

Discovering a Higher Law: Cicero's Creation of a Roman Constitution

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Dedication

Parentibus Optimis et Bene Meritis

Abstract

Political legitimacy is often characterized as a particularly modern concern, and, it is argued, one never broached by ancient political thinkers. The electoral contests of the Roman Republic, under this traditional view, have been seen as merely the marshalling of public support and the *quid pro quo* infighting of the great Roman families. A completely different story is revealed, however, by a close reading of Cicero's early speeches. The political atmosphere of the Republic, far from being an ideologically sterile wasteland, was in fact a fertile source of political ideas and competing political ideologies. It was in these early speeches, after all, that Cicero began building his public reputation. Although he was a newcomer to Roman politics (*novus homo* - 'new man'), his early speeches reveal the great effort (and risks) he took to articulate a coherent political program: a set of ideas about the Republic, its laws and constitution that set him apart from his contemporaries. Thus this project shows how Cicero's early private speeches, the *Pro Roscio Amerino*, the *In Verrem*, and the *Pro Caecina*, should be read as important steps in the construction of both Cicero's political thought and his public persona. In these speeches, Cicero laid out his vision for the Roman Republic, and this vision is, in its essence, a constitutional vision. His earliest speeches emphasize, repeatedly and consistently, the necessity of building a constitutional and limited Republic as the only route of escape from the troubles which were vexing Roman society. A government is made legitimate, Cicero argues, by those things it chooses *not* to do. Instead, a legitimate government recognizes and acknowledges that certain actions are simply unthinkable, illegitimate, and fundamentally *unconstitutional*. This vision of a limited and legitimate *Res Publica*, then, helps to explain some of Cicero's electoral appeal in his own time and his continuing influence in our own.

Table of Contents

Chapter 1: Introduction	
Discovering a Higher Law: Cicero's Creation of a Roman Constitution	1
Chapter 2	
Legitimacy and the <i>Res Publica Sulla Vivo</i> : Cicero's <i>Pro Roscio Amerino</i>	41
Chapter 3	
Redeeming Sulla's Republic: Cicero's Political Program in the <i>Verrines</i>	86
Chapter 4	
Sulla's Illegal Law: <i>Ius, Lex</i> , and Legitimacy in Cicero's <i>Pro Caecina</i>	137
Chapter 5: Conclusion	
Recovering Cicero's Constitutional Vision	188
Bibliography	204

CHAPTER ONE

INTRODUCTION

Discovering a Higher Law: Cicero's Creation of a Roman Constitution

It may seem paradoxical to speak, as the title of this study does, of one person *discovering* a higher law and *creating* a Roman constitution. For the doctrine of a higher law and a legitimating constitution is usually thought to consist in *recognizing* or *obeying* a pre-existing law code or set of customs, whether written or no, rather than deliberately altering, creating, or discovering such a doctrine. Perhaps the defining characteristic of a higher law concept or constitution is precisely that it is considered unchanging and inevitable, that it is thought to have always existed or at least since some easily recognizable founding event. It becomes a part not just of a state's political and legal landscape, but is treated as if it were virtually a part of the natural environment; for of itself a legitimating constitution defines the very boundaries of the political. Obeying (or claiming to obey) such a higher law conception is a political ideology generally known as *constitutionalism*.¹ So how, then, can we speak of one man, even Marcus Tullius Cicero, both *discovering* a higher law and *creating* a Roman constitution? The answer lies in Cicero's court speeches, and in the fact that our term constitution carries an inherent

¹ The term *constitutionalism* is much debated and has an amorphous quality which leads many scholars to avoid defining it. My own views on how to define this difficult term will become clear later on. Most contemporary definitions emphasize, as I do, the notion of legal or constitutional *limits*, e.g. McIlwain, *Constitutionalism: Ancient and Modern*, pg. 21: "but the most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law. 'Constitutional limitations,' if not the most important part of our constitutionalism, are beyond doubt the most ancient." See also Waluchow, "Constitutionalism", *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.) s.v.: "Constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations."

duality: for it is at once a historical or allegedly factual *description* of what a state's political institutions are and, at the same time, a political, legal, and ideological *argument* about what those institutions should be. Cicero's constitutionalism, as we shall see, was inherently creative in putting forward a consistent *argument* for a legitimate Roman constitution, and of a recognizably and surprisingly modern character.

