Thomas Craig's aetiology of law and society: literary dependence and independence in the *Jus Feudale*

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While Craig's relationship to, and emergence from, the French legal humanist tradition has always been widely recognised, this paper constitutes a deeper analysis of the specific threads connecting Craig to the humanist literature of the sixteenth century. It examines the first chapter to the Jus feudale and, by studying Craig's aetiology of law and society, assesses the literary and cultural influences on his historiographical product. It will demonstrate that Craig's understanding of the earliest human society and of law's evolution was highly dependent on continental humanist literature and, above all, on the writings of Jean Bodin. Yet it will also show that Craig was capable of independent thought and rigorous critical analysis of sources. We will see Craig's relationship to the writings of his fellow Scot and humanist, George Buchanan, whose De jure regni apud Scotos constitutes a vital intertextual frame for many aspects of Craig's thought, particularly as it relates to sovereignty, monarchy and the limits of royal power. Moreover, we will see that the first chapter, though seemingly an antiquarian digression, actually reflects Craig's thoughts on many significant political issues that were current in Scotland at the time he was writing.

Keywords

Thomas Craig; Jus Feudale; Legal Humanism; Scottish Humanism; Scottish Latin; Scottish Law; Classics in Renaissance Scotland; Classical Reception in Scotland; Jean Bodin; George Buchanan; De Jure Regni Apud Scotos; De Republica; Methodus Ad Facilem Historiarum Cognitionem; 16th century Scotland; Scottish Juristic Writing; Delitiae Poetarum Scotorum; Renaissance Legal Thought; Feudal Law; Feudalism in Scotland; Cicero; Livy; Tacitus; Aristotle; Homer; Basilikon Doron; James VI; Institutional Writers.

I. INTRODUCTION

To most modern readers, Thomas Craig is, first and foremost, 'a busy and successful lawyer',[1] an active advocate whose rôle in the Scottish legal profession of his day was sufficiently influential that his death was recorded in the Session's books of sederunt in

[1] J. W. Cairns, 'The *Breve Testatum* and Craig's *Jus Feudale*', 56 *Tijdschrift voor Rechtsgeschiedenis* (1988) 311-332 at 314; see also J. W. Cairns, T. D. Fergus, and H. L. MacQueen, 'Legal Humanism in Renaissance Scotland', 11 *Journal of Legal History* (1990), 41-69 at 48 and J. Finlay, 'The Early Career of Thomas Craig, Advocate', 8 *Edinburgh Law Review* (2004), 298-328 at 298-299.

'an unprecedented and unique addition to the formal court record'.[2] Like many jurists of his time, however, Craig was also an unambiguously literary man who produced a significant quantity of Latin verse. While his poetry was, aesthetically speaking, not quite on a par with Buchanan, it nevertheless has significant literary merit in its own right and has been preserved in the *Delitiae poetarum Scotorum*,[3] a compendium which has, in recent years, begun to receive a degree of attention from scholars of Scottish Renaissance humanism.

The nature of modern academic culture is such that it seems perfectly natural to distinguish between Craig the lawyer and Craig the poet. In his own time, however, any such division would have been incomprehensible. As early as 1915, Baird Smith was aware that modern conceptions of the lawyer's proper sphere had led to the imposition of anachronistic interpretational dichotomies which would have seemed, at the very least, unusual to Craig and his contemporaries.[4] Renaissance jurists like Craig admitted no artificial distinction between their literary and legal output;[5] indeed, one of the defining characteristics of legal humanism was its conception of law as something that had to be understood in literary and historical terms.[6] Even Craig's *magnum opus*, the *Jus feudale*, is a text which does not fit solely within the category of law. While the text is arguably the first, and certainly least studied, of the Scottish institutional texts,[7] it is not only a legal (or legal-historical)[8] document but also a very significant piece of Scottish Latin literature with great value in the philosophical, political and historiographical spheres and one which is heavily informed by a wide variety of sources, both classical and contemporary.

Craig was, as all writers are, a product of his own time, place and culture. During his lifetime, Craig was neither an Institutional writer nor the father of Scots legal historiography; these are labels appended to him subsequently, labels which would have been incomprehensible to him and which, in many ways, prevent us from understanding him as he and his contemporaries would have. While he lived he was, and saw himself as, a French-trained humanist lawyer,[9] a title which, in sixteenth-century Scotland, made implicit that Craig was a literary figure as much as a legal one and that his literary

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[2] On the recording of Craig's death, see J. W. Cairns, 'Thomas Craig (?1538-1608)', *Oxford Dictionary of National Biography*, Oxford, 2004.

[3] Cf. *Vita Cragii*, xvii (1732 edition).

[4] D. Baird Smith, 'Sir Thomas Craig, Feudalist', 12 *Scottish Historical Review* (1915), 271-302 at 275 and 291.

[5] Cf. J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century*, Portland, 2007, 50.

[6] C. P. Rodgers, 'Humanism, History and the Common Law', 6 *Journal of Legal History* (1985), 129-156 at 129.

[7] Cairns, '*Breve Testatum*', 312 calls it 'the first comprehensive treatise on early modern Scots law to be published'.

[8] Even in Stair's day, some forty years after Burnet first published the work and about ninety years after it was written, the *Jus feudale* was outdated in some substantial ways and constituted a voice from a distant past rather than a work of living law; see Stair, *Institutions*, 2.3.3.

[9] Craig was not unique; see Cairns, Fergus & MacQueen, 'Legal Humanism', 44 on Skene, Craig's contemporary, who was taught according to the *mos docendi Gallicus* at Wittenberg University; with this term, Skene was describing the utilisation of classics and the liberal arts as a 'systematic method of study' (Rodgers, 'Humanism', 131) as laid out by Alciato and his students at the University of Bourges; legal humanism was marked by 'the use of philological and historical methods of enquiry as a way of recovering...ancient Roman law' and stood in contrast to the *mos Italicus* of the earlier legal commentators (Ford, *Law and Opinion*, 9). Cf. G. Dolezalek, *Scotland under the Jus Commune*, 3 vols., Edinburgh, 2010, vol.1, 6 on the deep French influence over Scots law in the late sixteenth and early seventeenth centuries.

output, including the *Jus feudale*, was an expression of a humanist cultural nexus that centred on and derived from the law schools and universities of France; as Cairns puts it, 'Appreciation of this French, humanist influence is vital in interpreting and understanding *Jus Feudale*'.[10]

However, the other components of Craig's identity – his nationality and his profession – were no less important and, along with his humanist French education, form the foundational elements of his literary product. We can read his first chapter on each of these three levels: first as a lawyer's introduction to the concept and origin of law; second as a humanist's classicising explanation of human prehistory; and third as a Scotsman's effort at using the ancient past to illustrate and interpret the hard political realities of the times in which he lived.

This essay is a first attempt at locating and interpreting the author and his literary-cultural relationships to sources through his aetiology of human prehistory, as recounted in the first chapter of the *Jus feudale*. As such, it is literary, even hermeneutic, in nature. By close study of the Latin text, it will endeavour to show how Craig's narrative was shaped by the sources he used. As we shall see, he employed a wide variety of sources, ancient and contemporary, verse and prose, sacred and profane, and by recognising them we may begin to trace the flow of ideas that passed from sources to writer thence to readers. If, as literary critics so often claim, writers write in response to the pressure of earlier writers, Craig would seem to encapsulate the matter very neatly. His entire aetiology of law and society is an expression of the sources he used and the cultural milieu in which he lived and was educated.[11]

II. STRUCTURE AND FUNCTION IN THE INITIAL CHAPTERS OF *JUS FEUDALE*

When Craig set out to form a detailed history of feudal law, he began with the biblical narrative of the Tower of Babel. He explained how the earliest societies, laws and governments were formed in the days after the Fall of Man before going on to discuss state and citizenship, the creation of monarchy, the rise of tyranny (quite the hot topic in the Scotland of his day), the inception of written law and, finally, the origin of Greek and Roman law, with which the first chapter concludes. In the second and third chapters, he goes on to discuss the origin and rise of civil and canon law respectively.

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[10] Cairns, '*Breve Testatum*', 316. According to J. Pocock, *The ancient constitution and the feudal law*, Cambridge, 1957, 79, Craig studied in Paris 1555 to 1561 and was taught by François Baudouin but such a contention goes far beyond the evidence. We know that Craig studied in Paris as a youth (as Cairns notes, citing a line from the *De unione regnorum Britanniae*) and we can say that this French sojourn must have taken place after his graduation from St Andrews in 1555 but that is the limit of our knowledge. Cairns observes that the language Craig uses in describing his time in Paris is such that we cannot even say with certainty that he studied law there. Specifically, Craig speaks of studying *litterae* which 'strongly suggests he there exclusively studied arts' (note, however, that Cicero uses the word to mean 'edicts' or 'ordinances', *In Verrem* 2.5.56, so it is not impossible that Craig was using the word as a synonym for 'laws'); certainly, Craig must have been exposed to a great many French humanists, many of whom he would later cite in the *Jus feudale* and who constitute 'his intellectual, if not actual, mentors' (Cairns, Fergus & MacQueen, 'Legal Humanism', 48).

[11] The author is conscious of the danger of lapsing into New Historicist territory and presenting Craig as an impersonal, bourgeois scribe jotting down the cultural creation of the society in which he lived. That is not the intent.

The material in these three chapters is not perhaps germane to the reader seeking detailed information on the rules governing feudal investiture in early modern Scotland, but it should nevertheless be abundantly clear that these chapters express a great deal about Craig's conceptualisation of law, its purpose, origins, development and relationship to other social structures and to historical events. They could be said to represent a diorama of the philosophical and intellectual abstractions that underlie Craig's approach to the practice of law. At a philosophical level, Craig understood history as a narrative which explained why things in the present existed in their current state;[12] the first chapter is therefore a vital part of the author's attempt to harmonise the relationship between the study of feudal law and the socio-historical context in which the law emerged. In spite of this, the first chapter, in particular, is often overlooked.[13] Pocock, for example, observed that Craig traced the origins of feudalism 'at least as far back as the Germanic invasions' of late antiquity, that '[h]e begins...by explaining that, for reasons of climatic influence which recall Bodin, servitude amongst the northern peoples was more just and clement than amongst the southern'.[14] Yet Pocock is here referencing Craig's fourth chapter (*de feudorum origine et progressu*);[15] he is therefore choosing to pass over the first three chapters amounting, in the present writer's English translation, to some 17,000 words or just under ten per cent. of the entire first book, and to begin with the fourth chapter. Of the existing seventeenth century Scots-language compendia of Craig, one actually excises sections 1.1-8 entirely.[16]

From the point of view of modern legal historians, possessed of a nuanced and sophisticated understanding of western law's evolution, it could seem reasonable to treat these chapters as having no intrinsic value for the study of the wider topic and thesis of feudal law *qua* feudal law, as constituting introductory material for students or the kind of fluff one must tolerate when reading the work of a man who fancied himself an antiquarian. These chapters, however, are neither fluff nor padding. Rather, they constitute a core element of Craig's understanding of law and its authority within the rest of the book and, by overlooking it, we are limiting our own ability to approach and understand Craig's schema for law's evolution. Few things, then, better illustrate the artificial divisions which modern academic methodologies can impose.

The central thesis of the *Jus feudale*, to the extent we can usefully adduce one,[17] is that feudal law is a 'pan-European system',[18] a universal structure found across every

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[12] See Cairns, Fergus & MacQueen, 'Legal Humanism', 51-52 on Craig's understanding of history's 'broad sweep of development' and H. L. MacQueen, '*Regiam Majestatem*, Scots Law, and National Identity', 74 *Scottish Historical Review* (1995), 1-25 at 15-16 on the way in which Craig's humanist education and 'turn of mind' allowed him to recognise the historical changes to which Scots law had been subject; cf. Rodgers, 'Humanism', 130 on the contrasting medieval conception of history as no more than a 'valuable repository of examples and precedents'.

[13] A notable exception to this is Dr A. R. C. Simpson whose unpublished LLM dissertation, *Thomas Craig of Riccarton and the Genesis of the Scottish Legal Historiographical Tradition*, University of Aberdeen, 2007, provides new and valuable insights into this part of the text.

[14] Pocock, *The Ancient Constitution*, 80.

[15] *Jus feudale* 1.4.3.

[16] National Library of Scotland MS.5437; see Dolezalek, *Jus Commune*, vol.2, 56-57.

[17] Cf. Cairns, Fergus & MacQueen, 'Legal Humanism', 49.

[18] C. Kidd, *British identities before nationalism*, Cambridge, 2004, 280; cf. Cairns, '*Breve Testatum*', 313, 322.

part of Christendom and even in the Islamic world beyond.[19] Craig's intent was for his writings to be understood not simply in a Scottish, or even British, context but within a wider European discourse.[20] The decision to write in Latin, the universal language of Europe, underscores the universal nature of feudal law and also the fact that Craig's monograph was no mere practick, no handbook for local practitioners,[21] but constituted instead a profound study of feudal law at the European level which deserved to sit alongside the works of Zasius, Hotman, Bodin and Cujas;[22] and, indeed, the *Jus feudale* was the only work of Scottish legal Humanism actually to gain an audience in the rest of Europe.[23]

The first chapter is the mechanism through which Craig signals his intent to his readers by writing about the genesis of law, community, monarchy and state as human societal universalities. That is to say, feudal law is to be understood as one facet of a process of legal development and evolution that stretches all the way back to the Tower of Babel. Readers are not expected to interpret feudal law as something discrete from the historical (and, indeed, mythological) process of legal evolution but rather as a facet or aspect of a type of law no different from, and no less universal than, civil and canon law. The foundations of feudal law are thus to be found in the aetiology of the earliest human societies and the laws to which they gave birth.

III. DISSECTING THE JUS FEUDALE

1. Jus feudale 1.1.1: Craig's introduction

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[19] *Epistola nuncupatoria*, *Hoc etiam jus feudale his multis seculis omnibus Europaeis gentibus ita placuit, ut nulla sit in Christian orbe gens (addo etiam et immanissimos Turcas) quae non ex eo leges suas et instituta descripsit*. ('The Feudal law has been used by all European nations for many centuries, so that there is no nation in the Christian world (and I even include the monstrous Turks) which has not copied from it its own laws and institutes.') Craig attempts to explain the Turkish timariot as a form of feudalism and develops an etymology in which the Turkish *tîmâr* derives from the Greek τιμὴ (honorarium, stipend). On the timariot itself, see K. Karpat, *Studies on Ottoman social and political history*, Leiden, 2002, 333ff.; cf. also *Encyclopaedia of Islam*, Leiden, 1913-1936, *s.v. tîmâr*.

[20] E. A. R. Brown, 'The Tyranny of a Construct: Feudalism and Historians of Medieval Europe', 79 *American Historical Review* (1974), 1063-1088 at 1064; Cairns, '*Breve Testatum*', 313.

[21] Pocock, *The Ancient Constitution* calls the *Jus feudale* 'a book for Scotsmen' (84) but it was more properly a book for all feudists, for all lawyers and scholars living in countries which employed a feudal legal system; which is to say, though primarily about the feudal law as practised in Scotland, it was actually written for, and to be understood by, all Europeans. The text has been described appositely as 'a pre-digested encyclopaedia of the learning of the *jus commune feudorum*' (J. W. Cairns & G. McLeod, 'Thomas Craig, Sir Martin Wright and Sir William Blackstone: the English Discovery of Feudalism', 21 *Journal of Legal History* (2000), 54-66 at 57). See also J. W. Cairns, 'Institutional Writings in Scotland Reconsidered', in A. Kiralfy, and H. L. MacQueen, eds., *New Perspectives in Scottish Legal History*, London, 1984, 100.

[22] Not for no reason did Mencken describe the 1716 edition in a subtitle as *opus in Germania dudum desideratum* and it is inconceivable that Craig did not foresee the value of his work to European feudists. Cf. esp. 1.2.13: *At licet Fridericus Aenobarbus leges Romanorum et publicari et doceri praecepit, nullus tamen apud Germons juri Romanorum locus sed tantum juri feudali, ut post dicemus*. ('Although Frederick Barbarossa ordered Roman law to be both publicised and taught, the law of the Romans had no force in Germany; only the Feudal law did, as we will afterwards discuss.')

[23] Cairns, Fergus & MacQueen, 'Legal Humanism', 59

The *Jus feudale* opens with the line:[24] 'Before we begin to discuss the nature and state of feudalism, it would be worthwhile to introduce a few things about the earliest origin of law'.[25] The Latin phrase *facere operae pretium* ('to make something worthwhile') is also the opening three words of the *praefatio* to Livy's *Ab urbe condita* (albeit in the form of an indirect question in the future tense). Craig's echoing of Livy is no coincidence; rather, it is a statement of dialectic intent affirming that Livy is an historiographical pattern and frame for the *Jus feudale*.[26] The author thus opens the text with an explicit statement that he is at least as much historian as lawyer and that the *Jus feudale* is as much a history of legal institutions as a practical work for feudal lawyers.[27]

More than that, however, the first book of the *Ab urbe condita* acts as the model for Craig's first chapter. Livy's first book, which has been called a 'prose epic' and a 'counterpart of Vergil's *Aeneid*',[28] was published separately from the rest of the text and gives an account not of Rome's history but of her legendary or semi-legendary past, one which acts as introduction to Livy's 'real' historical narrative. It deals with the arrival of the Trojans and foundation of the city of Rome and continues down to the overthrow of Tarquinius Superbus, both topics upon which Craig himself touches in the course of his first two chapters.[29] Later in the *Jus feudale*, Livy will take something of a back seat to Tacitus,[30] yet, in the first and second chapters, Livy is Craig's historiographical model as Cicero is his philosophical source and Bodin his contemporary literary ideal. Livy is an object of emulation and the reason why Craig opens what is otherwise a dense history of legal development with a fantastic account of human prehistory, an account which goes out of its way to include elements from the Livian mytho-historical narrative and which, like Livy's first book, forms a body discrete from the larger work of which it is notionally a part.

Perhaps of greater significance, Livy's own fascination with what he saw as the conflict between Rome's traditional values and the corruption and decadence of Rome in the first century BC, the starting point for his whole historiographical project,[31] has clearly been internalised by Craig and constitutes the foundation for his understanding of the evolution of societies and their laws and of the feudal system itself.[32] As we shall see, the inevitability of human corruption and the degradation, over time, of human virtue are a recurring *leitmotif* of the first chapter and represent Craig's marriage of Christian motifs about moral degeneracy to Livian (and broader Roman) concerns about political and social corruption.

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[24] The author will, for ease of reference, follow the divisions found in Baillie's 1732 edition. However readers should note that these divisions were not Craig's creation. To assist readers, quotations from non-English texts will give both the original and the author's translation.

[25] *Antequam feudorum naturam et conditionem tractare aggredimur, operae pretium facere videbor si pauca praemisero de juris prima origine*.

[26] On the centrality of Graeco-Roman sources as model for Renaissance lawyers, see R. Bolgar, *The Classical Inheritance and its Beneficiaries*, Cambridge, 1958, 293.

[27] Baird Smith, 'Feudalist', 295, 301.

[28] R. Mellor, *The Roman Historians*, New York, 1999, 56; C. J. Hemer, *The Book of Acts in the Setting of Hellenistic History*, Tübingen, 1989, 81; but D. A. Pauw, 'The Dramatic Elements in Livy's History', 34 *Acta Classica* (1991), 33-49 considers this characterisation 'a rather slighting verdict' (33).

[29] On the founding of cities by Aeneas, see 1.1.4; on Tarquinius Superbus, see 1.2.1.

[30] The extensive quotation from the *Germania* at 1.4.3 is the most obvious example but, throughout the *Jus feudale*, Tacitus seems to be cited more frequently than Livy.

[31] See Livy, *praefatio* 4-12.

[32] Baird Smith, 'Feudalist', 301; cf. Cairns, Fergus & MacQueen, 'Legal Humanism', 52.

2. Jus feudale 1.1.2: humanity after the Universal Flood

Craig's opening for his aetiology of law is the Tower of Babel in the aftermath of Noah's Flood. So the foundations of law, as Craig understood them, are found in the fragmentation of the human race.[33] The use of a biblical starting point is unsurprising as Craig also opens his *De jure successionis regni Angliae* with a biblical narrative.[34] For sixteenth century authors in general, sources for prehistory were limited to the classical and the biblical. At the same time, for the literary product of any early modern Christian society, the Bible is the most natural textual frame and one which enjoyed an unchallenged cosmological hegemony, particularly in relation to human social origins. If the Bible served any purpose for a Christian culture in this period, it was as an account of how human society was created and as a definition of the limits of acceptable thought and action within that society. The Bible was the explicator of all things to do with human existence and creation. Yet Craig, from the very start of his text and despite his apparently zealous Protestant credentials,[35] offers neither simplistic nor unquestioning adherence to biblical sources. The biblical account is neither absolute nor incontrovertible in Craig's worldview. Rather, it is one more historical source and subjected to the same tests, criticisms and rational enquiries as Craig would (and does) apply to his other sources.[36]

This process of rational criticism is initiated from the very start of the text and continues throughout, arguably becoming one of the defining literary characteristics of the *Jus feudale*. It is noteworthy that Craig is not actually discussing the Tower of Babel but *turrim illam Babylonicam*. Neither the indeclinable Latin *Babel* nor its related adjective *Babelicus* are employed; rather, Craig goes straight to the classical Latin and gives his readers not the Tower of Babel but 'the famous Babylonian Tower'. This usage has limited mediaeval provenance – only Bernard of Clairvaux seems to have used it and then only once – but it found favour during the Renaissance as a more learned, more precise, more classical and, therefore, less biblical variant.[37] Amongst those who used it, is another famous European lawyer, Grotius.[38] Whether one sees this as stylistic choice or scholarly pretension on Craig's part, it is certain that the term anchors Craig within the humanist literary tradition. It represents, in a sense, Craig's assertion that he will subject biblical history to rational and scholarly (and therefore classicising) inquiry, removing it from its usual religio-mythological setting and re-interpreting it according to human reason.

