal authors to 'rediscover' themes in contemporary political science and public administration, and, unfortunately, on occasion to veer towards more pretentious theoretical enterprises. Harden and Lewis's extended foray into *The Noble Lie: The British Constitution and the Rule of the Law* (1986), and Birkinshaw, Harden and Lewis's *Government by Moonlight: The Hybrid Parts of the State* (1990) spring to mind as specimens of this genre.

There comes a point in some academic industries where interdisciplinary collaboration, co-operation and cross-fertilization begin to look like ill-advised trespassing, or loss of faith in one's own subject-domain. The book under review here illustrates these possibilities. Paul Craig's *Public Law and Democracy in the United Kingdom and the United States of America* (hereafter *Public Law and*

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Democracy) cannot be accused of being stereotypical or ignorant of recent political science or normative political theory. On the contrary, it is suffused with knowledge of political literature. However, it does sometimes convey the impression of purposeless trespassing, and a loss of faith in legal studies. *Public Law and Democracy* includes summaries of explanatory theories of the workings of the liberal democratic state, digressions on how historians of political thought analyse eighteenth-century Anglo-American republicanism, and discussion of up-to-the-minute political philosophers (Rawls, Barber and MacIntyre) and the debates they have generated. Craig usually provides a very fair *précis* of the political theory or theorist under scrutiny, gently summarizing and politely interrogating them for their merits and defects. In fact the latter half of *Public Law and Democracy* is so much given over to the field of political philosophy that the reader will feel like the woman in the American TV advertisement who asks 'where's the beef?', except that the question will be 'where's the law?'. This question prompts others: to whom is this book addressed? And what is the role of academic public lawyers in the UK? However, before addressing these queries I must give an account of the content of Craig's text.

I

The opening paragraph of *Public Law and Democracy* announces that it is 'a book about constitutional and administrative law' which has 'two themes'. 'The "minor" theme is that the content and direction of both subjects are integrally related' (1). I shall not discuss this theme: first, because it is a debate about the teaching of law, a jurisdiction which lies well beyond my competence; and second because it surprises me to learn, at least by implication, that there are people who believe that constitutional and administrative law are not integrally related. If such persons exist, and I am told that there are English habitats which could support such beings, then they clearly inhabit a universe which will be impervious to the kinds of arguments advanced by Craig. In any case the theme is very much a secondary one.

'The "major" theme is that the nature and content of constitutional and administrative law can only properly be understood against the background political theory which a society actually espouses, or against such a background which a particular commentator believes that a society ought to espouse' (1). Most reviewers, unlike publishers, are rightly suspicious of books with 'themes' rather than structures, especially when the author for some unexplained reason puts quotation marks around the adjectives describing the themes. What follows the introduction confirms the merits of such suspicions. To the untutored eye *Public Law and Democracy* is a set of essays, or reconstructed lectures on political theory and jurisprudence, rather than an integrated book. There is no obvious programmatic character to the chapters which follow the introduction. Although some of the individual chapters (essays?) are very fluent, the entire enterprise is less than satisfying, not least because it would have benefitted from a dramatic

editorial cut to exclude some of the more meandering and functionless digressions. Moreover, I felt cheated at the end when I discovered that the introduction is the concluding chapter.

The key problem is that although the major theme does indeed run through most of the subsequent chapters it is not clearly or consistently fleshed-out. To begin with Craig does not deal with the 'the background political theory which a society actually espouses' in either the UK or the USA. Perhaps that is not surprising. Establishing whether or not these societies have any (let alone just one) 'background political theory' would require a very carefully designed, if not loaded, social survey. Craig may be interested in the institutionally embedded political theory or theories which some believe can be found through careful inspection and hermeneutic interpretation of the intellectual history of particular countries' constitutions and patterns of administrative law, as his text often suggests, but the institutionally embedded is not the same thing as the 'actually espoused'. What Craig is actually interested in is the 'background political theory' of some particular commentators (such as Dicey); what we might fairly call the 'foreground political theories' of others (such as Rawls and Dworkin or the American pluralists of the 1950s and 1960s and the English pluralists of pre-World War II vintage); and both the explanatory and normative implications for public law of particular bodies of writing in political science and political sociology.