The importance of constitutions and constitutionalism for the later history and development of western civilization can hardly be overstated. At the same time, despite routine nods to precursor ideas in the ancient world, constitutionalism of this type is usually thought to be a fundamentally modern conception, rooted most firmly in the political thought of John Locke and the Glorious Revolution in England.² A few scholars have, however, noted the important Roman contribution to constitutional thought. McIlwain, for instance, long ago recognized the importance of the Roman Republic to the development of constitutional thought.³ His notion of Roman constitutionalism, however, emphasized the fundamental notion of the sovereignty of the *populus*, which he contrasted to absolutism: "The true essence of Roman constitutionalism... lies in the older, deeper principle that the *populus* and none but the whole *populus*, can be the ultimate source of legal authority. The fundamental doctrine underlying the Roman state, its true guiding spirit, is constitutionalism, not absolutism."⁴ More recently, Wood has

² Schmitt, *Constitutional Theory*, identifies its first roots in the Magna Carta and 1688 Declaration of Rights, pg. 97-99, but John Locke "provides the classic *Rechtstaat* formulations" pg. 182; Wolin, *Politics and Vision*, a widely praised history of political thought, also roots constitutionalism in this period: "'Constitutionalism' is a modern creation. Its theoretical debts are to Harrington, the English Levellers, Locke, Montesquieu, and the American *Federalist*," pg. 404.

³ McIlwain, *Constitutionalism, Ancient and Modern*, pg. 39: "The oftener I survey the whole history of constitutionalism the more I am impressed with the significance and importance of the republican constitution of Rome in that development."

⁴ *Ibid*, pg. 52.

recognized the importance of Cicero for constitutional thought, even calling him “the father of the idea of constitutionalism,”⁵ but his definition of constitutionalism seems to rest solely on a notion of due process and responsible government, without any significant higher law component.⁶ He appears to simply assume that there was a pre-existing and generally recognized Roman constitution of the mixed type. Central to Cicero’s thought, Wood argues, is his “conservative mentality” and a general unwillingness to alter the Roman state: “Fundamental to Cicero’s conservatism is his idealization of the ancestral constitution and ancestral way of life, the *mos maiorum*, fashioned by previous generations. It is the sacred archetype of social truth and civic virtue, an awesome monad of morality and utility from which we deviate at our peril.”⁷ But to say that Cicero’s conception of the Roman constitution was simply a largely traditional and fixed set of due process rules is to do him a great injustice. For, as will become clear, Cicero does not acknowledge rules simply because they are traditional or were passed legislatively. Instead, it is fundamental to his thought and practice to advocate and argue for rules and verdicts because they are *legitimate*.

The present study has two purposes. First, by examining the court speeches of Cicero’s early career, it aims to shed light on the nature of politics in the Roman Republic. Even now, it is far too common to speak of ‘the’ Roman constitution as a totalizing and universally accepted set of legal doctrines. By refocusing the discussion of

⁵ Wood, *Cicero’s Social and Political Thought*, pg. 208.

⁶ Ibid, pg. 207: “[In Cicero’s view] Government, therefore, should be so organized as to act within the framework of law and due process and to be answerable for its conduct to the governed. In a word, constitutionalism is the solution. It can best promote limited, predictable, and responsible rule by means of an institutional mixture that grants all citizens, poor or rich, humble or exalted, some voice in deliberations on common matters.”

⁷ Ibid, pg. 206-207.

ancient constitutions from positivistic conceptions of constitutional law to instead speak about normative constitutional argumentation, we can begin to recover the richness of Roman constitutionalism and a greater understanding of the complex nature of the constitutional debates that characterized the last century of the Roman Republic. The Roman legal and political environment that had developed by the late Republic had numerous (and often conflicting) sources of authority. These included such obvious sources as tradition, ancestry, religion, legal authority, popular support and election, precedent, and competence or success. One source that has been overlooked in the Roman Republic is the role that political ideas played in shaping the image and reputation of a Roman politician. Accordingly, the second goal of this study is to illustrate the power that Cicero's ideology of constitutionalism had as a political strategy. Further, it is argued that the doctrine of constitutionalism was developed and put forward by Cicero not as an abstract philosophical doctrine, but actually as a response to his unique political circumstances. He deliberately fashioned a practical political program that could appeal to the Roman electorate despite its varying allegiances in an extremely polarized political atmosphere. Cicero's attempts to define his politics and his political ideas served to define himself. They constitute a deliberate act of political self-fashioning, of creating a political reputation or 'brand' that led him to the very summit of Roman political life, the consulship. Though developed for contemporary purposes, it was Cicero's public attempts to clearly articulate and promote this ideology of constitutionalism in his writings which preserved this important legacy of the Roman Republic.