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[33] On the religious implications of the Babel story (specifically, that it is a story of rebellion against God and therefore against Natural Law), see Simpson, *Thomas Craig*, 80ff.

[34] Note, however, that where the *Jus feudale* begins with Babel, the *De jure successionis* begins after the Flood.

[35] Baird Smith, 'Feudalist', 279 calls Craig a 'Protestant lawyer but lightly encumbered with theological baggage' but the strength of his religious belief is apparent in a great deal of his literary output and in his personal papers; cf. *Vita Cragii*, xvii.

[36] This interpretation is at odds with that of Pocock, *The Ancient Constitution*, 6-7 where humanist writers are reluctant to apply 'critical techniques' learned in other disciplines to the study of law and legal history. But see Cairns, Fergus & MacQueen, 'Legal Humanism', 56 for an astute analysis of Craig's critical historical approach to sources that involving 'close attention to, and criticism of, texts'.

[37] Bernard of Clairvaux, *Sermo in assumptione* 5 is the only pre-Renaissance example of the usage *turris Babylonica* which I have been able to find. It is, however, used widely by humanist writers; for example, Johannes Herold, editor of the 1563 Basil edition of Bede, lists *turris Babylonica* and *Babyloniae* in his index even though Bede himself does not use either phrase.

[38] Grotius, *De jure belli et pacis* 2.2.3.

Where the biblical account states that the Tower of Babel was built in an effort to reach heaven,[39] Craig instead follows Josephus in explaining that it was actually built by the survivors of the Flood as a safety precaution 'so they would not be overwhelmed by the sudden force and flood of the waters'.[40] The question of whether this contradicts the biblical account or supplements it remains an open question among certain Christians down to the present. There seems to be nothing intrinsically contradictory between the narratives of Genesis and Josephus – it is, after all, wholly possible that the reason for wishing to reach heaven was to escape the rise of waters – so the matter depends upon whether one believes the Bible is complete and absolute needing no further explication or whether one believes (as Craig clearly did) that the bare biblical account can be developed by the application of human reason and scholarship. At the very least, Craig was supplementing – but possibly correcting and rationalising – an account that, in his day, would have been interpreted as literal and complete by most of his contemporaries and co-religionists. One must not construe this as nascent anti-religiosity on his part, as Craig was clearly firm in his religious convictions. Instead, we should interpret this as Craig's recognition of the fine distinction between the Bible as instrument of religious revelation and the Bible as historical source.[41] Craig neither denies nor challenges the Bible's religious mandate or its rôle as revelator of divine truth; rather, and in a very limited sense, he scrutinises what we might call the Bible's editorial commentary on events and thus expands upon the biblical-historical account without at any stage touching upon the central doctrinal message of the Babel story, which, as Simpson says, is one of rebellion.[42]

Craig accepts the intrinsic truth of the Babel story but rationalises and expands its context through reference to a classical text which gives the story meaning beyond the bald biblical account (*viz*., that the people who settled in Shinar built the tower in order to make a name for themselves by reaching heaven). It is nevertheless unlikely that Craig had direct access to a Greek text of Josephus;[43] given his apparent limitations in Greek and the relative rarity of the text in northern Europe, he probably had not. It is, for example, highly significant that the first English translation of Josephus (produced by Thomas Lodge in 1602) was founded not upon a Greek text but upon French and Latin translations and depended very heavily upon Bodin's historiographical theories.[44] It is most likely that Craig's source was another humanist writer, probably Bodin but possibly Zasius or Hotman, who had access to Josephus and the ability to read it in Greek. Craig may not even have known that Josephus was the ultimate source of this specific account and it seems significant that he did not attach

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[39] Genesis 11:1-9.

[40] *ne subita aquarum vi et inundatione obrueretur*. The relevant text of Josephus, *Antiquitates Judaicae* 1.4.2 reads ἀμυνεῖσθαι τε τὸν θεὸν πάλιν ἠπείλει τὴν γῆν ἐπικλύσαι θελήσαντα· πύργον γὰρ οἰκοδομήσειν ὑψηλότερον ἢ τὸ ὕδωρ ἀναβῆναι δυνηθείη, μετελεύσεσθαι δὲ καὶ τῆς τῶν προγόνων ἀπωλείας· ('He [Nimrod] said he would take revenge on God, if He decided to flood the land again; for he would build a tower higher than the waters could reach and so would punish God for destroying their ancestors.')

[41] Cf. Baird Smith, 'Feudalist', 292 where Craig is said to treat the *Libri feudorum* as no more than 'an interesting historical document'.

[42] Simpson, *Thomas Craig*, 80.

[43] A printed copy of Jospehus had been produced in Venice as early as 1481 by Rinaldo de Novimagio (or Reynaldus of Nijmegen); see L. Armstrong, 'A Renaissance Flavius Josephus', 58 *Yale University Library Gazette*, 1984, 122-139 at 122.

[44] F. J. Levy, *Tudor Historical Thought*, San Marino, Calif., 1967, repr. Toronto, 2004, 206.

Josephus' name to this part of the narrative but instead mentions him near the chapter's end along with a few other sources.[45]

Rational criticism of biblical narrative continues in the account of humanity's spread after Babel. Craig describes it thus: 'People dispersed and migrated first through Assyria but then through the whole of Asia and Palestine and eventually into Greece (which, in the Holy Scriptures, is definitively said to be an island) and the whole of Europe'.[46] The 1732 Edinburgh edition and Lord Clyde's 1934 translation both give Isaiah 42:10 as the biblical source which Craig is here disputing while the 1655 and 1716 Leipzig editions cite no source. The precise part of the Bible with which Craig takes issue is considerably less important than the fact that he does so at all. Biblical sources, biblical accounts are again subjected to the same critical inquiry as any other source and when they are seen to be wrong or at odds with reason, they are criticised and corrected.

This section demonstrates the author's broad approach to historiography. Despite describing his account of the origin of law as *repetita antiquitatis memoria* and, further, despite claiming that he had included this material only because it was 'not well-known to everyone, but [is] essential to the treatise we have begun on the origin and nature of feus',[47] there is no slavish repetition of source narratives. From just this one section we can discern the process of rational historical analysis to which Craig's sources are subject and the construction of an historical report which, though dependent on sources both ancient and contemporary, was resolutely Craig's own.[48] This independence of enquiry and thought makes it all the more obvious on those occasions when he becomes, effectively, a tape recorder for another author's opinions. Though the *Jus feudale* is a legal text, it is also an historiographical document and an attestation of Craig's cultural and mental mechanisms for understanding both the processes and the presentation of human history.[49]

3. Jus feudale 1.1.3: the origins of state and society

From Babel, Craig's narrative moves on to the *ur*-societies of prehistory which prefigure true states. The story is straightforward: after leaving Babel, humans sought the most attractive locales for settlement, giving particular preference to the availability of woods, streams and fertile land. However, human nature being what it is, larger and more powerful families used force to seize the best land which had already been claimed by others. The smaller families responded by banding together in a process which Craig describes as *accessio*, deliberately invoking the Civilian legal term.[50] Such, then, were the foundations from which the first communities, and eventually the

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[45] *JF* 1.1.13.

[46] *Prius per Assyriam, mox universam Asiam et Palaestinam dispersi homines, in Graeciam etiam (quam insulam in sacris literis dici certum est) omnesque regiones Europaeas commigrarunt*.

[47] *Jus feudale*, 1.1.1; *Neque enim haec omnibus sunt obvia et ad eum quem instituimus de feudorum origine et natura tractatum pernecessaria*.

[48] See Baird Smith, 'Feudalist' 272-3 on the legal-historiographical *milieu* in France when Craig studied there and 278 on how Craig took on 'characteristics of the French jurists and practitioners of his youth'.

[49] Baird Smith (ibid. 283) was clearly aware that Craig was equally historian and lawyer but insisted that 'his historical sense was blunted by his doctrinaire enthusiasm for an abstract feudal system or ideal'.

[50] Note that Craig appears to echo Bede, *Retractatio in actus apostolorum* 3.116-118. We know, from the *De union regnorum Britanniae*, that Craig had read Bede extensively.

first cities, sprang.[51] This is followed by a definition of society: 'For society is nothing other than the joining together of different people; nor is a city anything but some general consensus or amalgamation emerging from the alliance and union of different families, established beneath some common law and government constituted for the purpose of binding communities or families together in duty.[52]

This definition bears a striking similarity to the very first paragraph of Bodin's *De republica*: 'A commonwealth is a number of families and the things they share in common restrained by a supreme authority and reason';[53] one can expand upon this from Bodin's *Methodus*, which says Cicero 'defines a commonwealth as a multitude of men united for the sake of living well'.[54] Craig's definition is somewhat more developed but it nevertheless clearly derives, in its particulars, from Bodin. Both are focused on the idea that the first states were unions of families – indeed, that a state is just a collection of families – and both imply that state and kinship, at least in the earliest societies, were inextricably linked.[55] This is not the only text in which Craig discusses the origins of states and citizenship. He does so in the opening to the *De jure successionis*, citing Cicero as saying that a city is *societas hominum jure congregata* ('a society of people united by the law').[56] In the *Jus feudale*, however, it is plain that Craig draws upon Bodin, the contemporary interpreter, and not solely, or even primarily, upon the classical sources.[57]

Bodin gives the following account of the world before the creation of states: 'Before any city or any form of commonwealth existed, each father was supreme over his family and had the right of life and death over his children and wives. Later, violence and a desire to rule, and then greed and a longing for revenge, armed men against each other'.[58] Comparing it with Craig's description of the battle for resources, we can see only limited overlap between the two texts. Cicero's *De inventione* (1.2) is reflected in both Craig and Bodin, as it relates that, before the creation of law, the world was a violent place where the strong ruled over the weak. Cicero's cultural importance for medieval and Renaissance thinkers can hardly be overstated so any Ciceronian presence in Craig's text can be assumed to be a result of direct reading rather than indirect reading

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[51] *Ita amicitiae et societates primum initiae, ex cujus fundamentis, in certa naturaeque consentanea ratione positis, civitates postea conditae*. ('Thus friendship and communities first began, having been ordained in accordance with the clear logic of nature, and from those foundations cities were established.')

[52] *neque enim aliud est societas quam diversorum inter se hominum conjunctio; nequre civitas, quam ex variorum familiarum conspiratione et unione generalis aliquis consensus seu coetus sub aliquo communi jure et imperio ad societates seu familias in officio continendas constitutus*.

[53] *Respublica est familiarum rerumque inter ipsas communium summa potestate ac ratione moderata multitudo*. Jean Bodin, *De republica* p.1 (all references are to pages in the 1586 Paris edition).

[54] *Tullius rempublicam definit hominum multitudinem bene vivendi causa sociatam*. Bodin, *Methodus ad facilem historiarum cognitionem* p.195 (all references are to pages in the 1610 Geneva edition).

[55] For more on the position of families in the origin of the state, see Bodin *De republica* p.365.

[56] *De successionis regni Angliae*, 1.2 (p.7 in Gadderar's 1703 English translation); note, however, that this is not a quotation from Cicero but rather a summary of the *De officiis* 3.17 and perhaps 2.4 or possibly parts of the *Somnio Scipionis*.

[57]Craig was not the only Scottish lawyer of this period to depend upon Bodin. See A. R. C. Simpson, 'Counsel and the Crown: History, Law and Politics in the Thought of David Chalmers of Ormond', 36 *Journal of Legal History* (2015) 3-42.

[58] [58] *Prius enim quam ulla civitas aut reipublicae forma extaret, pater quisque familiae summum ius vitae ac necis habuit in liberos et uxores. Postea vero quam vis et imperandi cupiditas, tum etiam avaritia et ultionis appetitus aliis in alios arma suppeditavit*. Bodin, *De republica*, p.46.

via Bodin.[59] One interesting deviation from the *De inventione* is that, where Cicero describes the earliest men as devoid of reason, Craig (like Bodin) states the first alliances (*amicitiae*) and communities (*societates*) emerged from their innate rationality.

The *De inventione* contends that the earliest states were the creation of one eloquent speaker who convinced the bestial and irrational masses of the wisdom of organised society; Craig, however, treats society, community and human association as a natural consequence of two factors: human reason and utility. And, of course, these two factors flow from and feed into each other. Societies arose when weak families took counsel together and realised that only through the force of their combined numbers could they resist the oppression of those who were stronger than they. Society is thus a function of utility. This distinctly Epicurean flavour is also to be found in Bodin and is one to which Craig will return throughout the first chapter of the *Jus feudale*.[60] Craig's belief that social cooperation is natural to humans also explains one curious omission. While Bodin provides a detailed definition of the word *familia*, Craig provides none,[61] apparently assuming that the cooperative and collaborative nature and patriarchal leadership of family will automatically be understood by readers.

This section provides an interesting and early example of the way in which Craig navigates his dependence on sources to arrive at a reading which is, critically and intellectually, his own.

4. Jus feudale 1.1.4: citizen and state

In the following two sections, Craig goes on to discuss the founding of the first cities and the development of citizenship (1.1.4) before treating the emergence of kingship as an institution (1.1.5). These sections are illustrative of Craig's historiographical technique and, throughout, one is conscious that Buchanan's *De jure regni apud Scotos* joins Bodin as both source and frame.[62]

'Citizens,' Craig says in the section's first sentence 'may properly be said to be those who live beneath a single bond of law and community, whereas a city is a joining together of many families or communities beneath government and political union'.[63] By comparison, Bodin defines citizenship thus: 'A citizen is nothing but a free man

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[59] Cf. P. Hume Brown, *George Buchanan, Humanist and Reformer*, Edinburgh, 1890, 44-45 on the 'superstitious worship paid to Cicero by the stylists of Italy'.

[60] It is not probable that Craig had a deep understanding of Epicureanism but he would have been conscious of it through Bodin; see *Methodus*, p.263.

[61] *Familia est plurium sub unius ac eiusdem patrisfamilias imperium subditorum, earumque rerum quae ipsius propriae sunt, recta moderatio.* ('A family is the proper governance of a group subordinated beneath the authority of a single patriarch and of those things which belong to him.') Bodin, *De republica*, p.8.

[62] Baird Smith, 'Feudalist', 286 compares Craig unfavourably with Buchanan ('the penetrating political analysis which is to be found in…Buchanan's *De jure regni*…is absent from Craig's pages') while seeming to not to notice the extent to which Craig adapts Buchanan's arguments for his own ends. Hume Brown, *Buchanan*, is more judicious when he points out that the *De jure regni* makes 'no contribution to political science' (290) and that Buchanan lacked a 'philosophic conception', such as Bodin had, of the historian's task (298).

[63] *Cives enim proprie dicuntur qui sub uno vinculo juris et societatis vivunt; civitas ver conjunctio plurium sive familiarum sive societatum sub uno imperio et foedere*.

bound to the supreme authority of another'.[64] So once more, Craig broadly follows Bodin in defining the terms of his discussion but again provides a definition that is more developed, more complex.

As Craig moves on, he takes the text in a direction more characteristically his own by discussing the etymology of the two Latin words for city – *urbs* and *civitas* – and explaining the difference between them.[65] In doing so, he makes extensive use of classical sources – he refers to the *Aeneid* (7.55),[66] the Digest (50.16.239.6)[67] and Caesar's *De bello Gallico* (1.1.2 and 1.2).[68] The significance of this is not inconsiderable. Where Bodin provided simple definitions for the terms he employs in order to facilitate the reader's understanding of his argument, Craig develops a deeper philological treatment of the origins and etymology of language (something he will do throughout the *Jus feudale*). Nor does he do this as some antiquarian digression; rather, it is key part of Craig's historico-literary approach, a key element in his analysis of the origins of law, to delve deeply into the sometimes hidden, sometimes forgotten meanings of words, phrases and, indeed, the laws themselves.

Leaving aside these considerations, Craig's account of the creation of the first cities proceeds as follows: the first cities emerged from alliances which had been established for self-defence in a violent, lawless world. In time, these communities discovered trade, weapons, fortifications and the need for contracts or agreements. In the absence of laws and judges, the agreements were unenforceable, so the best man in the community was chosen to settle disputes and pass judgment fairly. The men thus chosen were the first kings and Craig thus moves on from the establishment of cities to the establishment of monarchies.[69]

The connection of trade, warfare, resources and community is another element which Craig seems to derive from Bodin – and, significantly, when Bodin lists the necessary items for *nascentes respublicae*, he lists not only food, water, a healthy climate and good geography,[70] but also materials for fortifications and weapons which are to be used both in self-defence and in aggressive campaigns to secure more resources, more materials and more luxuries.[71] Bodin emphasises the relationship

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[64] *Est autem civis nihil aliud quam liber homo, qui summae alterius potestati obligatur*. Bodin, *De republica* pp.45-46.

[65] On Craig's regular use of etymologies to facilitate legal discussion, see Cairns, Fergus & MacQueen. 'Legal Humanism', 51. On the importance of philology to humanist textual interpretation, see Rodgers, 'Humanism', 1985, 130.

[66] Note that the only English translation, the 1934 edition by Lord Clyde, badly misunderstands what is happening in the *Aeneid* at this point and imports that misunderstanding into the text.

[67] *Urbs ab urbo appellata est: urbare est aratro definire. et Varus ait urbum appellari curvaturam aratri, quod in urbe condenda adhiberi solet*. ('The word *urbs* is from *urbum*. The related verb *urbare* means 'to mark a boundary using a plough'. Varus says that the curve of a plough, which is customarily used in marking out the bounds of a city that was about to be built, was called an *urbum*').

[68] That is, the section where Orgetorix rallies the Helvetian *civitas* for foreign conquest. Craig's point is to illustrate that the usage of *civitas* in classical Latin (*apud bonos au*[*c*]*tores*) refers to the state or the citizens as a corporate entity and not to the city as a geographical location.

[69] On this section in general, see Simpson, *Thomas Craig*, 60-61.

[70] M. L. Thompson, 'Jean Bodin's Six Books on the Commonwealth and the Early Modern Nation' in Eriksonas, L., and Müller, L., *Statehood Before And Beyond Ethnicity* (Brussels, 2005) 53-66, 61-63

[71] *Beatior tamen futura civitas est, quae his aucta virtutibus, fundos habuerit ubertate fertiles aut quantum satis est ad civium alimenta: eaque sit aquarum ac spirabilis coeli temperatio, ut salubriter vivi possit, tum etiam materies ad exstruedas arces ac domos idonea; nisi regio satis ad vim hostium et ad iniurias caeli propulsandas per se ipsa tuta sit ac munita. Haec primordia sunt nascentis reipublicae, ut scilicet*

between a community and its material resources – food, water, building materials and so on. We have already seen Bodin's characterisation of the commonwealth as a union 'for the sake of living well'.[72] For Bodin, the condition of living well entailed a strong material component. People lived collectively first in communities and later in cities and states because they could enjoy not only a safer but also a more prosperous and materially better mode of life together than they could ever achieve separately.

Clearly, Craig has been influenced by Bodin's doctrine of social materialism. As we saw above, in 1.1.3, he discussed competition for resources and presented the conflicts that arose for control of them as the main spur for the creation of the earliest societies; families formed alliances and then communities in order to protect their control of specific resources. In this section, though, Craig develops Bodin's theory by construing resources not only as a potential source of conflict but also as an impetus for trade and, as we shall see, for Craig trade becomes an impetus for law.[73]

> The development of trade is explained as follows:
> Privately they discussed their own resources, what they had at home and what they lacked. As a result, nearby families supplemented those in need with their own supplies. In their homes, they cultivated crafts; outside their homes, they traded, so that what one lacked, he could gain from another. This was not done gratis but in exchange for something of equal value. Thus agreements were brought together and contracts were born.[74]

At this stage, Craig is still focused on the interactions between the individual members of his *ur*-communities. Trade is not yet something that takes place between polities (or even between individual members of different communities) but something that is conducted within the polity by and between citizens or, rather, between semi-autonomous citizen-families who together make up the *civitas*. These transactions required forms of rules which went beyond the simple obligation for mutual defence by which the communities were heretofore bound. As Craig explains, 'It would not be possible for many people to unite in a single community unless they were obligated by

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ea, parentur, sine quibus vivi nullo modo possit. Deinde quaerantur ea, quibus commodius vivitur, ut medicamenta ad morborum curationem: metalla quibus instrumenta opificibus armaque militibus necessaria conflati possint, non tantum ad repellendos, verumetiam ad ulciscendos hostes ac latrones. Iam vero cum inexplebiles sint hominum cupiditates, postea quam parta sunt ea quae necessaria, quaeque utilia putantur, deliciis etiam affluere, ac voluptates inanes consectari libet, ut suavius vivi iucundiusque possit. ('The city will be happier which is strengthened by these advantages: it should have fertile fields in abundance or in sufficiency for the sustenance of the citizens; there should be a sufficiency of water and a mild climate, so that it will be possible to live healthily. Then there will be materials for raising strongholds and suitable houses. If geography by itself is not enough to repulse the violence of the enemy and the injuries of heaven, there will be a secure fortification. These are the basic needs of the nascent commonwealth, without which no kind of life is possible. But then they will seek those things by which one lives more conveniently – medicines for the treatment of sickness; metals which they can cast into tools for workers and weapons for soldiers – not just for defence but actually for taking revenge on enemies and brigands. Men's desires are insatiable and when they have the things they need and the things they deem useful, they will afterwards long for an abundance of the delights and empty pleasures from which one lives pleasantly and happily.') Bodin, *De republica*, pp.4-5.