Craig does warn the reader that he is not interested in all 'background political theories', merely democratic ones. Since democracy is a contested term, and since 'any discussion of democracy shades into, and becomes part of a broader political theory' (5) three implications are held to follow for public lawyers: (i) they should understand such theories properly, instead of accepting, for example, 'bland incantations of pluralist or participatory democracy, as if these were self-evident propositions from which one could extract detailed legal conclusions' (5); (ii) having understood such theories properly public lawyers should then proceed to establish their implications for constitutional and administrative law; and (iii) they should recognize the institutional implications of adopting a particular background theory, in particular the repercussions for the judicial role in a democracy and the broader socio-economic preconditions required to sustain a particular democratic vision.

Each subsequent chapter, at least formally, appears to follow through on these three implications. The first substantive chapter brings out Dicey's vision of unitary, self-correcting parliamentary democracy, and reflects on its conceptual and empirical inadequacies. The next four chapters articulate Craig's understanding of the rival conceptions of pluralist democracy in the USA and the UK. The reader then confronts a hiatus, a chapter entitled 'Constitutional reform and democracy: UK', which appears to have walked in from another book. There follow two chapters on contemporary liberalism (which in this book, like many others, appears to be the copyrighted property of John Rawls and Ronald Dworkin), one on republicanism, and a last chapter on the radical vision of

participatory democracy (represented by Benjamin Barber and Roberto Unger). The book therefore has four distinct blocs of discussion which focus on: Dicey 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, particularly democratic élitism,[2] which embrace a positivist understanding of constitutional and legal systems.[3] 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] The ideological problems that the transatlantic transplant of this doctrine would pose for contemporary UK constitutional law are not mentioned. The fundamental intentions of the designers of the 1688/89 constitutional settlement are known with as much confidence as historians could possibly muster: they wanted to create an established Protestant and aristocratic state order.

[2] For a comparison of rival political theories of liberal democratic states see P. Dunleavy and B. O'Leary, *Theories of the State: The Politics of Liberal Democracy* (London: Macmillan, 1987).

[3] Craig maintains in the last paragraph of the introductory chapter that the particular theories on which he has chosen to concentrate 'have provided the focal point for much of the current debate concerning the scope and meaning of public law on both sides of the Atlantic' (11). However, even if anti-positivist theories of law have flourished recently, the very fact that they have anti-positivism as their common base suggests the strangeness of excluding considerations 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.[4]

Applied to liberal democratic states, legal positivism suggests at least two key propositions. 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 is a matter for empirical investigation to establish whether or not any given judicial system fulfils that rôle: 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 individuals rather than uphold the laws; and whether or not judges are competently educated, trained and recruited for the tasks they are required to perform. Second, for legal positivists the relevant operational background theory for judges and lawyers in a liberal democratic state is the one 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 not, 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[5] 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 any given country's legal system; and nor, finally, need they maintain that as a matter of fact judges do not, when interpreting the law, have recourse to normative principles.[6] 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 appropriate boundaries between the subject of law, including its technical interpretation by judges and lawyers, and discussions of the extra-legal determination of law. This demarcation had negative consequences in so far as it apparently established intellectual barriers to entry and enquiry on either side of this division. However there is no logical reason why

[4] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

[5] Indeed Hart laughs at the disappointed absolutist who 'has found that rules are not all they would be in a formalist's heaven' (Hart, at 135).

[6] See Alan Beattie 'Giving too much power to the judges? Law, politics, sovereignty and the constitution in Britain' (unpublished paper, LSE, July 1991).