Legitimacy, Constitutionality, and the Roman Republic

The argument that Cicero articulated an influential political ideology goes against a large and influential current of scholarship on the ancient world, and in particular the study of the Roman world. For much of the 20th century, the study of the Roman world eschewed politics and the ideological aspects of the Roman world.⁸ Recent studies, however, have begun to emphasize anew the robust political culture of the Roman Republic and rehabilitate the importance that political ideologies had in shaping how the Republic actually functioned.⁹ Attention is being turned once again to the important role that a ‘Republican ideology’ had to play in the history of the world’s first republic (the term is of course descended from the Latin *res publica*, literally ‘public business’) and in its outsized influence of the tradition of political thought in the West. This growing acknowledgement of the role that ideas and debates over the state should be welcomed, as it promises greater sophistication in understanding the complex set of foundation ideas that animated the Roman *res publica*. But it is, nevertheless, incomplete to speak about one, monolithic and totalizing Republican ideology;¹⁰ for the numerous ideological clashes of the Late Republic show there were a multitude of contrasting and competing viewpoints available to choose from. Almost certainly the most influential of these is the ideology expressed by the orator, statesman, and philosopher Marcus Tullius Cicero. It is his persuasive and consistent vision of a limited and constitutional *res publica* to which later thinkers returned again and again as a model and inspiration.

⁸ Gelzer, *Die Nobilität der Römischen Republik*.; Ronald Syme, *The Roman Revolution*.

⁹ Millar, *The Crowd in Rome in the Late Republic*; Wiseman, “Roman History and the Ideological Vacuum.”, but see also **Holkeskamp, etc.**

¹⁰ The persistence of this idea may itself be an artifact of Cicero’s overwhelming influence on our perception of the Roman Republic and its government. His views are often conflated with or presented as *the* Roman view. This study, although focusing on Cicero’s views as they were publicly presented, will also show that his views explicitly contrasted with those of other political actors and, further, that he took great pains to differentiate himself (and his ideas) from his contemporaries.

The astonishing influence of Cicero's portrayal of a constitutional and legitimate *res publica* in his speeches has been for the most part overlooked. This is mainly due to the venerable suspicion of rhetoric as a source for truth. Seemingly due to the very centrality of his writings in the Western canon, the innovative and revolutionary importance of this shift to thinking about the legitimacy of a state and the constitutionality (or unconstitutionality) of its actions has seemed a trifling contribution or one not attributable to a single thinker. Such, it appears, is the persuasive power of his rhetorical and oft polemical contribution to political thought, that he was able to make this revolutionary contribution appear the very soul of tradition. It is an essential part of his persuasive method that what is in fact new appears instead to be something very old, that the innovative find backing in long-established precedent. As we shall see, however, these twin ideas of legitimacy and constitutionalism were not just the hidden thought experiments and private musings of Cicero the philosopher.¹¹ They were, in fact, a cornerstone of the public political program of Cicero the politician, who consistently attempted to bring this constitutional republic to life through his rhetorical advocacy in the Roman courts. This ideology and Cicero's unique political program, although little remarked, is neither coded nor hidden, but is presented directly and forthrightly as a distinguishing characteristic of Cicero's public political 'brand' as he sought office and honors in the Roman Republic.

¹¹ Harries, *Cicero and the Jurists*, pgs 143-44, 147-48, in her study of Cicero's conception of law, has touched on the importance of higher law thinking in Cicero's speech *Pro Caecina*, but she says the passage in question (discussed here at length in chapter 3) is "arguably anomalous" and that it was intended simply to "raise the emotional temperature." Thus she views this argument almost exclusively as a legal rather than political argument, never touching on the political idea of legitimacy.