[72] Bodin, *Methodus*, p.195.

[73] See J. W. Cairns, 'The Civil Law Tradition in Scottish Legal Thought' in D. L. Carey Miller and R. Zimmermann, eds., *The Civilian Tradition and Scots Law*, Berlin, 1997, 191-223 at 200.

[74] *Tum etiam privatim opes suas exponebant, quid domi suppetebat, quid non; inde defectus suos vicinae familiae supplebant, domi artificia colebant, foris permutabant res ad invicem, ut quod uni deerat ab altero caperet, non gratuito, sed re non minoris utilitatis in vicinum collata. Sic et rationes contrahebant et contractus nascebantur.*

shared bonds through which they would first restrain the violence of more powerful men and then be bound by mutual duties in their private dealings with one another.'[75]

Yet, these *vincula* were a toothless guard dog so long as they lacked a mechanism for enforcement:

> In spite of these private covenants or agreements, individual disputes could not be adjudicated and new ones arose every day amongst the citizens of the community – and the more people in the union, the more frequent were these disputes; and so, since they were acting with such anger, such desire, such greed, the very best man of the community was chosen by common consensus, a man who would be acquainted with transgression and injustice, who would decide what was fair between neighbours.[76]

For Craig, the process by which law was created in the earliest human societies was wholly pragmatic but, more than that, it relies upon commerce and the attendant need for contractual enforceability and predictability as the catalyst for legal development. Self-interest meant that individuals could be trusted to defend their neighbours but that same self-interest meant they could not be trusted not to bilk or cheat those same neighbours. Thus, Craig's model has trade disputes between individual families as the catalyst driving forward the development of the earliest systems of legal adjudication and enforcement.

5. Jus feudale 1.1.5: kings and monarchy

In Craig's narrative, the adjudication of disputes was entrusted to men of good character who were titled kings and were initially judges and nothing more. This is, of course, a common motif amongst classical, medieval and early modern writers; Buchanan, indeed, advances the notion that kings of high moral standing are not only an inspiration to their people but can actually alter their subjects' disposition.[77]

In another of his philological excursions, Craig explains that the name of their office (*rex*) is a consequence of their duty (*regendus*). Thus, Craig's kings are guides whose responsibility is 'to prevent [their people] from going astray'. He emphasises this interpretation of monarchy by referencing Homer's epithet for kings, 'shepherds of the people',[78] a phrase discussed in Buchanan's *De jure regni* as an epithet of

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[75] *Sed cum fieri non posset, ut plures simul in una societate consentirent nisi mutuis vinculis colligati, quibus primum potentiorum vim reprimerent et privatim ipsi inter se reciprocis officiis interius continerentur*.

[76] *Nec tamen ex his privatis conventionibus sive pactis, singulae offensiones dijudicari poterant, quae cotidie novae inter ejusdem societatis cives oriebantur, quoque plures in uno coetu, eo frequentiores erant. Itaque cum multa iracunde, multa libidinose, multa avare fierent, electus est communi consensu vir illius societatis optimus, qui de offensione aut injuria cognosceret, quodque aequum esset inter vicinos decerneret*.

[77] Buchanan, *De jure regni*, (pp.95-96 of the 1750 Glasgow edition), discusses the way that good kings, specifically Numa Pompilius, changed the savage and warlike temperament of the Romans, thus laying the foundations of their future greatness.

[78] Craig's Latin term is *pastores populorum*, his version of Homer's ποιμὴν λαῶν. This epithet is repeatedly applied to Agamemnon and Hector in the *Iliad* (e.g. 2.243; 4.413) and once to Dryas, a king of the Lapiths (*Iliad* 1.263). See R. Auty, *Traditions of Heroic and Epic Poetry II: Characteristics and Techniques*, London, 1989, 50 for a discussion of the poetic context; see K. Raaflaub, J. Ober and R.

Agamemnon and an indicator of a king's rôle.[79] They are shepherds of the people 'because, from the beginning, the governance and guardianship of the people were entrusted to them'.[80] In keeping with his Greek theme, but probably also to advertise that his classical learning was wider than just the Latin, he goes on to mention Minos and Rhadamanthus as examples of ideal Greek kings who had 'presided over their people with the utmost fairness'.[81] In these examples too, Craig establishes that the prime qualification for the monarchic office is fairness. He develops both this point and his overall Greek theme by going on to state that 'amongst the Athenians those who ruled after the kings were called δικασάι'.[82] This is an intriguing remark showing, in more ways than one, both the limits and the pretensions of Craig's classical knowledge.

Anyone versed in Greek will recognise that Craig's δικασάι is misspelt.[83] It ought properly to be δικασταί. Craig has, in other words, dropped a tau (τ) and pushed the diacritic mark back from the iota (ι) to the alpha (α). It is, however, not only his Greek grammar which is problematic. His whole understanding of the function of an Athenian dicast is flawed. A dicast was a juror in the Athenian courts.[84] He (and it always was a 'he') was a member of a volunteer body of 6,000 male citizens who were then assigned into smaller divisions of 500 known as dicasteries. He was neither lawmaker nor magistrate and had no executive authority.[85] The words 'dicast' ultimately derives from the Greek δίκη, meaning 'justice', and therefore has a straightforward etymological base – a dicast is someone concerned with the dispensing of justice. In our modern sense, a dicast might be more akin to a kind of amateur judge than to a true juror because they were often called upon to work out the knotty problems caused by contradictory laws.[86] Indeed, in the Hellenistic kingdoms which succeeded classical Greece, the term dicast was used, at least sometimes, to refer to a royal judge rather than a volunteer juror.[87]

Craig is apparently mistaking the dicasts for the members of the *Ekklesia* ('Assembly') which acted as the main legislative body for democratic Athens. Both were volunteer bodies and while the dicasts numbered 6,000, the Assembly had a quorum of 6,000.[88] Etymologically, however, the verb for participation in the Assembly

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Wallace, *Origins of Democracy in Ancient Greece*, Berkeley, 2007, 32 for the phrase as a marker of ideal Greek kingship.

[79] Buchanan, *De jure regni*, p.50. On the prince as 'shepherd of the people', cf. R. Zanzarri, *L'educazione del principe dalla Grecia arcaica al Versailles*, Cosenza, 1996, 12-13.

[80] *quod procuratio et populi tutela eis esset ab intitio concredita*.

[81] *summa cum aequitate populis suis praefuissent*.

[82] *qui Atheniensibus post reges imperabant,* δικασάι *vocabantur*.

[83] In the manuscripts, NLS Adv. MS 25.4.1 has διχαραι while NLS Adv. MS 25.4.2 has δονασαί, both of which seem to be nonsense words in Greek. Burnet's 1655 edition has a grave accent instead of an acute. Note that δικάσαι is an aorist infinitive of the Greek verb δικάζω ('to dispense justice') but, in context, the word must be meant as a noun.

[84] Osborne, R., *Athens and Athenian Democracy*, Cambridge, 2010, has a respectable analysis of the Athenian legal system in ch. 9.

[85] Interestingly, Solon (whom Craig discusses at *JF* 1.1.15) allowed Athenian magistrates to act as dicasts: see G. Thür, 'Oaths and Dispute Settlement in Ancient Greek Law', in L. Foxhall and A. D. E. Lewis, eds., *Greek Law in Its Political Setting*, Oxford, 1996, 57-72 at 63.

[86] S. Todd, 'Lysias against Nikomachos: the Fate of the Expert in Athenian Law' in Foxhall & Lewis, *Greek Law*, 101-132 at 125.

[87] C. Haas, *Alexandria in Late Antiquity: Topography and Social Conflict*, Baltimore, 1997, 75.

[88] S. Hornblower, 'Greece: the History of the Classical Period', in J. Boardman, J. Griffin, and O. Murray, O., eds., *The Oxford History of Greece and the Hellenistic World*, Oxford, 1986, 142-176 at 157.

was ἐκκλησιάζω and the noun describing a participant was ἐκκλησιαστής.[89] It seems unlikely that anyone with a good understanding of Greek would make the kinds of errors that Craig has made.[90] Certainly, no-one could imagine George Buchanan making such elementary mistakes whether in grammar, spelling or terminology. Interestingly, Bodin, who is one of Craig's favoured sources, uses the phrase (correctly spelt!) in the *De republica*,[91] which, if we discount a later error in transcription by copyists of the *Jus feudale*, suggests that Craig misread or otherwise misunderstood the Greek letters.

So, from this section, we can deduce that Craig was far from *au fait* with the governmental and legal structures of classical Athens. He may indeed have been a talented humanist possessed of a fine familiarity with classical Latin but he was not a scholar of Greece and his grasp of the Greek language, though probably better than that of most Scots (and, indeed, Europeans) of his age, was limited. One must ask why he would choose to labour these Greek elements, when he was neither in control of nor comfortable with his material.

It may be that Craig was conscious of the debt he owed in this section to Buchanan's *De jure regni* and wished to demonstrate his scholarly independence by going further than Buchanan had, by reaching out beyond his customary Latin and into not only Greek history but also Greek language (and Buchanan, of course, was a marvellously accomplished Greek scholar).[92] However, it may equally be the case that Craig was simply eager to demonstrate his mastery of a still relatively obscure learned language and thereby to be understood as a member of the scholarly community of humanists with his work seen as part of that cultural continuum. It is a commonplace to describe Latin as the Occident's language of learning from the classical period until quite recently; Greek, however, was a language of prestige, a language of the truly sophisticated.[93] All learned men (and many who were not quite so learned) could speak and compose Latin,[94] but many otherwise educated men lacked any grounding in Greek; as Bolgar has it, 'The scholars who could understand their Homer or their Plato in the original were a small and select body'.[95] By emphasising Greek phrases and Greek sources, Craig was showing himself to be a cut above the usual lawyerly stock – and Craig does emphasise Greek regularly. From his employment of the phrase δὶς διὰ πασῶν in the *Epistola nuncupatoria* (a phrase probably taken, directly or otherwise,

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[89] *Liddell and Scott's Greek-English Lexicon*, *s.vv.* ἐκκλησιάζω and ἐκκλησιαστής.
[90] Lord Clyde, in his 1934 translation, simply rewrites Craig so that he is saying that the dicasts 'were the successors of the kings in their judicial function'. This is one way to avoid an otherwise problematic section but it is not what the Latin says.
[91] Bodin, *De republica*, p.419.
[92] On Buchanan's remarkably precise translations of Greek into Latin, see J-F. Chevalier, 'George Buchanan and the Poetics of Borrowing in the Latin Translation of Euripides' *Medea*', in P. Ford, and R. P. H. Green, eds., *George Buchanan: Poet and Dramatist*, Swansea, 2009, 183-195.
[93] Cf. Bolgar, *Classical Inheritance*, 276, but see 313 on English hostility to the teaching of Greek at Oxford and Cambridge and particularly resentment that it would reduce these mediaeval institutions to the level of a 'Lawyers' University'. Cf. Rodgers, 'Humanism', 134. In France, too, despite the founding of the Collège Royal to teach Hebrew, Latin and Greek in 1530, there appears to have been a degree of hostility or, at least, apathy towards the Greek language; see Hume Brown, *Buchanan*, 63-64.
[94] Cf. Dolezalek, *Jus Commune*, vol.1, 5.
[95] Bolgar, *Classical Inheritance*, 280.

from Erasmus)[96] through to his linking of the Turkish timariot system to the Greek noun τιμὴ,[97] to his discussion of *rhetrai* near the end of his first chapter,[98] Craig, as others have said, was 'manifestly proud of his knowledge of Greek';[99] indeed, he rarely lets pass an opportunity to use a Greek or Greek-derived word in place of a Latin, a fact which sometimes has some unfortunate consequences.[100]

Moving on, Craig turns to Cicero but still retains his Greek theme. He quotes Cicero as Cicero quotes Herodotus: 'Not only among the Medes (as Herodotus says) but also among our own ancestors kings appear to have been picked from men who had previously been of good character so that the people might enjoy justice'.[101] This line, too, is cited by Buchanan in his *De jure regni* which cannot be a coincidence.[102] Cicero's reference is to Herodotus 1.96ff which describes how Deioces was chosen by the villages of his region to arbitrate their disputes and was later elected king of the Medes. Craig draws out this motif linking kings, judges and high character, but one should note that his focus continues to be on the smaller communities. He is not yet discussing great cities or mighty empires but rather communities that have not yet coalesced into anything larger than a village. Thus one can see why Craig so emphasised the difference between *civitas* and *urbs* in the previous section. The communities he is discussing are, in a sense, *civitates* but they are not yet large or populous enough to constitute true *urbes*.

Be that as it may, Craig's judge-kings are chosen for their good character and high standing in their community. In the absence of a yardstick (*amussis*) by which to measure their decisions, they must rely on a sense of natural justice which had been implanted in their souls by God. The keen reader of this section will notice that Craig emphasises fairness – *aequitas* and its related terms – as the qualification for and marker of kingship, not justice (*justitia*). Justice cannot yet appear in Craig's narrative because *justitia* derives from *jus* but, at this stage, *jus* does not yet exist.[103] The process of creating it has only just begun.[104]

It was, in fact, a matter of supreme political and legal importance that Craig should not claim that laws existed before kings. James VI, in his *Basilikon Doron*, had declared that it was an act of sedition to say that laws, constitutions or parliaments predated kings.[105] Craig's account, though, is of a kind with that of many other writers

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[96] Δὶς διὰ πασῶν ('twice through all'), apart from being a musical term referring to an interval of two octaves, is a saw signifying things separated by distance or interval and which are, by extension, incompatible. Erasmus explains this in detail in the *Adagia* 1.2.63.

[97] *Jus feudale*, 1.4.6; in the 1655 edition, the word is incongruously given in its accusative form τιμὴν, though it is corrected in the 1716 and 1732 editions.

[98] *Jus feudale*, 1.1.14

[99] Cairns, Fergus & MacQueen, 'Legal Humanism' 50; the fact that Craig was proud of the Greek that he knew does not necessarily imply that he excelled at the language.

[100] See 1.9.22 where he uses *par cheirotechnarum* to mean 'a pair of gloves'; the Greek *cheirotechna* means 'handicraft' which suggests that Craig took the word a little too literally and was unfamiliar with its standard Greek usage.

[101] Cicero, *De officiis* 2.41.

[102] Buchanan, *De jure regni*, p.50.

[103] On Craig's approach to *jus*, see J. W. Cairns, '*Ius civile* in Scotland, ca.1600', 2 *Roman Legal Tradition* (2004) 136-170 at 153-154 and Ford, *Law and Opinion*, 565-566.

[104] Simpson, *Thomas Craig*, 63-65 discusses the Calvinist theological underpinnings of this section, a topic to which the present author can add little.

[105] Mason, R., *Kingship and the Commonweal*, Edinburgh, 1998, 229.

of the classical and Renaissance periods who also used words describing fairness and equity, rather than law and justice, to describe prehistory. That being so, it would be a mistake to suggest that the *Jus feudale* was expressly adapted to suit royal views on this topic. Nevertheless, one cannot dismiss or ignore the fact that Craig's focus is identical to that of his king, that it reflects James' own doctrine of the crown as font of law.[106] It may perhaps be best to explain this by saying that Craig and James VI drew upon the same sources, thereby reaching the same conclusions, albeit for slightly different philosophical and political reasons.

In these days before law, Craig explains, there were no defects in judgment nor were there criminal penalties; all decisions of the judge-kings were correct and the people were restrained not by threats or punishments but by their own honour and natural decency in times when virtue was esteemed and vice was hated. Craig draws upon and cites Tacitus' description: 'The most ancient of mortal men acted with no evil desire, without disgrace or crime and therefore without penalty or punishments'.[107] However 'after the decline of fairness, ambition and violence advanced in place of modesty and honour; and despotisms emerged and still exist amongst many peoples'.[108] Craig is here dependent upon Tacitus' reception of the Hesiodic Golden Age;[109] more significant than that, however, is the strong Christian thread running through this section. Craig assumes that earlier generations were more innocent (or less corrupt) because they were closer to the perfect Prelapsarian world (something he will discuss in the next section). This idea is certainly lifted directly from Augustine's theory of the *sex aetates* or Six Ages of the world (found in the *De catechizandis rudibus*). Craig, who was raised Catholic and whose uncle was one of the foremost theologians of the age (as well as one of the most important religious figures in the Scottish Reformation),[110] would certainly have been familiar with the text in particular and the theory in general.[111] From here, however, Craig moves on to discuss the growing rôle and authority of the monarch.

From 1.1.4 and 1.1.5, a number of significant points emerge in Craig's vision of primitive monarchy. First, it is apparent that Buchanan's *De jure regni* had a real influence on Craig. While Buchanan's account is concerned only briefly and tangentially with the early societies and the emergence of law, it nevertheless acts as a key historical and philosophical source. Like Craig, Buchanan contends that the citizen who stood out most for his 'fairness and sagacity' (*aequitate et prudentia*) would be elected king.[112] These kings were 'established in office for the purpose of defending fairness' (*eum aequitatis tuendae causa in magistratu esse collocatum*) but this was

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[106] Interestingly, at 1.2.12, Craig describes Roman law as the 'font of equity' and, at 1.8.16 described feudal law as the 'source and font' of all law in Scotland.
[107] Tacitus, *Annales*, 3.26.
[108] *At postquam exui aequalitas, et pro modestia ac pudore, ambitio et vis incedebat, provenere dominationes, multosque apud populos aeternum mansere*.
[109] Craig would have been familiar with Ovid's account of the Ages of Man but the ultimate provenance was with Hesiod's *Erga kai Hemerai*.
[110] On his uncle, see the *Vita Cragii*, xvi.
[111] As Peter Brown pointed out, there is considerable crossover between Christian and classical pagan beliefs about a decaying world made wretched by some ancient sin for which humanity as a whole must atone; see P. Brown, *Augustine of Hippo*, London, 1967, 388. This goes some way to explaining why Craig would have seen classical and Christian concepts of a prehistoric Golden Age as complementary rather than contradictory.
[112] Buchanan, *De jure regni*, pp.34-35.

eroded as kings were corrupted by their power. As with Craig, it is *aequitas*, not *justitia*, which makes a king.[113] Buchanan, though, takes a step further and, from discussing the primitive monarchy's job as an arbitrator of disputes, he passes on to cite a line from Cicero's *De legibus* 3.2: 'the king should be a law that speaks and the law a silent king' (*rex esset lex loquens, lex rex mutus*).[114] He further stresses the king's rôle as judge by relating a tale of Philip II of Macedon who refused to hear an old woman's case on grounds that he was too busy, only for the old woman to reply that if he was too busy to hear her case, he was too busy to be king. All of this is very similar to Craig. Kingship and judicial function are intertwined inexorably. Kings are chosen for their character and moral standing. They are protectors of their people. They solve disputes and keep peace within the community. But, eventually, they are corrupted and fairness declines.

Yet, if there are similarities between Craig and Buchanan, there are also stark differences in their approaches. Where Craig gives us an essentially straightforward, rational and perhaps even materialistic narrative about how and why laws exist, Buchanan's discussion of the same material is part of a wholesale attack on the (Epicurean) argument that law is a function of expediency.[115] He cites the line from Horace that states 'expediency herself, [is] almost the mother of the just and fair'[116] and then goes on to refute this, simultaneously drawing upon some parts of Cicero and rejecting others.

Buchanan has his interlocutor, Maitland, speak thus:[117]

> MAET. *Igitur humanae societatis non tu oratorem aliquem aut iureconsultum, qui homines dispersos colligeret, sed ipsum Deum auctorem putas?*
>
> MAIT: So you think it was not some orator or lawyer who assembled the scattered peoples but that God Himself was the author of human society?