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 the reader that 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 implausible' (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 'implausible'. 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.[7] 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, refuted by Przeworski and Teune, that comparative research cannot be undertaken for the 'most different systems' and can only be undertaken for the 'most similar systems'.[8] 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[9] 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 and 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 US 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

[7] P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (Oxford: Oxford University Press, 1987).

[8] Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (New York: Wiley, 1970).

[9] Are the USA's and UK's public law systems 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 to answer 'yes' would be regarded as 'implausible'.

Kingdom' (11), in particular the idea that constitutional debate extends beyond the scope of the courts and that a pluralist conception of public law need not 'bear the US connotation' (11). These reasons provide a visibly flimsy foundation on which to hang over 400 pages of text. They appear little more than retrospective justification for a collection of essays, as well as being a thin disguise for the (typical) ethnocentrism of much Anglo-American jurisprudence and normative political theory. There are other states, including English-speaking ones, which are of immense importance for those interested in studying public law and democracy. Indeed, the study of European and Commonwealth parliamentary democratic systems is, prima facie, more relevant to people interested in normative appraisal and political change of the UK's institutions than the examination of the USA's separation-of-powers regime. These objections to the lack of a comparative rationale for the book are not intended to be merely quarrelsome and pedantic: they suggest that the book lacks an overall conception, other than 'My reflections on recent Anglo-American jurisprudence and political science, by Paul Craig'.

III

The declared purpose of the second chapter is to show that Dicey's view of public law 'was integrally related to [his] conception of society and representative democracy' (12). Not all of the chapter is in fact devoted to this subject, which often becomes an essay in intellectual biography. The key arguments advanced by Craig are perfectly orthodox. Dicey argued that parliament is sovereign, and advanced well known theses about the nature of the rule of law in the UK. Craig argues that Dicey's background political theory was that of a believer in 'unitary' 'self-correcting' majoritarian representative democracy. The unitary strain in Dicey's thought, which I take to be anti-federalist, is not elaborated upon. Yet Dicey's anti-federalism surely merited greater attention in a book devoted to explicating background political theories and their (contemporary) public law implications. Dicey's vigorous Unionist biases are most visibly evident in his polemical *England's Case against Home Rule* (1887) and *A Fool's Paradise* (1913). They are also evident in his sharp hostility to the idea of Imperial Federation for the British Empire and 'home rule all around' within the UK.[10]

Craig is more concerned to bring out the fact that the early Dicey, the one of textook fame, believed in the self-correcting properties of representative democracy: a parliamentary majority would be internally and externally restrained from passing laws out of line with public opinion. In consequence he reasoned that constitutional review was unnecessary by British courts. Craig objects, following a now very well-established line of criticism, that Dicey had no convincing arguments as to why parliamentary sovereignty and his conception of the rule of law would protect general or minority civil liberties against statutes

[10] See his criticism of four new constitutional ideas in 'Preface to the Eighth Edition', in *Introduction to the Law of the Constitution*, (Indianapolis: Liberty Classics, 1982, reprint of eighth edition) xci ff.

which curtail or suspend them. He thought that the tyranny of the majority was something likely only amongst non-English peoples. The later Dicey, who wrote an extended introduction to the eighth edition of his book in 1915, was much more aware of the attenuated chain of legitimacy surrounding the notion that parliamentary sovereignty expressed the will of the people. Indeed he came to favour the use of the referendum to constrain parliamentary sovereignty on issues of profound concern to him, like opposing home rule for Ireland. In this respect Dicey resembles a recently retired British prime minister who loved to exercise parliament's sovereignty on its behalf, but has become an enthusiastic advocate of the referendum now that the instrument of power is in the hands of others. Nevertheless the later Dicey failed to revise his views radically on the merits of parliamentary sovereignty as the basis of the British constitution.