Before proceeding to discuss Cicero's political ideology of legitimacy, however, it is necessary to clarify just what exactly we mean when we employ the related terms constitution, constitutional, and constitutionality in the specific context of Cicero's rhetoric and in the broader historical context of the Roman Republic. The most obvious meaning of constitution is a *description*, whether scholarly, legal, or philosophical, of the composition or institutional arrangement of a particular government. This is the meaning of the term roughly corresponding to the Greek *politeia*.¹² Uncovering these institutional arrangements, as well as their corresponding strengths and weaknesses is, for instance, the task that Polybius undertakes in his discussion of the Roman constitution¹³ or Aristotle in his project to assemble the constitutions of ancient Greek poleis.¹⁴ This concern has been shared by modern scholars who have sought to examine the Roman constitution, with the most recent and influential being Andrew Lintott.¹⁵ He attempts to describe the Roman Republican constitution in terms of its institutional reality, as he says: "Politics in the Republic were a game played according to complex rules. Without

¹² McIlwain, *Constitutionalism, Ancient and Modern*, pg. 26: "Of all the varied meanings of which our word "constitution" is susceptible, the Greek *politeia* conforms to one of the most ancient. It means above all the state as it actually is. It is a term which comprises all the innumerable characteristics which determine that state's peculiar nature, and these include its whole economic and social texture as well as matters governmental in our narrower modern sense. It is a purely descriptive term."

¹³ Polybius famously insisted that explicating the Roman constitution (*politeia*) was a primary purpose of his *Histories*, 1.1.5: τῆς γὰρ οὕτως ὑπάρχει φαῦλος ἢ ῥάθυμος ἀνθρώπων ὃς οὐκ ἂν βούλοιο γινῶναι πῶς καὶ τίνοι γένει πολιτείας ἐπικρατηθέντα σχεδὸν ἅπαντα τὰ κατὰ τὴν οἰκουμένην οὐχ ὅλοις πενήκοντα καὶ τρισὶν ἔτεσιν ὑπὸ μίαν ἀρχὴν ἔπεσε τὴν Ῥωμαίων, ὃ πρότερον οὐχ εὐρίσκειται γεγονός. "For what person is so careless or indifferent that he would not wish to know how and with what type of constitution (*politeia*) that, in a period of not quite 53 years, virtually the entire inhabited world fell into the sole rule of the Romans, an event unprecedented in world history?" He elaborates upon his famous theory of the mixed constitution and *anacyclosis* at *Histories* Book VI.

¹⁴ E.g. *Ath. Pol.* See also *Politics* 1274b (Book 3) where he defines *politeia*: ἡ δὲ πολιτεία τῶν τὴν πόλιν οἰκούντων ἐστὶ τάξις τις. "A *politeia* (constitution) is a certain organization of those dwelling in a polis." Thus Lewis pg. 26, n. 4: "Extant Greek 'constitutions' are descriptive studies, not prescriptive plans."

¹⁵ Lintott, *The Constitution of the Roman Republic*.

knowledge of these it is hard to grasp the behavior of the contestants.”¹⁶ Lintott

explicitly sets himself the task of uncovering this *politeia*-type constitution with three intertwined approaches, as he says in a programmatic statement:

It may be helpful to differentiate between possible approaches to the constitution of the Republic. One is an analysis of how things worked in the last two centuries of the Republic, which can be achieved by a positivistic study of political history. A second is to trace developments from their origins in the early Republic or even before. This will inevitably have a large component of myth, as it does in our basic sources, Livy and Dionysius of Halicarnassus, both on account of the lack of sound information available to the earliest Roman annalists and because those who wrote history tended to have a contemporary political agenda. A third approach is to theorize about the nature of the constitution. [...] Without such a framework we are likely to lose our way in a mass of data; with the aid of one we may make fruitful comparisons with other constitutions.¹⁷

Despite the methodological sophistication at work here, these remain attempts to recover the Roman constitution as an institutional reality. Whether by positivistic study, tracing developments and, presumably, expunging ‘myths,’ or creating useful theoretical frameworks, these seek to uncover a factual legal constitution that can be universally accepted. While Lintott does at several points acknowledge that individual Romans might hold differing views on what that constitution entailed,¹⁸ his overall mission is to uncover a description of the Roman constitution in historical and legal terms.¹⁹

The modern conception of a constitution and of constitutionalism, however, contains more facets than simply describing governmental institutions. One notable problem is that, outside of the *politeia*-type constitution, scholars have been little inclined

¹⁶ Ibid, pg. 2.