The comment on *oratorem aliquem aut iureconsultum* is, obviously, a reference to and rejection of Cicero's *De inventione* (1.2). Cicero advanced the idea that the primitive world was an anarchic and violent place where 'no-one…understood that equitable law might have some utility' until a wise orator explained the advantage to people.[118]

Buchanan replies thus:

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[113] The full citation is, *neque multum referre puto rex, dux, imperator an consul vocetur qui praesit, modo illud teneatur, eum aequitatis tuendae causa in magistratu esse collocatum* ('I do not think it matters much whether the ruler is called a king, doge, emperor or consul, so long as it is borne in mind that he has been placed in office for the sake of preserving fairness'). Ibid., p.43.

[114] Ibid., p.45. In Cicero, the quote is *magistratum legem esse loquentem, legem autem mutum magistratum*. Mason, *Kingship*, 231 points out that the phrase was a commonplace in Buchanan's day and that James VI used it in his *True Law of Free Monarchies*.

[115] Buchanan, *De jure regni*, p.22; see also p.28, *Non quidem illam ut iusti et aequi matrem, ut quidam voluerunt, sed potius ancillam et civitatis bene constitutae e custodibus unam*. ('I do not see expediency as the mother of justice and equity, but rather as their handmaiden and one of the guardians of a well-ordered commonwealth.')

[116] Horace, *Satires*, 1.3.98, *atque ipsa utilitas, iusti prope mater et aequi*. Buchanan, *De jure regni*, p.23.

[117] Buchanan, *De jure regni*, p.27.

[118] *Nemo…ius aequabile quid utilitatis haberet, acceperat*.

> BUCH. *Ita profecto est. Ac iuxta Ciceronis sententiam nihil quidem quod in terris fiat principi illi Deo, qui hunc mundum regit, acceptius puto quam caetus hominum iure sociatos, quae civitates appellantur.*[119]
>
> BUCH: That is correct. I think, like Cicero, that there is nothing more pleasing to the supreme God who rules this world than the united communities of men which are called states.

It is fascinating that Buchanan can reject Cicero (*De inventione*) by citing Cicero (*De republica*). This highlights, as nothing else can, the importance of Cicero as a philosophical authority in the period: Buchanan is only confident in deviating from Cicero's writings because he can cleave to another text of Cicero. However, neither Buchanan nor Cicero are the focus of this essay. From the perspective of the *Jus feudale*, the key factor is that Craig has followed Buchanan almost to the letter. Like Buchanan, he cites Cicero and the idea that the desire for law is innate to humanity ('as Cicero rightly says, we are naturally inclined to right and fairness, and law in particular descends from the goodness of that very nature').[120]

In essence, Craig is having his cake and eating it as far as Cicero is concerned. The background he builds to the development of law and social contract is materialistic and rational; in a sense, it is Epicurean in that it holds up utility or expediency as the fundamental basis for human law and social relations. The entirety of the first five sections of the book are nothing if not an explanation of the pragmatic function of law and society in affording protection from external threats and an enforceable set of rules for interactions (particularly commercial transactions) within the community. At the same time, he accepts, albeit in rather bland terms, the naturalistic argument espoused by Buchanan.

This highlights Craig's rôle as historiographer and the purpose he envisions for his book: Craig is neither theologian nor philosopher; he is lawyer and historian. The *Jus feudale* is no theoretical text on the nature of law and kingship; it is an account of the historical development of the feudal law and its related institutions. Craig's concern is not with the religio-political doctrines which might be implied by this or that Ciceronian theory. His concern is with the function, history and origin of the law.[121] All of this is essentially another way of saying that Craig's approach is modelled very closely on that of the French Protestant humanist tradition which actively sought to divorce the study of history, politics and science from any theological baggage and that, in the process, Craig assumed a methodologically Aristotelian *Weltanschauung*.[122]

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[119] Buchanan, *De jure regni*, p.27. Note that this is a close paraphrase of Cicero, *De republica*, 6.13, *nihil est enim illi principi deo, qui omnem mundum regit, quod quidem in terris fiat, acceptius quam concilia coetusque hominum iure sociati, quae civitates appellantur; harum rectores et conservatores hinc profecti huc revertuntur.*

[120] *nam, ut recte Cicero, ad jus et aequitatem naturaliter instincti sumus, et jus praecipuum ex ipsius naturae beneficio descendit*. The print editions cite the source as *De legibus de jure naturali*. It is probably fairest to say that this sentence amounts to a loose summary of Cicero's view of natural law drawing upon aspects of the *De legibus* (2.9-11) and the *De officiis* (1.58, 1.153).

[121] Mason, *Kingship*, 20 claims that the Scottish philosophers of the fifteenth century were political theologians rather than political theorists. Craig, writing at the end of the sixteenth century, represents a clear break with that tradition. Cf. Baird Smith, 'Feudalist', 279.

[122] See T. M. Parker, *Christianity and the State in the Light of History*, New York, 1955, 169 on Bodin as a figure 'broadly Aristotelian in outlook... That is to say, Bodin conceives the State as a natural and

6. Jus feudale 1.1.3-1.1.5 collectively

At this point, it is worth observing that within the three sections – 1.1.3-1.1.5 – Craig has laid out his entire view of the inception and evolution of human society. If we follow Augustine's template of the *sex aetates*, Craig has provided a framework for understanding society and law during the Augustinian Second Age (that is, the period after the Flood but before Abraham's arrival). For a sixteenth century Christian, this period can be understood as encompassing the entirety of human prehistory.

The first human communities were created by families banding together in a kind of mutual-defence pact because, individually, they could not counter the threat posed by larger families. From here, they learnt to craft weapons, then to fortify their settlements and then to trade. With the creation of trade, they create contracts – unenforceable, because there is no law and hence no mechanism for enforcement – and, in time, they establish kings to act as judges in legal and contractual disputes. The foundation of monarchy, as an institution of government, represents the final step in creating the first human societies. Craig will, of course, talk about the evolution of monarchy itself (quite the hot topic in his day, following Buchanan's *De jure regni* and James VI's effective refutation, the *Basilikon Doron*)[123] but, in doing so, he is talking not about the emergence of society but about the mechanisms by which fully-emergent societies are governed.[124] From Craig's perspective, the process by which human society is created is also the process by which people pass from lawlessness to legally enforceable rules. Society is law and commerce is central to the process of creating law.[125] While the agreement of individuals to defend their community is the starting point for societal development, its conclusion is in an agreed structure for the enforcement of what Craig calls 'these private covenants or agreements'.[126]

We saw Craig's explanation that people could not live within a community or society unless restrained in their dealings by shared and enforceable obligations. Thus society is law. Society is a collection of mutually binding duties and obligations placed upon the members of a given community and enforced by a judge. Until that point is reached, the *ur*-society has not attained its full maturity.

7. Jus feudale 1.1.6: royal duties

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necessary feature of human life and studies it upon historical lines. Political science is for him, as for Aristotle and Machiavelli, an inductive study with its own rules, not a department of theology'. Cf. Hume Brown, *Buchanan*, 276-277.

[123] On the continent, of course, Bodin and Hotman were also talking about it, Bodin as a monarchist and Hotman as a Monarchomach (or, as Baird Smith, 'Feudalist', 273, puts it as 'a doctrinaire republican of the extreme type').

[124] This recalls the point made by Baird Smith (ibid. 301) that Craig was 'an historian and student of institutions'.

[125] Cf. *JF* 1.16.21 where Craig talks about the problem of debased coinage rendering uncertain 'partnership, guardianship, agency, sale, lease and all the other contracts by which human society is encompassed'; again, law derives from the need for contractual certainty in trade and commerce. If law is a foundational aspect of society, then commerce is the ground on which the foundation stands.

[126] *his privatis conventionibus sive pactis*. (*JF* 1.1.4)

In the previous section, Craig discussed how law and monarchy were created as a means to settle disputes within the community. In this section, he describes their next evolution, solving disputes that arose with the inhabitants of neighbouring communities. With no means of legal redress, disputes were settled by violence which eventually turned into open war between communities.[127] A single leader would be appointed to lead the community in battle:

> When the cities went out to fight in these wars, they appointed a single leader to whose wisdom and bravery they looked for victory and success in settling matters. Just as before, they followed as their leader in war the man who was most just and who seemed to stand out for his wisdom and other qualities, and this man decided what was most advantageous.[128]

He goes on to say that, '…the institution of monarchy rested chiefly in these two duties, of leading the people in war and of expounding the law. These are the particular province of all kings and their greatest authority resides within them'.[129]

By this point, Craig has shown the means by which disputes are resolved, whether between members of a given community or between neighbouring communities; in either case, the king's rôle is central. The king adjudicates internal disputes according to what will be fairest while he leads the community to war in order to settle external disputes.[130] In respect of this latter issue, monarchic status rests on the twin foundations of *consilium et virtus*. The latter word is particularly significant.

Craig previously said that the job of judging disputes was given to *vir illius societatis optimus* ('the best man in the community').[131] *Vir*, though translated simply as 'man', is not a neutral word; it is an overwhelmingly positive word which reflects the thoroughgoing excellence of the individual. It is, in many instances, the cognate of the Greek word hḗrōs (ἥρως) meaning 'hero'. The noun embodying the state of being a *vir* is *virtus*, the root of the English 'virtue'. In the context of warfare, it might be translated as 'manliness' or 'bravery' (as the present author has done) but its actual meaning is wider than can be captured by any single English word; it can describe decency, moral rectitude or any sense in which the individual is acting with moral propriety.[132] *Virtus* is that peculiar blend of characteristics which makes a man not only able to judge his community fairly but worthy of doing so; it is what makes him able (and willing) to lead the community in war and what makes the community willing to follow him. However, in this context, *consilium* (judgment, wisdom) stands alongside *virtus* as one of the features of the *vir optimus*.

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[127] Cf. Hume Brown, *Buchanan* , 285, n.1: 'Bodin, like many subsequent thinkers, thought that violence created society'.

[128] *ad quae cum singulae civitates exirent, unum ducem sibi praeficiebant cujus consilio et virtute victoriam et in rebus gerendis successum spectabant; et sic qui antea justissimus erat, consilio etiam et sic qui antea justissimus erat, caeteris praestare visus hunc et in bello ducem sequebantur, hic quod commodissimum erat praescribebat.*

[129] *sic regum institutio in his duobus maxime constabat, in populo ad bellum educendo et reducendo et in jure dicundo, quae omnium regum sunt propria et in quibus eorum potissimum imperium constitit.*

[130] Cf. Mason, *Kingship*, 191 on Buchanan's view of the function and specific responsibilities of monarchy.

[131] *JF* 1.1.4

[132] By comparison, the Greek analogue *andreios* (again, literally meaning 'manliness') usually describes physical bravery, although it can carry the negative connotation of stubbornness (see *Liddell and Scott s.v.* ἀνδρεῖος).

Craig's first kings were, thus, not just fair, courageous and morally upright but also wise and intelligent. In essence, Craig is advancing some vaguely Platonic or Aristotelian ideas about the nature of a king (or, rather, about the nature of the man who should be king); even the division of the king's qualifications into *consilium* ('wisdom') and *virtus* ('courage') recalls Aristotle's division of the intellectual virtues into *sophia* ('wisdom') and *phronesis* ('practical intelligence') – that is, the division between the theory and the practice, between the purely cerebral and the physical execution.[133]

We can see quite clearly how Craig matches the qualities of the *vir optimus* to the duties of the *rex*. These early kings have little in common with later monarchs but are, instead, a form of public servant, wise, courageous and wholly committed to the good of their community. Craig's diagram of royal virtuosity implies heavily that wisdom (*consilium*) and rectitude (*virtus*) are opposite sides of the same coin, that each derives, in some sense, from the other. To be morally upright is to be wise; to be wise is to be just, fair and brave. Wisdom and wickedness are thus mutually exclusive in Craig's worldview.

Moving on from the nature of monarchs, Craig explains that wars between neighbouring communities led to slavery and empire as the victor took the property, land and even the person of the defeated. Captives were enslaved rather than killed 'because the thirst for human blood had not yet sullied mankind'.[134] This is another reminder that Craig's treatment of prehistory is framed by his understanding of Augustinian theology and historiography, that he is describing the world as it existed after the Fall but before sin had fully taken seat in the human soul.

> For comparison, one must consider Bodin's comments on the origins of slavery:
> What is as agreeable to reason and humanity than that you should require obedience and labour from those whom you have taken as your share of the booty in a just war, whom you have cared for and even supplied with food and clothing, and whom you have nurtured with the greatest charity, in return for such kindnesses? Is it fairer to slaughter captives cruelly? This is the first origin of slavery.[135]

Bodin's discussion is long, complex and replete with historical and contemporary instances of slavery in Europe, Asia and America. Craig's is a single line and, unlike Bodin, who ultimately holds that slavery is contrary to God's law, takes no stand on the morality of the issue. Even so, a connexion between the two texts is likely, especially in view of their shared assumption that enslaving a captive was the only alternative to killing him and thus the more humane option.

While Craig does not explicitly state that he views slavery as a moral wrong, he cites the institution of slavery as the beginning of the end for human liberty. 'The conquered,' he says, 'were reduced to the status of slaves and compelled to serve while

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[133] Simpson, *Thomas Craig*, 64-65 suggests that Craig may have been influenced by Plato's *Laws* (something Baillie, the 1732 editor, also believed). My own view is that Craig is unlikely to have read Plato or, for that matter, Aristotle directly in Greek but could have either Latin epitomes or, as seems more likely, summaries of their thought in contemporary writers such as Bodin. On Aristotle's 'pride of place' for Renaissance humanists, see Bolgar, *Classical Inheritance*, 277-278.

[134] *nondum enim sitis humani sanguinis homines infecerat*.

[135] *Quid autem rationi ac humanitati tam consentaneum, quam eos, quos iusto bello ceperis parta victoria, servare iis etiam victum ac vestitum suppeditare, summaque caritate fovere ac pro tantis beneficiis obsequium et operas exigere? Num aequius illud est, quam captivos crudeliter mactare? Inde prima servorum origo*. Bodin, *De republica*, p.33.

the victors ruled. The conquered began to live under someone else's rule and that natural human liberty of living as you wish was diminished little by little'.[136] It is difficult to construe this as an endorsement of the institution of slavery and one recalls Craig's comments, drawing on Tacitus, that European serfdom was utterly different from slavery, that slavery was an alien practice belonging to the non-European, non-feudal world.[137] It is also hugely significant that the Latin word *libertas* has a more specific and arguably restrictive meaning than the English 'liberty'; it describes civil freedom or, more exactly, an individual's freedom to live within the constraints set down by law and society. By strict attention to the Latin, we can thus see that Craig construed slavery as something that undermined the law and that, by extension, the point of law is to guarantee the individual's natural right to live as he pleased.

From here, Craig has the victors in these wars debate about what their states should do next. They conclude that the characteristics of warfare – that is, theft, killings and the oppression of the weak – must not be allowed to occur within the community and, further, that men will not be restrained from these things solely by promises. This is the origin of crime and punishment. From a modern perspective, the text describes the beginnings of normative law. With the erosion of natural liberty, the position of the king is no longer just to settle disputes fairly but to enforce specific values, specific forms of behaviour, onto the community. This was the foundation of the *jus gentium*. In states which followed it (what Craig calls 'states which had discerned the fair from the wicked'),[138] good men were elected who met all of Craig's criteria for kingship (and the criteria for kingship were also, in his view, the necessary criteria to be an effective head of a household).[139] When such men measured up to the public opinion, they often held power for life. And thus Craig turns from the incipient monarchy to the origin of the hereditary principle.

8. Jus feudale 1.1.7: hereditary monarchy

In this section Craig discusses the evolution of monarchy from an elective to a hereditary office. The hereditary nature of monarchy was a hugely relevant topic in the Scotland of Craig's day as James VI stood on the cusp of inheriting the English throne. It was largely to defend the heritable nature of monarchy that Craig wrote the *De jure successionis regni Angliae* in which he 'argues strongly that kingship is not elective but dependent on hereditary right'.[140] This section must be read within that same context. It serves as another instance of Craig using the ancient past to create a literary diorama of contemporary political issues.

Hereditary kings, Craig explains, emerged because the talents and character of the father were often found in the son and thus, where the offspring of a virtuous monarch was popularly believed to share his father's qualities, he was often treated as

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[136] *at victi in servorum numerum redacti sunt, et quod imperabant victores, facere coacti et naturalis illa hominum libertas vivendi ut velis paulatim imminuta et alieno imperio vivere coeptum*.
[137] *JF*, 1.4.3.
[138] *in civitatibus qui aequum ab iniquo decernerent.*
[139] Cf. Simpson, *Thomas Craig*, 65 for a comparable perspective from Bodin.
[140] Cairns, 'Thomas Craig (?1538-1608)'. The *Vita Cragii*, xvi, discusses Craig's response to 'the Jesuit Parsons [who], under the assumed name Doleman, dared to attack and belittle' James VI over his right to the English throne.

his father's natural successor. Over time, this convention became corrupted so that 'when their wealth surpassed everyone else and the children were not disposed to the weakening of their paternal rank, the right of succession in monarchies was introduced'.[141]

What Craig has done so far is to present a very broad account of how, in his view, the earliest states coalesced and the earliest monarchies emerged and evolved. At this point, however, the plane of discussion shifts to the various exceptions to the rule. He explains that the Medes, Persians, Lydians, Phoenicians and others were hereditary monarchies from their very inception, citing Aristotle as the source.[142] He will go on, in the next section (1.1.8), to discuss the development of tyranny and those states which were tyrannous to begin with.

Craig does not dwell on the difference between the western and Asian monarchies here nor does he attempt to extrapolate any broad rules. Nevertheless, the idea that the monarchies of the near and middle east were hereditary foundations from the very start (and, in the next section, that some were tyrannies, not monarchies, from the moment of creation) recalls the common western literary trope of Asiatic servility and, specifically, Buchanan's remark in the *De jure regni* that 'the peoples of Asia are more slavish in spirit than the Europeans, so that they accede more easily to the commands of tyrants'.[143] While Craig does not explicitly bring up the trope of Asiatic servility at this point, he does discuss it at some length later in the text (1.4.3) and we can assume that he would have expected his readers to be aware of it and, therefore, to connect it with his treatment of historical Asiatic kingship.

In any case, the hereditary principle, though it may have started in Asia, was adopted elsewhere in order to forestall the kind of civil strife that follows the death of a monarch. Rather than subject themselves to the problems that attend an uncertain succession, the successor to the king was either his firstborn or the head of the family. The careful reader notes that Craig here, at the end of the section, broadens his concept of the *jus successionis* from the simple primogeniture envisioned at the start into a wider definition that seems to imply inheritance by seniority. More importantly, this section, with its references to the conflicts that result from an uncertain succession, must be read as a warning about what will inevitably happen in England should James VI's right to the English throne be rejected or challenged.

9. Jus feudale 1.1.8: the origins of tyranny

Craig begins this section by stating that his arguments thus far do not apply to the descendants of Ham. According to biblical narrative, Ham was one of the sons of Noah. He happened one day to see his father naked and drunk and told his two brothers, Shem and Japheth. Noah, upon waking from his drunken stupor, cursed his youngest son that

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[141] *cum eorum opes reliquis praeeminerent, nec facile paternae dignitatis imminutionem paterentur liberi, jus successionis in regnis introductum est*.

[142] The print editions cite Book 1 of the *Politics* as the source but Aristotle does not actually say this. He does, however, give a short account of the origin of states at 1.1252b which is very close to what Craig says in 1.1.3-4.

[143] *Nam, ut Asiae populi magis servili animo sunt quam Europaei, ita tyrannorum imperiis facilius parebant*. Buchanan, *De jure regni*, p.145.

his descendants would be slaves to his brothers' descendants.[144] The story was used historically by all three Abrahamic faiths to justify black slavery by connecting the 'curse of Ham' with black skin.[145] Indeed, until 1978, the Mormon church taught that all black Africans were marked with Ham's curse but could be made white through Christ's saving power. For Craig, however, the sons of Ham are not African and the servility imposed by the curse has a different meaning. The descendants of Ham, he explains, live under the rule of tyrants whose monarchies were established by force and violence. The first of these tyrants was Nimrod, founder of the kingdom of the Assyrians.

Craig narrates that Nimrod was called in scripture a 'mighty hunter',[146] but hunters were a type of brigand and to the ancients banditry was nothing but a special type of hunting. The equating of hunters with brigands has no particular provenance in the Bible but something very similar can be found in Plato's Nomoi.[147] Ever the antiquarian, Craig goes on to cite Bodin who noted that the first peace treaty between Rome and Carthage used the word *latrocinari* in place of the more usual Latin phrase *bellum gerrere*. *Latrocinari* is the present active infinitive of the verb *latrocinor* and its meaning is twofold: it can mean 'to perform military service for pay';[148] or it can mean 'to rob'.[149] Etymologically the word is the verbal form of the noun *latro* ('robber', 'mercenary') and the ancestor of modern Romance words like the French *larron*, the Spanish *ladrón* and the Italian *ladro*.[150] The twin meaning, of theft and military service, presumably goes back to a time when soldiers were paid with plunder from conquered communities. Craig takes all this from Bodin's *Methodus*,[151] though Bodin's ultimate source is Polybius 3.22.[152]

In quite a topical statement, Craig states that in antiquity the term *latrocinium* ('banditry') was no more iniquitous than the name 'pirate' amongst modern nations.[153] The *Jus feudale* was, of course, written at the dawn of Caribbean piracy, a time when English, French and Dutch pirates regularly plundered Spanish shipping and colonies, throughout the Americas and sometimes beyond, only to be fêted as heroes in their home countries. As a Scot and a keen historian, Craig may also have had in mind Sir Andrew Barton, a high admiral of Scotland and enthusiastic privateer, who raided Portuguese and English shipping during the late fifteenth and early sixteenth centuries but was condemned by his victims as no more than a pirate. However, while Craig makes the statement topical and gives it particular relevance to a British (or northern European) readership by relating it to piracy, it is ultimately taken from Bodin who

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[144] Genesis 9:20-27

[145] D. Goldberg, *The Curse of Ham: Race and Slavery in Early Judaism, Christianity and Islam*, Princeton, 2003, 170.