Craig also discusses Dicey's views on administrative law, which he loosely links to Dicey's conception of 'self-correcting' representative democracy, before elaborating on the standard criticisms: that Dicey misrepresented the empirical forms of administrative law even in his own times; that he had an anti-statist bias which failed to take into account the democratic interest in ensuring that public agencies fulfilled their functions; and that he displayed an unresolved tension between his concern to protect private common law rights and his defence of parliamentary sovereignty which might, after all, be expressed in a desire to set up agencies to perform public functions. However, the question which naturally arises at the end of the chapter is 'so what?' What have we learned? The normative and political presuppositions of Dicey's jurisprudence are and were well known. He was a liberal Unionist. He was not a straight positivist, he was too confused for that. He was a codifier and propagandist for a certain interpretation of British constitutional and administrative law, who tried none too successfully to blend the mythic 'ancient constitution' based on an organic common law which could not be traced to the sovereign with an unarticulated positivist conception of parliamentary sovereignty—which was justified as an expression of majoritarian will. So what is the rationale for Craig's discussion of Dicey, other than the fact that all British constitutional and administrative lawyers feel obliged to discuss him? Is it an oblique attack against what are now Conservative defence lines against constitutional change in the UK? If so, Craig would have done better to have launched a frontal assault on Dicey's Unionism, rather than pussyfooting about over his unsophisticated majoritarianism.

If Craig was concerned fully to explicate Dicey's background theory then he could have treated explanatory and normative theories of majoritarianism by drawing upon political science a little more. For example, Arend Lijphart's discussion of the contrast between majoritarian and consensual democracies is tailor-made for an exploration of explanatory and normative theories of majoritarianism.[11] Majoritarian systems are designed to give power to a simple majority

[11] A. Lijphart, *Democracies* (New Haven: Yale University Press, 1984). For a succinct statement see 'Democratic Political Systems: Types, Cases, Causes and Consequences' (1989) 1 *Journal of Theoretical Politics* 33–48. See also J. Mansbridge, *Beyond Adversarial Democracy* (New York: Basic Books, 1980) for a comparative discussion of adversarial and unitary conceptions of democracy.

by concentrating public policy- and law-making in the hands of a single-party cabinet which fuses effective legislative and executive power, and makes the whole state apparatus comparatively easy to capture and control. Consensual systems by contrast are designed to share and fragment political power, oblige the formation of cross-party governments and avoid the untrammelled control of executive and legislative power. This ideal-typical comparison does not correspond exactly to the differences between the UK's and the USA's political systems, because the USA has certain majoritarian features, such as the plurality-rule election system characteristic of backward English-speaking democracies. However, Lijphart's models, and his elaborations of the empirical conditions under which versions of each are likely to be stable or otherwise, would have provided a very appropriate framework for explicating background theories behind different conceptions of public law.

Consider the simple typology adapted from Lijphart's work in Figure 1. The horizontal dimension of the matrix classifies democracies on a federal-unitary axis,[12] whereas the vertical dimension of the matrix classifies democracies by the nature of their party systems, electoral systems and governmental formations.[13] It would be an interesting exercise to work out the actual role of the public law system in each entry in the matrix, and the normative expectations about the role the judiciary should play in each variant. Since Lijphart's work is the best known and most wide-ranging contribution to comparative pluralist analyses of democracies it is surprising that Craig does not refer to it. One might use it to advance the simple hypothesis that democracies with predominantly majoritarian traits will lack judicial review of the constitution (if there is one), and in their administrative law systems the judiciary will defer to the executive, whereas democracies with consensual traits are likely to have judicial review to protect both individual and communal rights, and in their administrative law systems the judiciary will seek to ensure participation-rights and multiple access points to decisions. One might also use Lijphart's typology to suggest that there will be a congruent set of normative expectations about the role of the judiciary in the different forms of democracy. In fact Lijphart's typological excursus and empirical investigation, much simplified here, produces some surprising discoveries (thus Switzerland, which is federal and consensual has a written and relatively rigid constitution, but lacks judicial review). The point I am trying to drive home, however, is that systematic comparisons of democracies and the role played within them by the public law system deserves a more rigorous analysis which integrates law with political science.