¹⁷ Ibid, pgs. 7-8.

¹⁸ Cf. Ibid, pgs. 61-63 on obstruction, abrogation, and annulment or pgs. 214-232 in dealing with Republican ideology.

¹⁹ Straumann, “Constitutional Thought in the Late Roman Republic,” pg. 281, has also pointed out that Lintott never explicitly deals with the question of whether the term constitution, in all its modern meanings, can really be applied to the Roman Republic.

to define or explain what they mean by the Roman ‘constitution.’ Neal Wood, for instance, in his study of Cicero’s political thought, arrives at the conclusion that, for Cicero, “constitutionalism is the solution” but fails to define the term beyond “to act within the framework of law and due process and [for government] to be answerable for its conduct to the governed.”²⁰ This essentially leaves to his readers the task of figuring out what, for Cicero, is entailed by law, due process, and a government answerable for its conduct, essentially boiling the complex interplay of legal of political authority entailed by constitutionalism down into a philosophy of ‘following the rules.’ How one could identify such rules or prioritize between them, when they almost inevitably come into conflict, is left unanswered, beyond the simplistic assertions that Cicero’s constitutionalism sought primarily “the consolidation and strengthening of the ruling class vis-à-vis subordinate classes, by thwarting any segment of either from establishing a tyrannical regime subversive of the interests of the propertied classes as a whole.”²¹ As shall be shown in this study, Cicero’s rhetoric of legitimacy and constitutionality in his early career could actually be quite subversive to the ruling classes, rather than merely an obstructionist ideology that served to buttress their rule.

A more interesting and complex account of a Roman constitution can be found in the recent work of Benjamin Straumann. He correctly identifies the scholarly discomfort that surrounds using the term constitution in the context of the Roman Republic.²² This is

²⁰ Wood, *Cicero’s Social and Political Thought*, pg. 207.

²¹ *Ibid*, pg. 208.

²² Straumann, “Constitutional Thought in the Late Roman Republic,” pg. 281: “There is of course much scholarly debate about constitutional issues, but the participants in this debate have mostly made up their mind as to the applicability of the term ‘constitution’ to the Roman Republic - either the term is applied without much further ado, or it is applied with scare quotes.”

due, he argues, to the inherent complexity of modern constitutions and the many features (including writtenness, judicial review, and the guarantee of some individual rights) which might be identified as the key ingredients of a constitutional order.²³ Straumann identifies two criteria as the markers for the existence of a constitution: entrenchment, by which he means that certain rules are conceived of as higher than others, and political importance, that is, that the constitutional rules in question are substantively important in the running of the state.²⁴ The defining quality of a constitutional order in Straumann's view is the presence of a "hierarchy of norms."²⁵ In a constitutional order, some legal norms are more entrenched than others. And in cases of conflict, a higher order norm takes precedence over any lower order norm, one that is less entrenched. Consequently, to make the case that a real constitution existed in the Roman Republic, Straumann identifies what he conceives to be *the* fundamental constitutional rule of the Roman Republic, as quoted in Livy and supposedly dating back to the Twelve Tables, the foundation of all Roman Law "that the most recent decree of the [assembled] *populus* was lawful and binding."²⁶ Thus for him the essence of the Roman constitution lies in a sort of Roman popular sovereignty – that there is no rule of the Roman Republic which the *populus* via their assemblies could not change.²⁷ While Straumann's definition of entrenchment is a good starting point to re-open discussion about the fundamental nature of the Roman constitution, it is in the final analysis unsatisfactory. It is *a* definition of a

²³ Ibid, pg. 281, 284.

²⁴ Ibid, pg. 284.

²⁵ Pg. 281

²⁶ Livy 7.7.12: *ut quodcumque postremum populus iussisset id ius ratumque esset*. Straumann, "Constitutional Thought in the Late Roman Republic," pg. 284-85."

²⁷ This view of popular sovereignty as a key component of Roman constitutionalism is also (see page 2) evinced by McIlwain, *Constitutionalism, Ancient and Modern*, pg. 10, although he additionally emphasizes the presence of limits, see. n.15 above .