[146] Genesis 10:9.

[147] Plato, *Laws* 7.823.

[148] For example, Plautus, *Trinummus* 2.4, 598; *Miles gloriosus* 2.6, 499.

[149] For example, Cicero, *In Catilinam* 2.16, *Pro Milone* 17.

[150] Bodin also discusses the Hebrew equivalent of the Latin *latro* in *De republica*, p.46.

[151] Bodin, *Methodus*, p.195.

[152] Grotius also discusses this word and its implications; *De jure belli et pacis* 2.15.5.

[153] Regarding the lack of infamy attaching to *latrocinium* among the Germans of the first century BC, see Caesar, *De bello Gallico* 6.23, *Latrocinia nullam habent infamiam, quae extra fines cuiusque civitatis fiunt* ('Banditry involves no disgrace, provided it takes place beyond the border of one's state').

says: 'The ancients, such as Plato, Aristotle and Xenophon, considered banditry to be a type of hunting'.[154]

The text continues that many kings had arisen from the ranks of bandits and hunters ('and the mire of the worst of humanity');[155] and, following the hereditary principle, they passed their kingdoms on to their children. At this point, Craig illustrates his point by drawing upon Juvenal's excoriating attack on Roman aristocratic pretensions in which the poet claims that his subject's ancestor was a criminal who had gone into hiding at the Asylum of Romulus ('the first of your ancestors, whoever that was, was either a shepherd or something that I'd rather not say').[156] The mention of Rome represents an interesting change in Craig's tack, as he had claimed to be discussing the origin of kingship among the descendants of Ham (which Craig takes to describe various middle eastern peoples) and its difference from kingship in the rest of the world; thus where kings elsewhere began as fair-minded judges, Hamitic kings were originally brigands. However, by introducing Juvenal and Rome, who were certainly not Hamitic as Craig understood the term, the narrative is expanded into a subtle but acerbic comment on the nature of power and those who hold it. He implies that all rulers, whether western or Asian, ultimately derive their authority from the fact that their ancestors took power by force. In a sense, this a subtle response to Buchanan and the Monarchomachs who insisted that monarchic legitimacy and authority derive from the ruled.

In any case, Craig next discusses Nimrod, the grandson of Ham (through Ham's son Cush) and 'the first to claim for himself authority over all things and who attacked and subdued each of his neighbours by violence and force and suppressed their liberty with burdens and slavery, for which he was named Nimrod (that is, *amarus dominator*)'.[157] In the Jewish and Christian traditions (including that of Josephus) and in certain medieval Muslim narratives (though, interestingly, not in the biblical account),[158] Nimrod led the people who built the Tower of Babel so, in a sense, Craig has returned to his starting point for the chapter. More importantly, however, by translating Nimrod as *amarus dominator* ('harsh overlord') he has revealed something about the sources and methodologies from which he has gathered his interpretation of human prehistory.

The actual meaning of the name Nimrod (נִמְרוֹד in the Hebrew) is unknown but, at some point in the early sixteenth century, *amarus dominator* became a common Latin translation and remained so until at least the mid-eighteenth century. The etymology appears to have originated with Johann Carion (1499-1537) whose Chronicles had such an important influence on continental Protestant thought. The text was later expanded, by Melanchthon amongst others, and translated (arguably, completely re-written) into Latin as the *Chronicon Carionis* wherein we find the earliest instance of the phrase

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[154] Bodin, *De republica*, p.189.
[155] *Ex pessimorum hominum colluvione*.
[156] Juvenal, *Satires*, 8.274-5.
[157] *Nimrodum primum fuisse qui rerum omnium arbitrium sibi arrogaret; vi et potentia vicinos singulos aggressus subjecerit, oneribus et servitiis eorum libertatem oppresserit et inde Nimrod (id est amarus dominator) dictus est*. Compare this to Bodin, *De republica*, p.46, *testis est historia sacra, qua docemur Nimerodum Chami nepotem primum omnium homines sub imperium vi subiunxisse*. ('The sacred history is proof, from which we are taught that Nimrod, grandson of Ham, was the first ever to subjugate people beneath his rule by force.')
[158] Josephus, *Antiquitates Judaicae*, 1.4.2, seems to be the earliest literary provenance for this tradition; this is the same part of the text from which Craig derives his narrative of *JF* 1.1.2.

amarus dominator in a section dealing with the sons of Ham.[159] The earliest instance of the phrase in the Latin language appears to be in a relatively obscure Late Antique tragedy by Dracontius, the *Tragoedia Orestis*, which states *rex Agamemnon erat, patriae dominator amarus* ('Agamemnon was king, the harsh overlord of his country').[160] While Melanchthon is best known for his theology, he was also a talented scholar and teacher of the classics, particularly Vergil, so it is probable that he was familiar with Dracontius, whose manuscript had been known since the fifteenth century, and appropriated the phrase; given that Dracontius was an orthodox Roman Christian who lived and wrote under, and was eventually imprisoned by, Arian Vandal kings, it is even possible that Melanchthon saw some parallels between Dracontius' plight and that of sixteenth century Protestants living under Catholic monarchs.

Be that as it may, the essential point is that we can find this phrase used time and again in sixteenth century Latin texts. Flinspach's *Genealogiae Christi* gives *amarus dominator* as the meaning of Nimrod,[161] as does Walter Raleigh's *History of the World* which cites Melanchthon as the source.[162] Indeed, the translation of Nimrod as *amarus dominator* was common enough that the Dutch jurist Giphanius – or Hubert van Giffen – was nicknamed *amarus dominator* by students at the University of Altdorf, where he taught law between 1583 and 1590, for his vitriolic and domineering attitude to those whom he taught.[163] Simpson rightly observes that the 1560 Geneva Bible, which may have been known to Craig, mentions the translation *amarus dominator* but the more likely source is a Latin humanist text.[164] Craig's understanding of Nimrod – in fact, his whole understanding of law, history, language and religion – derived from and was steeped in the learning of continental humanists and the *Jus feudale* was a conduit by which the humanist literary and cultural product was introduced to Scotland.

In the *De republica*, Bodin, very interestingly, does not use *amarus dominator*. Instead, he states *dictus est Nimerodus, id est dominus metuendus* ('He was called Nimrod, that is "terrifying lord"').[165] In the *Methodus*, he says that Nimrod 'is described as a strong hunter by Moses, by which word he described all kinds of bandits and wicked men' but otherwise gives no etymology or definition for the name.[166] It is most likely that Bodin used a non-Latin source, possibly the original German edition of Carion's *Chronicles* or a French translation thereof, while the other humanists were drawing upon Melanchthon's expanded Latin version of Carion. The result, predictably, would be that these other authors utilised Melanchthon's *amarus dominator* where Bodin translated the German or French directly into Latin and arrived at *dominus metuendus*. It is quite surprising that Craig did not use Bodin's etymology

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[159] *Chronicon Carionis* (p.20 of the 1601 Bern edition or p.35 of the 1559 Basel edition).
[160] Dracontius, *Orestis Tragoedia*, 2.410; cf. A. M. Wasyl, *Genres Rediscovered: Studies in Latin Miniature Epic, Love Elegy and Epigram of the Romano-Barbaric Age*, Krakow, 2011, 65-74 but esp. 70. On Dracontius generally, see F. Raby, *A History of Christian-Latin Poetry*, Oxford, 1966, 95-100.
[161] Flinspach, *Genealogae Christi et omnium populorum tabulae*, Basil, 1567, 202.
[162] Raleigh, *History of the World*, 1.10.2 (p.158 in the 1614 London edition). This is not to imply that Raleigh was Craig's source – particularly given that Raleigh's text was not published until after Craig's death – but rather to underscore that Melanchthon was being read and cited by insular humanist scholars.
[163] W. Mährle, *Academia Norica: Wissenschaft und Bildung an der Nürnberger Hohen Schule in Altdorf (1575-1623)*, Stuttgart, 2000, 152.
[164] Simpson, *Thomas Craig*, 72; note that the Basel *Chronicon* was published the year before the Geneva Bible which indicates an earlier provenance for the phrase *amarus dominator*.
[165] Bodin, *De republica*, p.189.
[166] *Nimerodus...a Mose robustus venator appellatur, quo verbo latrones ubique et sceleratos homines appellavit*, Bodin, *Methodus*, p.270.

of Nimrod. Looking closely at Bodin's account of Nimrod's origins, we can see that Craig's dependence on the French text is far greater than his passing references to Bodin might suggest: 'It is obvious and convincing to everyone that the first of all monarchies was constituted in Assyria by King Nimrod whom the Holy Scriptures called the most powerful hunter, a common figure of speech amongst the Hebrews by which they intended to signify that he was a bandit'.[167]

So, as we see, not only is the motif of the first Hamitic kings being bandits imported from Bodin but so too is the concept of banditry as a form of hunting. In fact, this entire section is effectively a very close adaptation of Bodin with Craig's contribution being limited to the introduction of Juvenal and Rome. Bodin's account also states that 'Before the age of Nimrod, everyone's liberty was equal'.[168] This recalls Craig's remark, at the end of section 1.1.6, that military conquest marked the end of human liberty. We can safely assume that Craig adapted this sentence from Bodin's to suit his own concern with the wider (i.e. non-Hamitic) origins of law and society.

Moving on, Craig's text says that Nimrod gathered hunters 'who, like himself, were oppressors of other people's liberty' and thereby established the Assyrian kingdom.[169] The other empires of antiquity – the Egyptians, Lydians and Persians – were likewise founded upon violence. This, Craig explains, makes sense even if one is completely ignorant of history because 'the stronger are accustomed to take everything for themselves, to despoil, murder and conquer weaker people and to drive them into slavery'.[170] So, in effect, Craig is saying that degeneration to the Hamitic standard of tyranny is inevitable for all humans, that the principal difference between them and the descendants of Shem and Japheth is that the descendants of Ham were subject to tyranny from the very beginning while all the other nations had to devolve to that point. This interpretation is reinforced by section 1.1.3 where Craig explained that the earliest communities were organised by the weak to provide mutual defence against stronger clans. The stronger clans were not specifically Hamitic, so Craig's argument is that this is a universal, not merely Hamitic or Asian, phenomenon.

Having established their empires, the Hamitic kings abandoned even 'natural liberty' by subduing their most outstanding generals. The idea that kings would strike down those whose power or reputation posed a threat was a common motif in antiquity and can be found in Herodotus and Aristotle. Both tell the story of how Thrasybulus, tyrant of Miletus, sent a messenger to the Corinthian tyrant Periander asking how to rule; Periander responded by taking the messenger to a field of wheat and decapitating the tallest stalks – the implication being to remove all outstanding individuals as they might prove powerful enough to pose a threat.[171] This story was probably known to

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[167] c*um omnibus persuasum sit ac perspicuum monarchiam omnium primam in Assyria fuisse constitutam Nimerodo Principe quem sacrae literae potentissimum venatorem appellant loquendi genus Hebraeis familiare quo verbo latronem singificari volunt.* Bodin, *De republica*, p.187.

[168] *Ante Nimerodi aetatem, aequa erat omnium libertas.* (Ibid.)

[169] *Nactusque multos sui similes venatores alienae libertatis oppressores, regni Assyriorum prima constituit initia*.

[170] *Fortiorem omni sibi solitum arrogare, infirmiores spoliare, caedere, subjicere sibi et in servitutem adigere*.

[171] Herodotus 5.92 and Aristotle, *Politics*, 3.1284a. Aristotle, however, states that this is a policy pursued not only by tyrants but by democrats and oligarchs as well. He specifically cites the Athenian policy of ostracism as a variant but he may have in mind the execution of Socrates following the restoration of democracy after the Tyranny of the Thirty.

Craig through one ancient source or another but, even if not, it is related by Bodin in the *Methodus* and must have been in Craig's mind when he wrote this section.[172]

10. Jus feudale 1.1.9: the difference between a tyrant and a monarch

This section deals with a very hot topic of Craig's day, the distinction between a legitimate monarch and an illegitimate tyrant. Even in violent societies where oppression and enslavement were the norm, there were still rights and laws; Craig explains that even bandits enforced rules on proper behaviour, 'otherwise, as Cicero says, there would be no fellowship between them'.[173] These laws, however, depended upon the whim of the king. As the most powerful man in the group, the king's commands were law and Craig supports this with a reference to Livy saying 'amongst the barbarians, the commands of kings took the place of laws'.[174] A very similar remark can be found in Buchanan's *De jure regni apud Scotos* which says *libido regum pro legibus esset*,[175] and in Bodin's *De republica* which says *Livius scribit barbaris...pro legibus semper dominorum imperia fuerunt* ('Livy writes that, for barbarians, the commands of their lords always took the place of laws').[176] It is certain that Craig had read Bodin on this point, but he probably also drew upon Buchanan, which should be unsurprising as the *De jure regni* would be a natural source for any Scot of the period interested in the topic of tyranny.[177]

The king, as the only source of authority in his domain, appointed deputies to govern and dispense justice in his stead. He provided them with written provisions to follow both to ensure that justice would be dispensed fairly and because he wished to constrain his satraps lest they become too powerful and usurp the throne. The fact that Craig describes the king's deputies using the Persian word satrap, meaning 'viceroy', reinforces the idea that he is speaking about Persia and, in all likelihood, the near east generally rather than making a universal rule applicable to Europe. In any case, 'these were the first foundations of tyranny',[178] for while tyrants provided written guidance to their judges, the tyrants themselves were unrestrained by any law or statute and any complicated or controversial judgment by a deputy had to be made in accordance with the king's wishes and after consulting the king 'so that ultimately they directed the law to suit the king's pleasure and advantage'.[179]

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[172] Bodin, *Methodus*, p.216.

[173] *Ut ait Cicero...alioqui nulla esset inter eos societas*. This is not a direct quotation from Cicero, though the 1732 edition and Clyde treat it as such. Rather, it is a close paraphrase of *De officiis* 2.40, *Quin etiam leges latronum esse dicuntur, quibus pareant, quas observent*…. Cicero goes on to give specific examples of bandits who were known for their fairness in dealing with other bandits.

[174] *Apud barbaros regum imperia pro legibus sunt*. The reference is to *Ab urbe condita* 37.54, which says *barbari*, *quibus pro legibus semper dominorum imperia fuerunt, quo gaudent, reges habeant* ('Let the barbarians have kings, for to them the commands of their lords have always taken the place of laws, something in which they delight').

[175] Buchanan, *De jure regni*, p.44.

[176] Bodin, *De republica*, p.190. Note that Bodin is actually quoting Livy where the others are merely paraphrasing him.

[177] Hume Brown, *Buchanan*, 287, n.1 observes that Buchanan and Bodin shared an interest in tyrannicide and kingship. These topics were obviously not Craig's primary concern, but the centrality of Bodin and Buchanan to his narrative meant that he could not avoid treating the issues that they discussed.

[178] *Haec itaque prima erant tyrannidis fundamenta*.

[179] *Ad cujus libidinem et commoda jus illud qualaecunque tanquam ad finem dirigebant*.

So, while these primitive states were subject to a form of law, it was wholly dependent on the whim of whichever man happened to be strong enough to enforce his will on everyone else, 'men who believed that because they were stronger everything was owed to them and who oppressed the people gravely'.[180] Craig goes on to explain that 'in this, legitimate monarchy can be distinguished from tyranny: the tyrant looks only to his own advantage and profit and is unconcerned about condition and well-being of his own people, while the true monarch disregards his own well-being and profit in favour of the well-being and advantage of the people'.[181] This is redolent of Bodin's remark that 'it is tyranny if the prince arrogantly abuses people's property, nature's law and the goods and liberty of subjects for his own caprice'.[182] By itself, one might excuse this as coincidence but it is found on a page which Craig has clearly read thoroughly (and borrowed from extensively), so we must characterise Craig's description of the difference between tyranny and legitimate monarchy as ultimately an expansion of Bodin's thoughts. Indeed, Craig finishes this section by comparing the legitimate monarch to Codrus, a mythical king of Athens and a key part of the city's civic mythology during the classical period. According to the Attic orator Lycurgus in his only extant speech, Athens was attacked in the ancient past by a Dorian army who had received an oracle at Delphi stating that they would conquer the city provided they did not harm the Athenian King. When Codrus heard this, he disguised himself, went to the Dorian encampment and provoked a fight during which he was killed. Lycurgus invokes Codrus alongside the daughters of Erechtheus as a paragon of patriotic (and royal) self-sacrifice.[183] This story is recounted in detail in Bodin's *De republica* (and in passing in his *Six livres de la République*).[184]

Thus, in its entirety, Craig's conceptualisation of the tension between legitimate royal authority and tyranny is actually Bodin's conceptualisation. Even to the extent that Craig may be drawing upon some other source, such as Buchanan, they are ultimately drowned out by the sheer intellectual hegemony that Bodin exercises over Craig's understanding of sovereignty and authority;[185] indeed, other than to the extent that they endorse Bodin's view, Craig seems to have minimal use for other sources. At the same time, Craig does not expressly state that he is presenting a narrative which is founded upon Bodin's work, something which may reflect a desire on Craig's part to minimise the appearance of dependence on other parties or which may simply show that he expected his readers to be able to recognise the shadow which Bodin cast over the *Jus feudale*.

11. Jus feudale 1.1.10: state, society and the Jews

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[180] *Qui sibi, quod fortiores essent, omnia deberi putabant, multitudinem graviter opprimebant*.

[181] *In hoc enim principatus legitimus a tyrannide dignoscitur, quod tyrannus sua tantum commoda et utilitates spectet, de populi sui statu et salute securus; verus autem princeps suam salutem et suas utilitates populi saluti et commodis postponat*.

[182] *Tyrannis denique si princeps imperiose spretis gentium ac naturae legibus subditorum bonis ac libertate ad libidinem abutatur.* Bodin, *De republica*, p.189.

[183] Lycurgus *Kata Leokratous* 84-87. The same tale is told in a number of sources but Lycurgus is the earliest version and was included in Manutius' 1508 compendium of Attic orators, upon which Bodin almost certainly drew.

[184] Bodin, *De republica*, p.200.

[185] Cf. Cairns, Fergus & MacQueen, 'Legal Humanism', 55

Having disposed of the descendants of Ham, Craig proceeds to discuss the descendants of Shem, by which Craig means the progeny of Abraham and thus the Jews. He explains that Abraham and his descendants were nomadic and had neither laws nor contracts; though extremely wealthy, that wealth was measured in cattle.[186] During the time of the Patriarchs (that is, Abraham and his son Isaac and grandson Jacob), 'not only had Natural Law grown in strength, but the Law of Nations had been further consolidated and perfected; kingdoms and empires were being founded at that time and communities and civil agreements were being implemented'.[187] The concept of private property emerged during this same period, as did the laws of war, whereby, and according to scripture, any man who took something in war acquired a lawful right to it.[188] Finally, laws of slavery and manumission and contracts of sale, hire and loan emerged and, ultimately, laws on succession and wills, examples of which, Craig assures us, can be found in Genesis along with penalties for wrongdoing and rewards for the good.

The interesting thing about this, certainly from the perspective of the development of law and society, is that Craig makes no attempt to explain why, how, where or when these laws came about. We leap from a period when the ancient Jews were nomadic and lawless through to the period of the Patriarchs when laws existed. The Jews had no laws and then they did; these laws are presented to the reader as a *fait accompli* requiring no exposition. Given that the *Jus feudale* generally makes a point of exploring the origins and development of law, this apparent omission demands explanation. The most likely issue here is Craig's lack of useful source material. Bodin, one of his favourite modern sources, seems not to touch upon Abraham or the pre-Mosaic Jews at all. Craig's source of last resort, so to speak, is therefore the Bible itself and so he provides a basic recounting of Genesis in which no explanation of the development of law is to be found. This is as good an illustration as any of Craig's dependence on his source material and, perhaps, a demonstration of his limitations in spheres not directly related to the practice of law.