[12] In Lijphart's model this dimension is composed of three variables: (i) unwritten as opposed to written and rigid constitutions, (ii) unicameral (and asymmetrically bicameral) as opposed to strongly bicameral legislatures, and (iii) unitary as opposed to federal structures.

[13] In Lijphart's model this dimension is composed of five variables: (i) concentrated executive power as opposed to executive power sharing, (ii) executive dominance as opposed to executive-legislative balance, (iii) two party as opposed to multi-party systems, (iv) one-dimensional as opposed to multidimensional electoral and party systems, and (v) plurality rule as opposed to proportional representation election systems.

Figure 1

	Majoritarian unitary system	Consensual federal system
Majoritarian party and electoral system	1. majoritarian democracy (eg UK)	2. majoritarian-federal system (eg USA)
Multi-party/coalition party system	3. consensual-unitary democracy (eg Denmark)	4. consensus democracy (eg Switzerland)

IV

Knowledge of comparative political science, as opposed to more abstract political philosophy, might also have helped Craig avoid the very dull and restricted contribution he makes to the debate about constitutional reform and democracy in the UK. Since most advocates of constitutional reform are seeking to change the UK from a majoritarian to a consensual democracy their background normative theoretical arguments surely merited explication. Instead we are told the reasons advanced for constitutional reform are 'eclectic' (208), although the authors footnoted as guilty of this crime are exclusively lawyers. One would have expected Craig to show that there is a philosophical coherence rather than merely eclectic relationship between arguments for a bill of rights, European integration and federalizing devolution within the UK. Such arguments are advocated to Europeanize the British political system into a consensual democracy, as the Conservative party and its supporters are well aware, as are partisans of Charter 88.

But instead of fulfilling his declared role of explicating the background political theory of constitutional reformers—in this case consensual federalism—Craig makes a querulous and curious series of observations. He claims that there is 'no detailed historical enquiry which demonstrates that the [Conservative] administration has a record which is worse in relative terms than many of its predecessors' (210) in infringing civil liberties and/or disturbing the allocation of power between differing tiers of government,[14] and observes sagely that the 'mere fact that constitutional conventions can be said to have altered does not *per se* indicate that the "new position" is constitutionally objectionable' (210). In a tutorly fashion Craig then sets out to tell (his fellow public lawyers?) how they should generally discuss constitutional reform. My notes from the tutorials are as follows.

Item 1: Bills of rights surprisingly 'will depend, *inter alia*, upon the particular background theory through which they are viewed' (213). More surprisingly still it turns out that judges will have interpretative difficulties with a bill of rights, especially where rights clash with one another. In a genuinely shocking twist it

[14] The differential erosion of civil liberties and increase in centralization under recent Conservative governments is eloquently treated in K. D. Ewing and C. A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Oxford University Press, 1990), even if their prescriptions are less compelling than their analysis. The repercussions of Conservative centralizing initiatives on British inter-governmental relations which have resulted in a 'policy mess' receive a sophisticated treatment at the hands of R. A. W. Rhodes, *Beyond Westminster and Whitehall: The Sub-Central Governments of Britain* (London: Unwin & Hyman, 1988), especially 367 ff.

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 follow. Then it appears that discussions of 'substantive principles' such as proportionality and legal certainty 'require the proper articulation of a background political theory' (221) and so it goes on, to no apparent end other than 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). Democracy and decision-making within 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 undemocratized 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 Wales.

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 by the Diceyan thesis 'is inaccurate in descriptive terms, 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 in prescriptive terms'. But, he immediately cautions his readers 'shortcuts are . . . not possible. One must be prepared to reveal the conception of democracy which underlies specific proposals, and be ready to defend the broader political theory of which it is one part' (243). To which all readers will doubtless say 'Amen!', and then immediately complain that Craig has not done what he thinks he and his colleagues should be doing.