Moving on, the point is made that oral laws provided no real deterrent to criminality. This is a theme to which Craig returns at various points – the need for law to be set down in order to ensure that it is publicly available and that no-one therefore commits a crime through ignorance. In place of written law, good men, 'or those believed to be such, through the opinion or error of the people',[189] dispensed justice. He then recounts another Old Testament story, this time one of the sister-wife narratives. When Abraham arrived in Gerar, he identified his wife Sarah as his sister, whereupon the king, Abimelech, took her for his own. That night God sent the king a dream revealing Sarah's identity and warning that Abimelech would be killed if he violated her. The king responded that Abraham had deceived him and therefore his own conscience was clear. God agreed with this but told him to restore Sarah to Abraham. Abimelech did so but not before rebuking Abraham for unjustly bringing God's anger down upon Gerar. Abraham explained that he feared he would be killed by the men of Gerar because there was no fear of God in that land.[190] As Craig puts it, Abraham

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[186] From a Scottish, and particularly Highland perspective, many people in Craig's own day might have measured wealth in the same terms as the ancient Jews.

[187] *Non solum jus naturae sive naturale valuisse certum est, sed jus etiam gentium constitutum et absolutum fuit; nam regna et imperia tum erecta, societates et civiles conventiones contrahebantur*.

[188] Genesis 48-49.

[189] *Aut qui ex opinione aut errore vulgi tales credebantur*.

[190] Genesis 20:5-11.

'trusted not laws, which did not then exist, nor the rights of hospitality but only the fear of God on which alone commonwealths rested'.[191]

Traditional Jewish interpretation is based around the idea (not actually found in the text) that Abimelech broke the rules of hospitality by immediately asking if Sarah was married. Christian interpretation tends to focus more on the moral lapse when Abraham, an otherwise ideal figure, lies from fear. Craig's use of anecdote is to illustrate the problem that arises when social order derives not from written law but from royal commandments. A king, as the ultimate power in the community, answered to no-one and was therefore restrained solely by his own sense of decency. Only *timor Dei* – the fear that even a king's transgressions will be punished – can guarantee that the king will act justly.

Craig explains that devout impulses had remained in Abraham's descendants even after the Fall and that, with no fixed laws, rights or homes, it was this divine spark that provided the foundation for law and governance amongst them. However, to illustrate this contention, he cites a line from the pagan poet Ovid, 'They cultivated faith and fairness willingly and without law'.[192] Ovid was describing the classical pagan view of the Golden Age of Man and, indeed, Craig extends his use of Ovid by borrowing the term *aurea aetas* ('golden age') to describe this period as the 'first and truly golden age of the Patriarchs'.[193] Despite using the pagan Golden Age in this way, Craig prefaces his quotation of Ovid by saying, 'even after the fall of the first man, Adam, some remaining element of the divine breath brought forth those devout impulses of the soul in the descendants of Abraham'.[194] The phrase *in Abrahami familia produxerat* seems to function as a reductive statement; it implies that these divine impulses were not found in all people – certainly not in the Hamitic peoples, about whom Craig has written, and apparently not in the ancestors of the non-Semitic Greeks and Romans, nor even in all Semitic peoples – but only in the blood descendants of Abraham, the first Jew. Jewish society is thus founded upon *timor Dei* and 'devout impulses of the soul'. Yet this cannot be Craig's meaning because, immediately after, he states that the descendants of Abraham 'departed in no way from Natural Law, or from the laws of other nations, except in the worship of God'.[195] Thus, the laws of Jewish and non-Jewish nations are the same, except in matters of religion. If law owes its origin to some divine spark in the human soul, that spark was found equally in Jews and non-Jews. Similarly, Craig stated that commonwealths rested solely upon *timor Dei* and yet recognised the existence of societies where the Abrahamic god was not worshipped. We must therefore interpret his comments broadly as describing fear not of the biblical god but of divine judgment and retribution in a more general sense. It may be significant that Craig earlier referred to Minos and Rhadamanthus who, according to Plato's pagan, sat in judgment of wrongdoers in the afterlife.[196] The parallels between this and the Judeo-Christian concept of judgment in the afterlife could not have escaped Craig.

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[191] *Non leges, quae tum nullae erant, non jura hospitalia praetexuit, sed tantum timor Dei, quo solo tum respublicae stabant, proposuit.*

[192] *Sponte sua sine lege fidem rectumque colebant*. Ovid, *Metamorphoses* 1.90.

[193] *Illa prima et vere aurea aetate patriarcharum*.

[194] *Siquidem post lapsum Adae protoplasti, divinae tantum aurae particula adhuc relicta pios illos animorum motus in Abrahami familia produxerat*.

[195] *Ita tamen ut a jure naturali nunquam discederent, a jure aliarum gentium nisi in Dei cultu raro.*

[196] Plato, *Apologia* 41A.

The similarity of Jewish and non-Jewish society is reinforced when Craig goes on to describe the emergence of kingship among the Jews. Echoing his earlier treatment of kingship in non-Jewish societies, he explains that a single leader was appointed who would judge matters, issue decrees and convene the community. In time, the people started to call him the king but that term was not an indicator of monarchic sovereignty so much as a title of respect, something Craig illustrates by recounting a line from the *Punica* of Silius Italicus where Scipio is named *rex*, or king, by the Spaniards because 'they undoubtedly considered this the highest badge of virtue'.[197] The evolution of Jewish kingship is explained by reference to a Roman account of kingship among the Spaniards because, as Craig understood it, the evolution of ancient Jewish society was interchangeable with that of any non-Jewish (and non-Hamitic) society.

From here, Craig makes an interesting digression. He notes that the absence of laws and judicial punishment in prehistoric times is made clear by Homer because, in all his books, the word 'law' is not to be found. This is factually correct. The Greek word for law, *nomos*, is found nowhere in the *Iliad* or *Odyssey* although *dikê* ('justice') does put in a few appearances and the verb *nemein* ('to distribute'), the etymological source of *nomos*, also appears. However, the argument is not Craig's; it is lifted directly from Bodin's *Methodus* which says 'Homer, in his great work, nowhere employed the word *nomos*'.[198] This is indicative of Craig's general lack of familiarity with Greek texts and his reliance on secondary sources to fill the interpretational gap; but, from the perspective of Craig's argumentation, the larger point is that he treats Homeric Greek society as interchangeable with the world of the Old Testament. The position of kings, both Homeric and Jewish, is explained thus: 'Homer lived one hundred and sixty years after the fall of Troy and, at that time, a king was nothing other than popular authority or armed justice',[199] a conclusion that is reminiscent of Buchanan's assertion that a ruler, whatever title he went by, existed for the purpose of upholding the law.[200]

12. Jus feudale 1.1.11: the codification of law

This section is quite short and provides an orthodox explanation of the earliest codification of law. The golden age of human morality passed and wickedness took its place; virtuous judges were replaced by wealthy men who showed partiality to members of their own social class and prejudice against the poor. Faced with inconsistent verdicts, communities demanded that the law be set down in writing 'so that it would speak consistently with a single voice to all people'.[201] Craig follows this with an extended quotation from Cicerio's *Pro Cluentio* in which the orator detailed the characteristics of the ideal judge.[202] The quotation explains that a judge is permitted only a specified amount of authority, that he must not overstep his bounds and that authority has been vouchsafed him on the understanding that he can acquit those whom

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[197] *Scilicet hunc summam norant virtutis honorem*. Silius Italicus, *Punica* 16.281.*Norant* is rendered *norunt* (contracted form of *noverunt*) in modern editions of the text.
[198] *Homerus in opere tanto* νόμον *verbum nusquam usurparit*. Bodin, *Methodus*, p.183.
[199] *Vixit autem Homerus centum et sexaginta annos post captam Trojam; nec rex aliud tum erat nisi publica potentia aut armata justitia*.
[200] Buchanan, *De jure regni*, p.43.
[201] *ut idem omnibus uno ore loqueretur*.
[202] Cicero, *Pro Cluentio* 58.

he hates and condemn those whom he likes, making judgments on the basis of law and piety.

The comment about judicial partiality towards the wealthy recalls the *De officiis* where Cicero explained that the first judges (and thus kings) were created to ensure that the poorer classes should not be oppressed by the wealthy.[203] The insistence of the people on fair and equitable treatment, and their attempts use law to guarantee it, also reflects the influence of the *De officiis*; in fact, the desire for the law to 'speak consistently with a single voice to all people' is a slight re-working of Cicero's own phrase *leges sunt inventae, quae cum omnibus semper una atque eadem voce loquerentur* ('laws were invented, which then spoke to all people at all times with one and the same voice').[204]

Craig was certainly very familiar with the *De officiis*, so its influence should be assumed to be direct. Having said that, it is worth noting that Buchanan quotes these same sections of *De officiis* at length;[205] this comes shortly after Buchanan's own discussion of the reasons for the codification of law. His account is similar to Craig's but harsher and much more explicit in that it is talking about kings and not just magistrates:

> One ought always to bear in mind what we said at the start, that kings were first established for the purpose of upholding fairness. Had they held to that, they would have been able to maintain the power they received forever, that is free and unrestrained by laws. But, as in all human matters, the state of affairs degenerated into something worse and authority which was established for the public good turned into arrogant domination. For, when the licence of kings took the place of laws and these men collectively would not temper their limitless and unbridled power, but instead indulged their own friendships, hatreds and personal interests, the insolence of kings made a necessity of laws.[206]

While Craig has specifically discussed the corruption of judges, we must recall that his narrative, informed as it is by Ciceronian thought, treats kings as no more than a type of judge. So when Craig talks about the partiality and injustice of judges, he is actually talking about the failures of kings. He does not say so explicitly, does not use the word *rex*, but he nevertheless shares Buchanan's theme of royal high-handedness and of laws arising to constrain the monarchy. This, in a way, represents a certain friction between the text as Cicero wrote it and its interpretation by sixteenth-century Scots.

For Cicero, writing under the late republic, kings were figures from the distant historical and mythological past. He could therefore write of the relationship between kings, judges, corruption and written law without any particular political implication;

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[203] Cicero, *De officiis* 2.41.
[204] Ibid. 2.42.
[205] Buchanan, *De jure regni*, pp.50-51.
[206] *Illud igitur quod initio diximus tenere semper oportet, reges primum tuendae aequitati fuisse constitutos. Id illi si tenere potuissent, imperium quale acceperant tenere perpetuo potuissent, hoc est liberum et legibus solutum. Sed (ut humana sunt omnia), statu rerum in pejus prolabente, quod publicae utilitatis causa fuerat constitutum imperium in superbam dominationem vertit. Nam cum libido regum pro legibus esset, hominesque in potestate infinita et immoderata collocati sibi non temperarent, sed multa gratiae, multa odiis, multa privatis commoditatibus indulgerent, regum insolentia legum fecit desiderum*. Buchanan, *De jure regni*, p.44.

in fact, for any good Roman republican, the act of writing about the arrogance of kings and the need to constrain them with codified law was a reinforcement of Roman civic ideology – after all, the republic had been founded by driving out an arrogant king who ruled as a tyrant.[207] Matters were less simple for a Renaissance Scot, living under the Stuart monarchy and particularly for Craig living under an adult James VI jealous of any challenge to his monarchic authority but facing an unprecedented 'constitutional crisis' that revolved ultimately around the question of where sovereignty lay.[208] The values of the Roman republic, as voiced by Cicero, could bring one into sharp conflict with Stuart monarchic ideology. It was as a consequence of just such a conflict that all copies of Buchanan's own *De jure regni apud Scotos* were ordered, on pain of a £200 fine, to be surrendered to the Privy Council so that they might be 'purgit of the offensive and extraordinare materis'.[209] In time, James penned *The True Law of Free Monarchies* in 1598 and the *Basilikon Doron* in 1599 to refute Buchanan's Monarchomachic ideology and establish a literary and theoretical foundation for his own ideology of monarchic absolutism.[210]

Buchanan openly advocated the assassination of tyrants (a term which, in this sense, appears to mean any monarch who fails to uphold the duties placed upon him by the people or who acts outside the bounds of law and reason) and championed some form of popular sovereignty.[211] Thus, he was advancing an ideology that he knew would bring him into conflict with the monarchy, in the form of his pupil, James VI. Craig shared none of these beliefs with Buchanan and, in fact, can broadly be described as a Stuart loyalist.[212] His intent in writing this section was to state, as anodyne fact, that kings had originally been appointed by the people to fill a specific judicial function and that some kings had failed in that rôle. As a result of this failure, laws were created to bind monarchs. It is not likely that James VI was offended by Craig's statements; indeed, in his 1610 speech to the English parliament, James acknowledged that the difference between tyranny and legitimate monarchy rested on royal obedience to the law.[213] However, this whole section, when read alongside Buchanan, illustrates the

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[207] The last king of Rome, Tarquinius Superbus or Tarquin the Arrogant, provoked a revolution by raping a virgin who later killed herself. The motif that sexual excess was a marker of tyranny is something to be found in much of Buchanan's historical work. See Mason,) 193.

[208] Mason, *Kingship*, 195.

[209] T. Thomson and C. Innes, eds., *Acts of the Parliaments of Scotland 1424-1707*, 12 vols., Edinburgh, 1814-1875, vol.3, 296.

[210] G. Burgess, *Absolute Monarchy and the Stuart Constitution*, London, 1996, 42 and 96-102 argues that James VI was not an absolutist but simply believed in divine right while simultaneously recognising the legal limits of his own authority. Cf. J. Somverille, 'King James VI and I and John Selden', in D. Fischlin and M. Fortier, eds., *Royal Subjects: Essays on the Writings of James VI and I*, Detroit, 2002, 290-322. B. P. Levack, 'Law, sovereignty and the union', in R. Mason, ed., *Scots and Britons Scottish Political Thought and the Union of 1603*, Cambridge, 1994, 213-238 claims 'it is possible to locate Craig within a tradition of emerging absolutist thought' (229), a claim which, in the present author's opinion, misunderstands the feudal theory underpinning Craig's discourse on sovereignty and monarchy.

[211] R. Mason, '*Rex Stoicus:* George Buchanan, James VI and the Scottish polity' in J. Dwyer, R. Mason, and R. Murdoch, eds., *New Perspectives on the Politics and Culture of Early Modern Scotland*, Edinburgh, 1982, 9-33.

[212] Indeed, his second son, Sir James, died fighting for the Stuarts against Irish rebels in 1641 while his third son, John, became physician to James VI and archiater to Charles I; see *Vita Cragii*, xviii.

[213]As Mason, *Kingship*, 238, says, James I of England was less an absolutist than James VI of Scotland. Cf. I. Ward, *Law and Literature: Possibilities and Perspectives*, Cambridge, 1995, 64-65 where James, whatever the theories of absolutism he may have advanced in writing, was still less an absolutist than the Tudors monarchs. Further, K. Sharpe, *Reading Authority and Representing Rule in Early Modern England*, London, 2013, 38 noted a certain degree of insecurity on the king's part about the reception his

tension that existed in the Scottish Renaissance reception of classical thought on the topic of monarchy and tyranny. Classical writers such as Cicero were recounting the values of their time, the values of their culture and society, but such values were potentially problematic in a Scotland, and indeed in a Europe, where political radicals were challenging the legitimacy of established monarchies. The brevity of this section of the *Jus feudale* may reflect Craig's discomfort with the topic and his desire to recount it in as short and uncontroversial a fashion as possible, to downplay the troublesome republicanism which might shine through from the *De officiis* and to dissociate himself and his text from contemporary political conflicts, hence Craig speaks of the corruption of judges as a class where Buchanan speaks of the corruption of kings specifically. Similarly, Craig introduces an extended quotation from Cicero about the characteristic of the ideal judge precisely because he wishes to keep his dialogue focused on the law and its ancient origins, not on issues relating to sovereignty or political power in contemporary Scotland.

This short section, if it serves any purpose for a modern reader, shows the conflicting ways in which classical authority could be construed for rhetorical or literary purposes and the issues attending those who tried to employ potentially controversial texts in broadly uncontroversial ways.

13. Jus feudale 1.1.12: the utility of written law

This section, standing as a justification of written law, is a great deal more important than its length would suggest. Written law, for Craig, was the marker of developed legal system and he often lamented Scotland's lack of written law,[214] just as he lamented the absence of an educational infrastructure for the teaching of law in Scotland.[215] Indeed, Craig describes the *Jus feudale* as no more than an attempt to reduce Scottish forensic practice ('which is widely considered to be vague and uncertain') to a fixed and accessible order.[216] That being so, this section stands as a form of apologia for the writing of the *Jus feudale* and as an explanation of the project's worth for a predominantly Scottish readership to whom the idea of setting down native legal authority in writing was a great innovation.[217]

The treatment of written law's utility begins by returning to Cicero and the ideal judge. Since there will always be a dearth of morally perfect judges, the ancients solved the matter by compelling judges to draw from fixed, written laws and regulations rather than from personal whim. Such was the genesis of written law. However, Craig adds a very particular perspective by observing that there is no judge so upright and so just

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literary works (including not only *The True Law of Free Monarchies* but also his *Counterblast to Tobacco*) would receive from an independent and generally distrustful public.

[214] E.g., *JF* 1.2.14, 1.8.5, 1.8.9, etc.

[215] *JF* 1.2.14; the oldest chair of civil law in Scotland is that of Edinburgh, founded in 1710. By happy coincidence, its first occupant was James Craig, great-great-grandson of Thomas (see Baillie's *Vita Cragii* for genealogical details). Before that, however, there had been a royal lectureship in law in Edinburgh in the 1550s and an 'abortive scheme' for a chair of law (see Cairns, Fergus & MacQueen, 'Legal Humanism' 41) and there is some evidence that civil and canon law were taught at Glasgow as early as the 1450s; see W. Gordon, 'Roman Law in Scotland', in R. Evans-Jones, ed., *The Civil Law Tradition in Scotland*, Edinburgh, 1995, 13-40 at 19.

[216] *Quod vagum et incertum a plerisque creditur*. *Epistola nuncupatoria* (p.viii of the 1732 edition).

[217] On Craig and the written law – or *jus scriptum* – of the kingdom, see Cairns, '*Ius Civile*', 154ff.

that his judgments will always be fair; in a foreshadowing of Acton's saw about power and corruption, Craig says no judge has such personal probity that his power need not be tempered 'for unrestrained power leads even good men into wickedness'.[218]

Various sources are then adduced to support this contention. The author cites Aristotle who 'famously said that those who wish the law to be sovereign over the state would prefer God to be sovereign; those who wish a man to be sovereign over the state would place a beast in command'.[219] This is an approximate summary of some of Aristotle's ideas about law's capacity to restrain the worst human impulses.[220] The idea that external physical and emotional stimuli will corrupt even good men, something which clearly influences Craig's thought, is to be found in the *Nicomachean Ethics*.[221] It can be assumed that Craig did not read Aristotle directly and instead lifted the citations from another author, in this case most probably Hotman but possibly Bodin.

From there, the author cites Livy and Dionysius of Halicarnassus and their accounts of the decemvir Appius Claudius.[222] This story is rather convoluted but, in summary, the decemvir Appius Claudius (451 BC) became infatuated with the plebeian maiden, Verginia. When she rejected his advances, he secretly ordered one of his clients to kidnap her under the pretext that she was a runaway slave. The Roman people, being aware of Verginia's free status, demanded that the case be brought before the decemvirs for judgment. Appius Claudius heard the case and ruled that Verginia was the client's slave whereupon the girl's father, a celebrated centurion, stabbed her to death in the forum rather than see her enslaved. In the chaos that ensued, the dictatorship of the decemvirs was overthrown and the republic re-established. Thus, in the Roman tradition, the government's political legitimacy is seen to derive from the justice of its rulings.

The story was very well-known throughout antiquity and the Middle Ages and, indeed, is even mentioned in Shakespeare's *Titus Andronicus*. It is also mentioned in Buchanan's *De jure regni* (pp.75-76); but, most importantly, it is found in the Digest (2.2.24), meaning it would have been known to any lawyer educated in the Civilian system, which includes not only Craig but most of his readers. That being so, it is significant that Craig should cite Dionysius and Livy instead of the legal text with which readers would be most familiar. This must represent another example of Craig attempting to advertise his humanist learning, his familiarity with literary texts beyond the purely legal. It is also interesting that the story of Appius Claudius holds up sexual wrongdoing and intemperate use of legal authority as a manifestation of personal wickedness, something that, as we said above, reflects both Buchanan's view of the connection between sexual impropriety and tyranny and Livy's belief that pleasure was innately corrupting.[223]

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[218] *Nam bonos etiam viros licentia reddit deteriores*.
[219] *Qui legem volunt civitati dominari, hi videntur deum dominari velle; qui vero hominem, hi belluam praeficiunt*.
[220] Aristotle, *Politics* 1.1253 (esp. a31).
[221] Aristotle, *Nicomachean Ethics* 6.5.
[222] The 1732 edition cites Livy 3.4, 45 but 3.45-58 is more apposite. For Dionysius of Halicarnassus, the relevant source is *Roman Antiquities* 9. 28-32.
[223] Cf. Livy's *praefatio* 4-12.

The story of written law then shifts into a discussion of values. Craig comments that the law 'is a mind without selfishness',[224] a shield protecting magistrates from the duplicity of litigants and litigants from judgments given in error or from bias. Written law is one of the foundations upon which legitimate political authority is based because it ensures just and unbiased rulings. The final sentence of the section is simply a statement that 'there was no republic, whether an aristocracy, in which the nobles ruled, or a democracy, in which the dregs ruled, in which the phenomenon of legal codification did not occur or evolve.'[225] While superficially this is merely a remark on the universality of written law, it actually reveals that this section should be read as counterpoint and frame to George Buchanan's contentions about written law, as I shall explain.