V

One of the two largest blocs 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. Terse summaries would have been quite sufficient, and have 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 (80–136). There are several problems with this categorization and what follows from it.[15] 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.[16] Public choice writers have been consistent methodological individualists, and contingently (but not universally or necessarily) display a conservative value-bias which has made their thinking part and parcel of the political agenda of the New Right.[17] 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 deprofessionalization 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 (perceived) economic consequences of democracy. One would have expected the public choice literature 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-

[15] There are two other objections to Craig's treatment of pluralism which I shall not elaborate. (i) Although he acknowledges that Dahl, in my view correctly, has contested the idea that classical pluralists held that all groups were of equal strength (100) Craig persists in repeating the canard that pluralists pictured society as populated by 'equal competing groups which bargain between themselves, and which are automatically self-correcting' (134). (ii) He misuses the social scientific terms equilibrium and disequilibrium by treating them either as synonyms for equality and inequality, or as synonyms for harmony and disharmony.

[16] See *Theories of the State: The Politics of Liberal Democracy*, (London: Macmillan, 1987) 13–135, and 319–49 and more expansively P. Dunleavy, *Democracy, Bureaucracy and Public Choice: Economic Explanations in Political Science* (London, Harvester Wheatsheaf, 1991), especially chapters 1, 2, 4 & 6.

[17] See D. S. King, *The New Right* (London: Macmillan, 1987).

developed normative doctrine of how judges should behave when handling administrative law issues: they should seek to imitate the outcome which a perfect market process would have generated.[18] There are powerful critiques to be made of this literature, but unfortunately that offered by Craig is insubstantial.

Second, Craig's differentiation of what he calls 'modified' pluralism from a process model of pluralism is unnecessary. Modified pluralism is what others have termed 'neo-pluralism',[19] and is Craig's shorthand for the views of those like Robert Dahl and Charles Lindblom who have drawn attention to the deformation of polyarchy by the privileged position of business in policy-formulation and policy-implementation. Craig's process model turns out to be John Ely's normative prescriptions in his much discussed theory of judicial review.[20] The reason this 'process model' is not a third model of pluralism is that it is explicitly put forward as the normative counterpart of the neo-pluralist explanatory account of the policy process in liberal democratic states, as Craig's own discussion makes plain. (That said, it must be acknowledged that Craig's summary of Ely's writings and the debates they have generated is very good indeed, and provides one of the best passages in the book for those interested in the interaction between political science and public law).

Third, Craig fails to distinguish sufficiently the explanatory and normative components of both pluralist and neo-pluralist thinking. There are in fact three explanatory images of the relationship between society and state in pluralist thought.[21] In the cipher image the state and policy outputs are a weathervane reflecting the prevailing balance of pressures in civil society; in the guardian image the state has the capacity to equalize and intervene to regulate the balance of pressures in civil society; whereas in the partisan image state agencies are self-serving brokers interested in their own aggrandizement. Each of these images suggests a different empirical expectation about the role of the judiciary in the liberal democratic state: as mere registers of societal pressures; as guardians of the polyarchy; and as active agents guided by their own interests. These explanatory pluralist accounts would be well worth examining for their truth or falsity in a comparative analysis of different legal systems. Such empirical analysis is in principle separate from normative debates about what role the judiciary should play in a pluralist system. Craig is clearly more interested in the latter debate, but what his own account shows is that apart from Ely, there is a paucity of profound reflection by American pluralists on the role the judiciary should play, as distinct from the one it actually plays in the policy process. In this instance political science has far more to learn from public law than vice versa so it is unclear what is the value of the lengthy expositions of pluralist thinking in this section of the book.