Where Craig saw written law as a shield against injustice, Buchanan said it was 'like some obstinate and ignorant slave driver'.[226] Craig saw written law as providing clearer guidance for judges, lawyers and litigants and clearer guidance necessarily amounted to greater justice. For Buchanan, more law meant more injustice.[227] Written law was a conspiracy against what Cicero called 'the supreme law', the well-being of the people.[228] Where Craig valued the impersonal nature of law and the absence of favouritism or bias which entails, Buchanan deplored it thus:

> Before a king, there is the plea of weakness or rashness and the option of pardoning someone taken in error. The law is deaf, inhuman and inexorable. The young man blames the recklessness of youth, the woman the weakness of her sex, another poverty, drunkenness or friendship. What does the law say to these? 'Go, lictor, bind his hands, cover his head, flog him and hang him from that unhappy tree.'[229]

Buchanan's quotation is taken from a story in Livy where the father of Horatius attacks the law which requires his son's execution.[230] The rest of the text also borrows heavily from a part of Livy where arrogant young noblemen claim that the overthrow of the kings has reduced them to slavery because they can no longer do as they please while relying on royal friendship as protection from punishment;[231] thus Buchanan slyly twists Livy's words away from their natural meaning to suit his own ideological ends.

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[224] *At lex est mens sine cupiditate*.

[225] *Nulla erat respublica, sive ea aristocratia, in qua optimates sive democratia, in qua faex popularis imperabat quae non inde occasionem legum condendarum aut arripuerat aut praetenderat*.

[226] *Est enim in legum imperio aliud incommodum. Lex enim, quasi pertinax et imperitus quispiam officii exactor, nihil rectum putat nisi quod ipsa jubet.* ('There is another disadvantage in the authority of laws. For law, like some obstinate and ignorant slave driver, thinks that nothing is right unless the law itself ordered it.'). Buchanan, *De jure regni*, p.61. The phrase *quasi pertinax et imperitus...officii exactor* seems to be a Latin re-working of a similar phrase from Plato's *Politikos*, 294c (ὥσπερ τινὰ ἄνθρωπον αὐθάδη καὶ ἀμαθῆ - 'like some stubborn and ignorant man').

[227] *Probas igitur vetus illud* summa jus, summa iniuria*.* ('You therefore agree with that old saying, the more law, the more injustice'). Buchanan, *De jure regni*, p.72.

[228] *illa Ciceroniana lex sancta et inviolabilis esset,* populi salus suprema lex esto. ('that sacred and inviolable law of Cicero, let the good of the people be the supreme law'). Ibid. p.73.

[229] *Apud regem vero infirmitatis et temeritatis est excusatio, et veniae in errore deprehenso locus. Lex surda, inhumana, inexorabilis est. Adolescens lubricum aetatis causatur, mulier infirmitatem sexus, alius paupertatem, ebrietatem, amicitiam. Quid ad haec lex?* I, lictor, colliga manus, caput obnubito, verberato, arbori infelici suspendito. Ibid. p.61.

[230] Livy, 1.26.6-11; a part of the same formula is also to be found in Cicero's *Pro Rabirio* 13.

[231] Livy, 2.3.

Craig's remarks on the emergence of written law in aristocratic and democratic republics vaguely foreshadow the *Basilikon Doron* which railed against demagogues like Buchanan who aspired to become *tribuni plebis* in an 'imagined Democracie'.[232] But, much more significantly, it shows Craig's awareness of the paradoxical political space which Buchanan's discourse occupied; although Buchanan is all too commonly presented as some kind of radical democrat based on his seeming hostility to monarchy, the reality is more complex. Buchanan dismissed the masses as a 'many-headed monster' to whom the running of the state could not be entrusted.[233] So, while espousing popular sovereignty, he was clear that the nobles must exercise that sovereignty on behalf of the people.[234] Even his attack on written law relies upon a passage from Livy in which noblemen attack fixed law on grounds that it takes no account of their social status and implicit right to do as they please without repercussions. Thus he espouses a discourse of power which legitimises political domination by the established élite (largely or wholly unrestrained by a monarchic counterweight). In his *Rerum Scoticarum historia*, the picture is more explicit: once more, for all his posturing about popular sovereignty, Buchanan's ideal republic places power in the hands of the great noble families. Craig's dismissal of both aristocracy and democracy shows that he had a very subtle understanding of Buchanan's discourse, both tacit and articulated, even if his treatment of it is more terse than we might like.

This terseness should not lead us to underestimate Buchanan's importance as one part of the wider literary structure underpinning the *Jus feudale*. Buchanan's ambition was, ultimately, for a polity in which royal power was constrained by nobles acting on behalf of popular sovereignty, for a state in which the king (paradoxically) was reduced to a mere judge, carrying out functions that had long since passed to other officeholders. Craig the feudist, though, founded his entire legal worldview upon the idea of the king as the font and origin of law, especially in the case of the feudal law since the king is, effectively, the ultimate feudal overlord holding a feu directly from God.[235] Nowhere is this doctrine better expressed than in the *Epistola nuncupatoria* where Craig states that the feudal law is 'the training ground for all customs and duties',[236] which are

> the most vital parts of the system, by whose defences your own god-given office is propped up, as if by supporting pillars, and is lifted up, as though by an outstretched hand, to a perfect understanding of law and equity; and nothing on earth is more pleasing or more gladdening to Almighty God whose breathing image on earth a king is.[237]

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[232] N. Rhodes, J. Richards and J. Marshall, eds., *King James VI and I: selected writings*, Aldershot, 2003, 224.

[233] *bellua multorum capitum*. Buchanan, *De jure regni*, p.69.

[234] Cairns, Fergus & MacQueen, 'Legal Humanism', 57 state that 'Buchanan attributes ultimate sovereignty to the people' while also believing that 'law should emerge from the rational deliberations of the politically responsible members of society'. On who was expected to exercise sovereignty, see Goodare, J., 'The estates in the Scottish Parliament, 1286-1707', 15 *Parliamentary History* (1996) 11-32.

[235] *JF* 1.12.1.

[236] *omnium morum et officiorum gymnasium*. (p.vii of the 1732 edition).

[237] *Haec sunt hujus disciplinae capita praecipua, cujus disciplinae praesidiis divina illa tua natura tanquam fulcris innixa et, quasi manu porrecta, allevabitur ad juris et aequitatis perfectam congnitionem; qua nihil in terris praestantius nihil Deo Optimo Maximo (cujus spirans imago rex in terris est) gratius.*

The position of monarchy in this feudal world is laid out clearly when Craig says, 'If the whole of Britain were cut into tiny pieces, there would be nothing which was not held in feu of Your Majesty (as we say in court) and nothing which did not owe you fealty'.[238] And it must not be forgotten that Craig spoke as a unionist, as someone who saw in a united kingdom of Great Britain a solution to the age-old antagonism and warfare which had blighted the island.

Thus, Buchanan's philosophy is anathema to Craig's entire conceptualisation of British law, politics and society. Nor is the conflict based around a simplistic model of democratic republicans versus tyrannical monarchists. Rather, as Craig is perfectly aware, Buchanan articulates an ideology which would invert the traditional flow of feudal obligations by subordinating the monarchy to the nobles. For Craig, this was a perversion of the feudal oath which he considered to be the foundation for civilised society.[239] So, while this section curtly sweeps Buchanan's argumentation aside without a serious engagement, readers must nevertheless be aware both of the depth of philosophical conflict between Craig and Buchanan (kinsmen though they were) and of how well-developed Craig's vision of feudalism, and its place in society, actually was.[240]

14. Jus feudale 1.1.13: the first lawgivers, Moses and Prometheus

Having talked about the advantage of written law, Craig returns to his historical narrative and the question of who first set laws down in writing. He acknowledges Plutarch's account which says that Prometheus first brought written law to the Egyptians, but this classical narrative is interwoven with biblical accounts as Prometheus becomes the son of Japheth, himself one of the three sons of Noah and the biblical ancestor of Europeans.[241] He writes 'A story is related, named the *Prometheia*,[242] which says that when men were without wisdom, he brought down celestial fire from heaven in a fennel stalk,[243] from which he enlightened the whole

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[238] *Nam si tota Britannia in partes vel minutissimas secetur, nulla erit quae non in feudo de Maiestate Tua teneatur (ut in foro loqui solemus*).

[239] *Neque in societate civili ullum sanctius et certius vinculum est retinendae amicitiae vel benevolentiae quam hoc feudale sacramentum, quo alter alteri in omnibus, tam in pace quam bello, adesse ope et consilio tenetur.* ('Nor, in civilised society, is there any more sacred and certain restraint for the preservation of friendship and goodwill than the feudal oath, under which each is bound to supply the other with help and advice in all things, both in peace and in war.')

[240] Craig's wife, Helen Heriot, was the niece of George Buchanan's mother, Agnes Heriot, and thus Buchanan's cousin.

[241] Prometheus is also mentioned by Buchanan (*De jure regni*, p.178) although in a more conventional, classical reading that derives from Ovid (*Odes*, 1.16.13-16).

[242] The *Prometheia* is the name of a trilogy of plays by the tragedian Aeschylus (of which only *Prometheus Bound*, probably the first play, survives). Craig's account, however, derives from Plutarch's enormously influential *Moralia* which discusses Prometheus in two places: in the *De Iside et Osiride*, where he refers to the Egyptian belief that Prometheus was their ancestral giver of wisdom (*Moralia* 5.26.3) and in the *De fortuna* (*Moralia* 2.8.3-5). Plutarch drew upon both Hesiod, the usual source for the Prometheus myth, and Aeschylus and actually quotes *Prometheus Bound*.

[243] In the myth, Prometheus hides the stolen fire inside a ferula (that is, the stalk of a giant fennel plant). Unfortunately the word *ferula* in Latin also means 'cane' and usually refers to a whip used to beat schoolboys (e.g. Juvenal, *Satires*, 6.479). The word appears to have confused Lord Clyde who excised it from his translation entirely.

human race'.[244] This is followed by a reference to Plato calling law a *deorum munus* or gift from the gods and specifically attributing the origin of Cretan law to Jupiter and Spartan law to Apollo.[245] However, 'among all the secular authors too, it is absolutely settled that Moses was the first to furnish written laws'.[246]

The secular authors under discussion are Diodorus, Justin, Josephus and 'many others' (*plerique alii*). Philo, meanwhile, is said to describe Moses as 'the wisest lawgiver, most just prince and greatest prophet,..because he was the first who committed his laws to writing'.[247] This remark recalls Craig's *De unione* where Philo is cited as saying almost exactly the same thing: 'Philo the Jew calls Moses the greatest king and holiest prophet and best legislator'.[248] In both cases, Craig is presenting a paraphrase rather than a quotation and, again, in both cases his ultimate source was Bodin's *Methodus* where Moses is described as 'the most just and wisest prince'.[249] It is likely that his knowledge of Josephus' opinion of Moses is from the same source.[250]

At this point, Craig challenges the standard reading of Moses as the first lawgiver arguing, instead, that God was the true lawgiver and Moses his clerk or secretary. The true importance of Moses was not in giving law but in setting law down in writing. While this is a valuable critical observation, it too ultimately derives from Bodin's reading of Josephus rather than from independent interpretation on Craig's part.[251] More originality is found in his interpretation of Moses' laws as wholly religious in nature and therefore sufficient only for the governance of the Israelites. Real law derived from the neighbouring states 'which attended to earthly things...[and] thought many things were lacking in Moses' country, things they considered beneficial for human society'.[252] The limited influence of Israelite law, Craig says, was in part due to the fact that their legal texts were hidden away and 'preserved in secret by the Levites'.[253] So secretive were they that Juvenal described Jewish law as 'Whatever Moses committed to his secret volume',[254] demonstrating that existence of Mosaic law was well-known but its contents were much more obscure. In reality, Juvenal seems to

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[244] Significantly, while Hesiod simply tells us that Prometheus stole fire from the gods, Aeschylus expands this and says that Prometheus taught humans all the civilised arts, such as writing, mathematics, agriculture and medicine. To this list, Craig adds law.

[245] Plato, *Laws*, 1.624a.

[246] *Ac inter omnes etiam profanos auctores certissimum est Mosen fuisse qui primus leges scriptas exhibuit*.

[247] *Philo enim prudentissimum legislatorem, justissimum principem et maximum prophetam asserit...quod primus is esset qui leges scripto commendavit.*

[248] *Philo Iudeus Mosen et regem maximum et prophetam sanctissimum et optimum legislatorem vocat*.(p.14 of the 1909 Latin edition of *De unione*). Simpson, *Thomas Craig*,78 also notes this citation of Philo.

[249] *Moses ipse iustissimus et sapientissimus princeps*. Bodin, *Methodus*, p.182.

[250] *Nam Josippus eo argumento colligit Mosem antiquissimum omnium fuisse legislatorem.* Ibid. p.183.

[251] *Iosephus, optimus antiquitatis interpres, Israelitarum originem ab ultimo principio repetens in libris adversus Appionem Grammaticum, docuit Mosem primum omnium mortalium leges scripsisse*. ('Josephus, the best interpreter of antiquity, recounting the origin of the Israelites from the very beginning in his book against the grammarian Apion, demonstrated that Moses was the first of all mortals to have written down the laws'.) Bodin, *De republica*, p.272; the text referred to is Josephus' *Contra Apionem*, a defence of Judaism against the criticisms of Apion, an Alexandrian grammarian.

[252] *Itaque vicinae respublicae quae res terrenas sectabantur...multa in Mosis republica abesse putabant quae ad humanam societatam curandam spectarent*.

[253] *Apud solos enim Levitas et eorum principem in occulto servabatur*.

[254] *Tradidit arcano quodcumque volumine Moyses*. Juvenal, *Satires*, 14.102. In a satire about bad parents, this line is part of an attack on what Juvenal sees as Jewish separateness and secretiveness.

have had a decent knowledge of Judaic tradition but, for Craig's purposes, the satirist's account shows that Mosaic law too secretive to be useful and that non-Jewish law developed without the direct influence of Jewish legal culture.

Craig's approach to Mosaic law reveals some essential elements of his own legal worldview. He is less interested in law as a metaphysical abstraction than in the law as he met it in his daily life as a practitioner. By extension, this also says something about why Craig bothered to spend so much time discussing the origins of law and society; it is, for him, not a theoretical subject but an intrinsic part of understanding the history of practised law and a means by which he, as a humanist, could understand how the present state of affairs had come about. Further, Craig is impatient of the secretive nature of Mosaic law. He could not tolerate the idea that law should be hidden away from people; it had to be open, available to all, and written down so that it could be consulted. The secretiveness implicit in aspects of Jewish law (as interpreted by Juvenal) was, like the arbitrary royal justice espoused by Buchanan, anathema to Craig's professional, ethical and philosophical sensibilities.

Craig demonstrates this by going on to speak about the context in which the people began writing laws for themselves 'because the leaders they had previously set to rule over them were not safeguarding fairness completely when they expounded the law'.[255] So laws were born, as a defence against arbitrary judgments, 'so that the strong should not be able to act with impunity',[256] (a line Craig borrows from Ovid)[257] because 'all things were being oppressed by the force and licence of more powerful men'.[258] This, of course, brings the reader back to the original basis for society expounded at 1.1.3; just as communities, and later states, were formed to protect the weak from strong outsiders, now law has been not only introduced but systematised and set down in a fixed and theoretically unalterable form to ensure the safety of the weak against powerful men within their community.

Craig explains the need for this protection by saying that 'strong men think they are entitled to everything';[259] he illustrates their behaviour by reference to Horace's description of Achilles: 'Energetic, angry, relentless, keen, let him spurn all laws, let him claim nothing but by force of arms'.[260] In particular, Craig is talking about powerful men's unwillingness to restrain their lust for other men's wives; for, 'the most frequent and foulest cause of murders and even wars was truly wandering Venus'.[261] To be sure, Craig is placing a considerable amount of blame on women for their infidelity,[262] but it would be a mistake to make that the focus of this section. 'Wandering Venus' has her part to play – and Craig is clearly speaking about the Trojan wars but also about, for example, the biblical murder of Bathsheba's husband Uriah by David and, more topically, about Mary, Queen of Scots, who was widely portrayed as an adulteress – but his point here is about the powerful men, the *viri fortes* and *potentiores*, whose arrogance leads them to set aside the conventions of their community and take other

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[255] *Cum viri principes, quos sibi praeesse antea jusserant, aequalitatem...omnino in jure dicendo non servarent*.
[256] *Ne fortior omnia posset*.
[257] Ovid, *Fasti*, 3.279. The full line is *inde datae leges, ne firmior omnia posset* ('Whence laws were given, so that the stronger should not be able to act with impunity').
[258] *Potentiorum enim armis et libidine omnia opprimebantur*.
[259] *Viri fortes omnia deberi sibi putabant*.
[260] *Impiger, iracundus, inexorabilis, acer,/ Iura noget sibi nata, nihil non arrogat armis*. Horace, *Ars Poetica*, 121-122.
[261] *Sed erat et alia etiam bellorum et caedium frequentissima causa et teterrima, nempe vaga Venus*.
[262] Cf. Baird Smith, 'Feudalist', 282 on Craig as a 'strong anti-feminist' (or, as we would now say, misogynist).

men's wives for themselves. Of course, this brings us back to the story of Abraham and Abimelech mentioned earlier where a powerful king did, in fact, respect social norms by releasing Sarah upon finding out she was married. It also takes us back to the story of Appius Claudius and, by extension, to the story of Tarquinius Superbus and the expulsion of the kings from Rome. It was to put an end to 'these disgraceful lusts and oppressions, which were bringing about the certain ruin of the commonwealth' that written laws were created.[263]

15. Jus feudale 1.1.14: Lycurgus and Spartan law

With this section, the narrative comes to classical Greece, a key cultural touchstone for Renaissance humanists. It opens by explaining that laws were enacted at an assembly of all the people of the community where opinions would be sought and, provided the majority acquiesced, the proposed law would be adopted as binding. It was, though, different in monarchies; there, a single distinguished leader would decide what was and was not law. Based on Craig's earlier comments on the origins of monarchy (*JF* 1.1.8), it is clear that he is here distinguishing between the Asiatic and Hamitic monarchies, on the one hand, and the states of Europe on the other.

Craig leads into his discussion of the Greeks by talking about the Egyptians. Ancient Greek and Roman admiration for and fascination with Egypt was widely expressed in the classical authors, so any Renaissance figure educated in the classical literary and mythological corpus would have been aware of Egypt's influence on classical Europeans – the idea that Greece had a cultural debt to Pharaonic Egypt certainly did not originate with Martin Bernal and *Black Athena*! Thus, Egypt is a reasonably natural place to open a narrative of Graeco-Roman law. As we shall see in the next section, however, Craig has other motives for introducing Egypt to his discourse.

Craig explains that Vechoreus IV wrote the first laws for the Egyptians and that, according to Diodorus, he reigned around the 3,077th year of the world, around the time that Carthage was founded. The name Vechoreus is a Latin attempt at transliterating the Greek Oukhoreos, the name given by Diodorus Siculus (50.3) for the founder of Memphis.[264] The name can be found in a few other sources of the early modern and late Renaissance periods. Samuel Bochart's *Geographia Sacra* employs it citing Diodorus as the source;[265] Beyerlinck also employs the name in the *Magnum theatrum* and, although he does not specifically name his source, he calls Vechoreus 'the king of Egypt who built Memphis' which shows he was drawing upon Diodorus.[266] In the Insular tradition, we can find the English transliteration 'Uchoreus' in Raleigh's *History of the World* and, again, Diodorus appears to be the source.[267] In a section that is essentially a narrative of ancient Greek law, Craig brings up Diodorus' legendary lawgiver Vechoreus in order to locate Greece within a wider historical and cultural

[263] *Ut igitur his importunis libidinibus et oppressionibus, quae in certissimam reipublicae ruinam et praecipitium tendebat, modus imponeretur, leges latae sunt.*
[264] Diodorus' Oukhoreos appears under the name Menes in Herodotus 2.99.
[265] Samuel Bochart, *Geographia Sacra*, Caen, 1646, 1101-02.
[266] Laurentius Beyerlinck, *Magnum theatrum humanae vitae*, 8 vols., Lyons, 1665-1666, vol.7, 387 (*Urbes magnifice conditae*).
[267] Raleigh, *History of the World*, 2.26.2 (p.514 in the 1614 London edition).

context but also because Craig understood law as just one step in a process of social evolution that seems to have been reached more or less simultaneously by most ancient societies.

Thus, at the time Vechoreus was writing laws for the Egyptians, Craig has Lycurgus ruling the Spartans. He was considered to be the natural successor to his brother Eunomius and enjoyed widespread support but, upon learning that his late brother's wife was carrying a child, he refused the title of king and instead governed as regent in the name of the unborn child, the future king Charilaus. Following the baby's birth, Lycurgus continued as regent and enacted an extremely harsh legal regime. The citizens were unhappy so Lycurgus agreed to consult the Delphic oracle but extracted a collective promise that the laws would not be changed until he had returned. In the end, he never returned and arranged that even his bones would be burnt to ash and scattered so the Spartans would be left with no way of evading their oath. Much of this material appears to have been taken from Bodin's *Methodus*;[268] Bodin's source, in turn, seems to have been Diodorus although, in places, it is possible that he was following Plutarch's biography of Lycurgus.

Sparta is sufficiently well-known in western culture not to need a great deal of introduction.[269] It was a 'militaristic society whose primary objective...was to foster a high degree of conformity and discipline in its citizenry';[270] labour and food production were carried out by helots, the slave-serf descendants of the Messenian people whom the Spartans had conquered in the late eighth century BC and the fact that these helots outnumbered the Spartans by a factor of at least seven-to-one probably explains a great deal about Sparta's rather paranoid stratocracy.[271] The laws which created the Spartan state and its brutal military culture were known as the laws of Lycurgus (or Lykourgos), a name which means 'deed of the wolf' or 'wolf-worker' and probably refers ultimately to a local wolf god who was in some way related to Apollo.[272] The Lycurgan laws were famous for their rigidity and extreme conservatism; indeed, their antique and unchanging nature was a key element in Sparta's self-image and national mythos.[273].

Having dispensed with introductory material, we return to the narrative. An overarching factor in Craig's treatment of Sparta is, simply, that he was not a particularly accomplished Hellenist but borrowed heavily from Bodin who was.[274] Thus, Craig's account is laden with a great deal of literary, symbolic and historical meaning that he was, in all likelihood, unequipped to understand. For example, it seems

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[268] Bodin, *Methodus*, p.169.

[269] The best general book on the development of law at Sparta is still the late Douglas MacDowell's *Spartan Law*, Edinburgh, 1986, although since we have no written or epigraphic record of law at Sparta, we are wholly dependent on the literary product of non-Spartans, particularly Xenophon, Aristotle and Plutarch.

[270] R. Garland, *Daily Life of the Ancient Greeks*, Westport, Conn., 2009, 119.

[271] D. Kagan, *The Peloponnesian War*, London, 2005, 4; K. Kuiper, *Ancient Greece: From the Archaic Period to the Death of Alexander the Great*, New York, 2011, 40.

[272] Parts of the Spartan system do seem to have predated the Lycurgus myth; see P. R. Coleman-Norton, 'Socialism at Sparta', *The Greek Political Experiences: Studies in Honour of William Kelly Prentice*, Princeton, 1941, 61-77 at 64.

[273] A. Powell, *Athens and Sparta: Constructing Greek Political and Social history from 478 BC*, London, 1988, 217.

[274] Bodin, of course, closely followed Aristotle (see, e.g., *De republica*, p.12, where he follows Aristotle in discussing the warlike constitutions of Crete and Sparta (and, somewhat incongruously, the Westphalian Anabaptists).

to have escaped his notice that the brother of Lycurgus was called Eunomius, which means 'good law' or 'good order' and happens to be the masculine form of Eunomia, the name often given to the Lycurgan legal system.[275] Charilaus, meanwhile, translates to 'favour of the people'. Thus, symbolically, we see the connection between Lycurgus' law ('the deed of the wolf') and its relationship to good order and popular favour. Based on his critical response to biblical mythology, we can assume that if Craig had been aware of this, he would have acknowledged it in some way. In fact, and certainly by comparison with his treatment of the Bible, Craig seems to attach relatively little importance to the story of Spartan law. Where Bodin made Lycurgus an important part of his argument,[276] Craig simply imports the information for the sake of completeness while providing little context and no commentary of his own. He does, however, mention Aristotle's comments on them which, again, are taken from a contemporary source rather than directly from the original.

Craig explains that Aristotle considered Spartan law to be immensely valuable but only in the military sphere. Since Lycurgus' military obsession was inadequate for the proper governance of a state, the Spartans were forced to augment their constitution with new laws. He then cites the extreme spartophile Xenophon and his claim that Sparta was Greece's supreme military power for seventy years because their laws 'in addition to military discipline, encouraged frugality, temperance and contempt for wealth',[277] values which are the foundation for any good commonwealth.[278] From this section alone, the careful reader can discern that Craig is largely ignorant of the primary sources and is, instead, relying on partial accounts (in both senses of the phrase) found in contemporary writers. For example, Craig is not aware that Aristotle's treatment of the Spartan constitution is far from fulsome praise. The philosopher made serious criticisms of the helot system and of the seeming promiscuity, extravagance and poor discipline of Spartan women;[279] Plato, in his *Nomoi*, prefigured Aristotle in condemning the inadequacy of Spartan law and its excessive focus on war.[280] Plutarch, one of the other great sources on Sparta, condemned the corruptibility of Spartans.[281] In what could, perhaps, be a salutary lesson to modern students about over-reliance on secondary sources, Craig's obliviousness to Sparta's later military weakness and its terrible reputation for financial corruption show us that he has not looked directly at ancient writers but rather at Bodin's treatment of them. This leads to a skewed and excessively upbeat account of Sparta exacerbated by the absence of useful critical commentary on Craig's part.

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[275] J. Lazenby, *The Spartan Army* (Mechanicsburg, Penn., 2012, 92; cf. Coleman-Norton, 'Socialism' 63 where it becomes 'the famous code wherein posterity discerned the handiwork of Lycurgus the nomothete'

[276] In particular, see Bodin *De republica*, pp.177-178.

[277] *Nam praeter militarem disciplinam, frugalitatem, temperentiam et opum contemptum inducebant*.

[278] Xenophon was inordinately fond of Sparta, even fighting for the Spartans against his home city of Athens at Coronea in 394 BC. Amongst other works, he wrote an account of the Spartan constitution and a biography of his friend, the Spartan king Agesilaus II. In the past, he was also often identified with 'the Old Oligarch', author of an anonymous and deeply critical account of the Athenian constitution, although this view is no longer current.

[279] Aristotle, *Politika*, 1269a-1270a; cf. Powell, *Athens and Sparta*, 246.

[280] See R. De Laix, 'Aristotle's Conception of the Spartan Constitution', 12 *Journal of the History of Philosophy* (1974) 21-30.

[281] Plutarch, *Lysander*, 16-17.

Authorial dependence on Bodin is further illustrated in the next part of the narrative where he explains that Lycurgus refused to have his laws set down in writing calling them, instead, *rhetrai*,[282] or 'sayings', because they were preserved through oral memorisation and recitation: 'he was accustomed to remark that he was happier if his laws were not engraved on bronze tablets, as was the custom in other states, but in men's minds'.[283] It was not uncommon in the ancient world for civic laws to be inscribed on bronze plates,[284] but Craig is actually taking all of this material directly from Bodin's *De republica*.[285] He does, in an apparent effort to advertise his learning, transliterate *rhetrai* into Greek letters where Bodin used Latin, but otherwise Craig is little more than a regurgitator of Bodin's thoughts. This is perhaps the reason why Craig is so uncharacteristically supportive of unwritten law, claiming that, despite being unwritten, no laws were more enduring than those of Lycurgus.

This section ends with a transition to Athens, what Craig calls 'the other eye of Greece' (*alter Graeciae oculus*), a reference to Justin where the Spartans refuse to destroy Athens because doing so would be to pluck out 'one of the two eyes of Greece'.[286]

16. Jus feudale 1.1.15: Draco, Solon and Athenian law

In Athens, the first lawgiver was the infamous Draco whose laws were outrageously harsh: 'Demades used to say (as told in Gellius) that the laws of Draco were written in blood, not ink, for he set one punishment for all crimes, namely death' and Craig illustrates the point by stating that death was the penalty both for murder and for stealing vegetables from one's neighbour.[287] The reference here is to *Noctes Atticae* 11.18 which treats the transition from the law of Draco to that of Solon.[288] However Demades's remark about blood and ink is not from Aulus Gellius at all but from Plutarch's *Life of Solon* 17. This strongly suggests that Craig had access to neither Plutarch nor to the *Noctes Atticae* and was therefore drawing on (and perhaps mangling) a secondary source.

Bodin's *De republica* contains a comment that parricide and the theft of fruit were both punished by death;[289] obviously, this is strikingly similar to Craig's comment

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[282] Craig gives the Greek *rhetras* (ῥήτρας) the accusative plural form of *rhetra*. Generally *rhetra* is translated as 'decree' or 'ordinance', with the implication that they are spoken, but it also refers very specifically to the unwritten laws of Lycurgus. See *Liddell and Scott s.v.* ῥήτρα.

[283] *Saepe enim se felicem praedicare solitus est si leges suae non tabulis aeneis, ut in aliis civitatibus fieri solebat, sed in animis hominum sculperentur*.

[284] See *Codex Theodosianus* 12.5.2, 14.4.4 and 11.27.1. In general, see C. Williamson, 'Monuments of Bronze: Roman Legal Documents on Bronze Tablets', 6 *Classical Antiquity* (1987) 160-183.

[285] Bodin, *De republica*, p.241.

[286] *Negaverunt se Spartani ex duobus Graeciae oculis alterum erunturos.* Justin, 5.8.

[287] *Demades dicere solebat (ut est apud Gellium) Draconis leges sanguine non atramento scriptas; unam enim omnibus delictis poenam nempe mortem constituit*.

[288] The print editions cite the source as 12.18. This may reflect an error on Burnet's part, repeated by later editors, but it more likely reflects the arrangement of the edition of the *Noctes Atticae* to which Craig (or Burnet) had access. Clyde excised the citation entirely from the 1934 translation.

[289] *Draco, qui rogatus quamobrem pomi furtum morte perinde ut parricidium vindicaret, reposuit se graviores parricidae poenas illaturum fuisse, si poenam scisset morte graviorem*. ('Draco, who was asked how he could punish the theft of fruit with death in the same way as parricide, replied that he would

about murder and the theft of vegetables. However, neither Demades nor the remark about blood and ink are to be found in Bodin.[290] While it was a common literary trope of the period to describe Draco's laws as being written in blood and to attribute the observation to Demades, Craig specifically (and incorrectly) cites Aulus Gellius as the source. The safest interpretation is therefore to assume that Craig was drawing upon Bodin but elaborated his account with material from another unspecified contemporary source.

The narrative next recounts how Solon was given authority to repeal Draco's law and write new, more reasonable, ones. As with Lycurgus, the lawgiver demanded from the citizens an oath that his laws would not be repealed until he had returned to the city; he then departed for Cyprus where he lived until his death whereupon his bones were taken to Salamis and scattered in the fields so that the Athenians could never be absolved from their oath. Craig was aware this was effectively a duplication of the Lycurgus story,[291] but the observation is not original and is again taken from Bodin.[292] We see in this dependence on the *De republica* the limits of Craig's knowledge of ancient Greek primary sources. The recognition that the story of Solon's burial on Salamis may be a rhetorical trope is interesting, not least because it illustrates the literary awareness of Bodin and thus of humanist culture in general, but it also shows a misunderstanding of wider political context. Solon was born on Salamis and the recovery of the island from Megara was a personal and political obsession of his.[293] The story can therefore be seen less as an attempt to maintain Solonic law than as a challenge to the Athenian *polis* to re-conquer the island. Bodin was either not aware of this or chose not to mention it in any of the places where he discusses Solon and Athens.[294] Since Bodin did not mention it, Craig does not mention it.

Craig continues the narrative by citing a story from Plutarch which says that Solon had visited Egypt and brought his laws from that place, 'which means that Greece is indebted to the Egyptians not only for their philosophy but also for the science of political governance'.[295] Here Craig adds some original and very important work of his own by stating that, since the Israelites bordered the Egyptians, it must have been the case that the Egyptian law was ultimately an imitation of Israelite law. 'Thus the logic of all laws and governance ought to be attributed to God and His scribe, Moses, from whom even the most renowned of the ancients, drawing upon the fonts of law, led its brooks or springs to their own people.'[296] As Greece received the science of law from Egypt, Egypt was in turn the recipient of Mosaic law. The *translatio studii* continues when Craig follows the traditional account that Rome's Twelve Tables were founded

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have inserted a more serious punishment for parricide if he had been aware of a punishment more serious than death.') Bodin, *De republica*, p.765

[290] Demades is mentioned, in a completely different context, in the *Methodus* p.44 but, again, blood and ink are not to be found.

[291] *De ejus morte idem commemorant quod de Lycurgo antea diximus*.

[292] Bodin, *De republica*, p.427.

[293] Diogenes Laertius, 1.2.

[294] On Solon, see Bodin, *Methodus*, p.303 and *De republica*, pp.21, 56, 236, 427 and 555; on Athens generally, see *De republica*, pp.202, 694-696 and 699-700.

[295] *Solonem in Aegyptum profectum et inde leges accepisse testatur Plutarchus, adeo ut non solum philosophiam suam, sed etiam reipublicae gubernandae rationem Graecia Aegyptiis debeat*.

[296] *Itaque omnium legum et reipublicae gubernandae ratio Deo et ejus amanuensi Mosi adscribenda, a quo etiam reliqui in suis rebuspublicis excellentisimi fontes juris haurientes ad suos ejus scaturigines sive rivulos deduxerant*.

upon the laws of Solon.[297] Thus, the Roman law which Craig had studied in France and which was utilised in Scotland had its ultimate antecedent neither in Rome nor Athens nor even in Egypt but in the Mosaic law of the ancient Israelites. This has significant implications for the rest of the *Jus feudale*.[298] Yet, given Craig's earlier observations about the deficiencies of Mosaic law, we must understand that the knowledge transferred from Moses was not that of law itself but rather the *ratio* of law and governance in the form of written law which was, in Craig's eyes, the truest and must trustworthy form of law and one ultimately given to humanity by God. We have seen that humans, even wicked ones, could develop law and, indeed, had no option but to develop law if they wished their communities to function; yet written law was a gift from God, a gift which preserved justice from the whims of kings and judges by making law incorruptible and publicly available.

Returning to Craig's treatment of Sparta and Athens, it is singularly striking that there is no discussion whatsoever of the very peculiar legal and governmental arrangements of those states. The Spartan diarchy and ephorate, the Athenian *ekklesia* and Areopagus, are ignored despite Bodin actually discussing each of these at length. Given Craig's concern, both in this chapter and throughout the *Jus feudale*, with the development and history of government,[299] one would expect him to at least mention these unique institutions and their place in creating the laws of their respective cities. The only reasonable explanation, particularly given Craig's difficulties with Greek and his (over-)reliance on contemporary, rather than ancient, sources, is that he lacked a general familiarity with the subject and its vocabulary and therefore had no confidence in his ability to discuss the subject usefully. Thus fearing that he had lost control of his material, he brought the narrative back to Moses. By contrast, when dealing with Roman or canon law, Craig is wholly confident and entirely in control of his material.

17. Jus feudale 1.1.16: other states

This section is the shortest in the chapter and seems to have been created by Baillie, the 1732 editor, simply because it could not conveniently be attached to the previous section on Athens. It says only that various other states flourished in Greece and elsewhere and that they each had their own lawgivers; as examples, Craig cities Phaleas for Carthage, Hippodamus for the Miletus and Minos for Crete. He acknowledges the existence of others about whom he had not spoken and recommends that anyone seeking more information should read Aristotle. Phaleas and Hippodamus are both discussed in Book 2 of the *Politics*,[300] but, more importantly, Phaleas was the lawgiver of Chalcedon, not of Carthage, although there were apparently some early humanists who thought otherwise.[301]. Quite clearly, Craig was, once more, relying on secondary literature rather than on the sources themselves; and, once more, it is informative that this occurs when the topic is ancient Greece and its literature.

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[297] *JF* 1.2.3 following Digest 1.2.2.4 and 1.2.10.
[298] I owe this profound and valuable observation on *translatio studii* from Moses to Scotland entirely to Prof. J. D. Ford. See also Ford, *Law and Opinion*, 214-215, 222-223, and 239-240.
[299] The study of institutions of law and government was, of course, one of legal humanism's defining characteristics; Rodgers, 'Humanism', 129-130.
[300] The 1716 and 1732 editions, though, both cite Book 1 of the *Politika* here
[301] J. Gillies, *Aristotle's Ethics and Politics*, London, 1797, 91, fn.

IV. CONCLUSION

Unsurprisingly, Craig's sources have long been a fruitful topic of discussion for scholars of Scottish legal history.[302] The continental foundation upon which Craig built the first 'real' Scottish legal monograph is obviously interesting in its own right and valuable for understanding the legal processes, education and philosophy of early modern Scotland. Bodin's influence on his thought has always been clear, not least because Craig himself often cites his name and refers his readers to Bodin's work. What has, perhaps, been less clear is the sheer scale of Bodin's influence on Craig's interpretation of the earliest societies and the creation and evolution of the earliest legal systems. Bodin has traditionally been seen as a political, not legal, writer; indeed, Baird Smith went so far as to insist that Craig's 'exclusively legal mind' could not comprehensively grasp Bodin's political theories.[303]

In reality, Craig's mind was not 'exclusively legal' and the *Jus feudale* was never intended to be a narrow practick. Craig drew upon Bodin not, as Baird Smith said, because he wished to appropriate a political framework upon which he could overlay his own theories of feudal law but, rather, because he relied upon Bodin as his principal authority for understanding and analysing the genesis of human law and legal institution. Bodin was both the lens through which he understood legal prehistory and the authority he drew upon to support that understanding. Nor did Craig employ Bodin only in the 'scene-setting' chapters on the origins of law; like Buchanan, he borrowed Bodin's theory of climate and,[304] even in his discussions of substantive law, Bodin clearly had a significant influence on Craig's thought.[305] As Baird Smith had it a century ago, Bodin stands alongside Budé and Cujas as the scholarly and legal foundation upon which the *Jus feudale* was built.[306]

This makes Craig seem profoundly dependent on his sources and, in a sense, such a characterisation would be accurate. The careful reader will often find wholesale borrowings from other legal writers.[307] But, as we have seen, Craig is more than capable of taking a strikingly independent interpretational stance. The *Jus feudale* is a layered text, a particular blend of the historical, the philosophical and the legal, certainly given shape by the literature of classical antiquity and the Latin Renaissance but ultimately reflecting Craig's vision and not merely that of his sources. His historiographical

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[302] E.g., Baird Smith, 'Feudalist', 294, n.1; Cairns, '*Ius Civile*', 151ff; Cairns, Fergus & Mac Queen, 'Legal Humanism', 50.

[303] Baird Smith, ibid.

[304] *JF* 1.4.3; note that Craig's references to Tacitus are taken directly from Bodin. For Buchanan, see *De jure regni*, p.8.

[305] Baird Smith, 'Feudalist', 286-287, emphasises (287) that Craig's view of monarchy 'follows closely on Bodin', which is fine, as far as it goes, but may ignore the political and professional reality which Craig faced given that he was in the employ of a monarch, James VI, who was not wholly sympathetic to the idea of limited monarchy and who explicitly stated, in the *Basilikon Doron*, that *rex in suo regno imperator est* (cf. *Jus Feudale*, 1.12.5). See also Mason, *Commonweal*, 108 on the 'crystallisation' of absolutist monarchic ideology around the idea and theory of *rex in suo regno*…

[306] Baird Smith, 'Feudalist', 273-274 n.2

[307] For example, *JF* 1.14.11 and 1.9.9 quote more or less directly from Zasius' *Usus feudorum*. Other instances can be found for almost any well-known feudist.

technique is defined, from the beginning of the work, by its rationality. Sources, religious and secular, are subjected to the same critical analysis. The fact that he sometimes draws upon sources at a remove – sources cited in another contemporary work – does not obviate this. Whatever the source, its account is explained and rationalised.

Rationality defines Craig's approach to history. His legal and societal aetiology is naturalistic and presents man as a rational social and political animal and civil life as the natural outcome of such human properties. The influence of Aristotle is patently obvious, though Craig probably had not read the philosopher directly and certainly not in Greek. Taught by French humanist professors who advanced the rational methodologies of the classical world and engaged in a career which was founded upon the underlying rational structures of Roman law, it is hard to see how Craig could have escaped the intellectual influences of the ancient world and its literary, historical and philosophical corpus.

In this worldview, Craig's worldview, history was not merely a series of past events and it was not to be studied for its own sake; rather history (and prehistory) constituted an explanation of how the present had come to be and allowed informed readers to analyse and understand the evolution and development of events and institutions. History was a diorama of the human experience and the rational man could extrapolate much from it. The first chapter, though ostensibly an aetiology of human law and society, is also a means by which Craig is able to approach important topics of the day. Hereditary monarchy, tyranny, the nature of kingship, slavery, personal liberty and the position of law in free and unfree societies are all discussed and these discussions are all, ultimately, about the Scotland in which Craig lived.[308]

Acknowledgments

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[308] Craig, of course, has much to say about English law and particularly about the commonalities between Scots and English law. One could call the *Jus feudale* a unionist text, in that it is concerned in a fundamental way with espousing the creation of a kingdom of Great Britain in consequence of the approaching union of the Scottish and English crowns. The present author's view is that, though fair to characterise Craig as a unionist, the *Jus feudale* was, ultimately, a text about Scotland's place within the universal system of feudal law.