[18] R. Posner, *Economic Analysis of Law*, (Boston, Little, Brown and Co. 1986), 3rd edition, and *The Economics of Justice*, (Cambridge, Mass.: Harvard University Press, 1981).
[19] *Theories of the State: The Politics of Liberal Democracy* (London: Macmillan, 1987), chapter 6.
[20] J. H. Ely *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: 1980).
[21] *Theories of the State: The Politics of Liberal Democracy* (London: Macmillan, 1987), 43–59, 327–34.

VI

The last bloc of the book is devoted to a discussion of various contemporary normative theorists and theories in political philosophy and jurisprudence. The summaries of the key arguments advanced by Rawls and Dworkin are perfectly competent, and some acute problems in the work of Barber and Unger are detected. Craig joins in the defence of Rawls's and Dworkin's versions of liberalism against their communitarian and radical critics. He raises the sensible question which is not addressed by Rawls: what is the role for judicial review if a legislature is passing legislation in accordance with Rawls's principles of justice? And how should a judiciary behave in a non-ideal world in which Rawls's principles of justice are not constitutionally or legislatively entrenched? He also judiciously and fairly explores the neo-republican literature in the United States, pointing out that there are fundamental tensions between republicanism and any capitalist economic order which is not based on a society of roughly equal small farmers or petit bourgeois owner-proprietors. Finally, he engages, with a wary degree of sympathy, Barber's work on 'strong democracy' and Unger's vision of participatory or empowered democracy.

The questions raised in this bloc of the book are not uninteresting, some of the answers are informative, and Craig demonstrates his grasp of much of the literature. However, since I am not competent to appraise specialist literature in political philosophy I shall confine my comments to two observations. First, Craig failed to persuade me that these four lengthy chapters did much to advance the major theme of the book entitled *Public Law and Democracy*. In these chapters he is concerned not so much to explicate background theories of democracy which have implications for administrative and constitutional law, but rather to describe foreground political theories of the good society at some length, defending them against their critics, and then constructing, often with some difficulty, their prescriptive implications for constitutional and administrative law. The problem with this approach is that it seems that some of these normative theories are pitched at such a high level of abstraction that determining their implications for public law is problematic and indeterminate at best. I confess that I smiled with relief when I read the declaration in the penultimate footnote in the book that 'Space precludes a detailed examination of the views of J. Habermas' (415). In addition, the question arose for me which I'm sure will arise for other readers: why didn't Craig simply refer readers to the basics on Rawls et al so that he could leave himself sufficient space to tease out whatever constitutional and administrative law implications there are in contemporary political philosophy?

VII

This question brings me back to the ones that I raised in the introduction. To whom is this book addressed? In this form, at this length, diversity of scope, and

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 indulgently 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 by 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 *seul a seul* 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 amongst social historians has it that the law of homicide's attitude to the duel of honour, formally at least, was one of unyielding hostility.[3] Duels of honour did not, 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.[4] If, however, such a duel did end in the death of one of the participants and prosecution followed, there could in theory be no other result in law than a murder verdict; although of course a merciful jury might see things differently on the facts of an individual case, and often did.[5]

[1] The words of Captain MacNamara, speaking in his defence at his trial for murder in 1803. The killing took place in the course of a duel. He was acquitted of both murder and manslaughter: see Baldrick, *The Duel: A History of Duelling* (London 1965), 97–8.

[2] I will not be concerned here with the legal duel, whereby disputed claims were formally resolved by single combat, at judicial direction. On opposition to this kind of duel, see John Selden, *Antiduello* (London 1632).

[3] See eg Simpson, 'Dandelions on the Field of Honour: Duelling, the Middle Classes, and the Law in Nineteenth Century England' (1988) 9 *Criminal Justice History* 99, 121–2.

[4] See Andrew, 'The Code of Honour and its Critics: The Opposition to Duelling in England, 1700–1850' (1980) 5 *Social History* 409, 412.

[5] Andrew, op cit above, n4 at 412–13 and 415–16; see also Beattie, *Crime and the Courts in England 1600–1800* (Oxford 1986), 98.

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