Roman constitutional order, and one that some Romans may in fact have endorsed,²⁸ but it is certainly not *the* definition of a constitutional order. Cicero, for instance, would have rejected it out of hand; for it would ascribe no limits to the power of the *populus*. To say that the Roman constitution consists in the principle of unlimited popular sovereignty is actually profoundly *unconstitutional*, in that it ascribes to the assemblies all power over every situation. It is also profoundly *unhistorical*, for it would leave out or minimize all the contentious debates of the Middle and Late Republic, which frequently centered on the legitimate authority of the popular assemblies.²⁹ Straumann's understanding of the Roman constitution remains purely descriptive. In attempting to describe the "hierarchy of norms," it aims to locate an assemblage of the laws, procedures, and rules a government employs in practice. When we speak of constitutional arguments, however, we must move to the realm of the legal, historical, and philosophical ideas that legitimized the Roman Republic ideologically.

For our purposes, the modern term 'constitution,' clearly has another sense. As well as the descriptive sense described above, the term may be employed *prescriptively*. A descriptive constitution purports to be a neutral, objective, and uncontroversial *account* of rules and procedures of government which are universally respected (or nearly so). Explicating this descriptive constitution has been the goal of most previous studies in the

²⁸ Cicero characterizes his opponent Piso as propounding such a view in the *Pro Caecina*, although this is intended to be derogatory and illustrate Piso's ignorance of the Roman constitution; see chapter 3.

²⁹ One thinks, for instance, of the constitutional debates over the tribunate in the last century of the Republic. Under this conception, the debates about whether Tribunes could repeat, whether legislation could be passed in the face of a veto, whether religious concerns like *obnuntiatio* could vitiate legislation could have all been decided by a vote of the *populus*. That they were not all resolved in this manner shows that there were other concerns at play beyond popular sovereignty. Consequently, these situations were resolved in a variety of means, including court judgments, Senate resolutions, and even, notoriously, violent lynchings in the case of Tiberius and Gaius Gracchus.

field of classics, such as those of Mommsen, Lintott, and even Straumann. The conception they seek is at heart a positivistic conception rather than a normative conception, rooted more in institutional reality than the realm of ideas. This way of understanding a constitution co-exists, somewhat problematically, with a *prescriptive* notion of constitutionality. By *prescriptive* constitution, I mean a moral, legal, or historical *argument* put forward by a political actor of what limits a legitimate government ought to or legally must respect in a certain situation. The former, then, exists as a description of past legal and institutional realities, while the latter, by contrast, exists more tenuously as a proposed set of norms that limit future conduct. When used prescriptively a constitution need not be recognized by major institutions in a society, nor even given sanction by its courts or magistrates, as it does not necessarily exist in the realm of institutional reality. Instead, a prescriptive constitutional norm exists as an ideal in the minds of its proponents, of those who are willing to argue in the political realm that this norm has been established, now exists, and must be obeyed. A constitution of this type is far from the incontrovertible rules of a descriptive constitution; in fact, it is only proposed when it is dubious and under threat. It is created by its proponents to meet what they consider a constitutional challenge, and only reaffirmed and reified if those proponents win the day in the court or the legislature.³⁰ The assertion that Cicero created and promoted, as I argue, a consistent Roman constitution of this prescriptive type does

³⁰ A similar idea is put forward by Connolly, *The State of Speech*, pg. 72, referencing Cicero's *De Inventione* on the courts of law as institutions continually engaged in defining and re-defining the republic itself: "The law court is introduced from the start not simply as the place where justice is done but as the place where the republic is renewed through the active participation of its best citizens. [Cicero's] argument implies that the most common practical application of rhetoric, forensic oratory, is the bedrock of the polity, the central practice of citizenship."

not entail that all other Romans accepted his arguments, nor even that he won all such constitutional arguments. He did not. It means that, in particular situations, he proposed a set of legal norms that certain actions were not just undesirable, but actually beyond the pale of acceptable political behavior. These legal norms, whether established by natural law, custom, or statute, whether discoverable from rational thought, examining past or current practice, or directly from a statutory text, are argued to be legally inviolable. Any action that controverts them is thus defined as *unconstitutional*, and the government or political actors that commit such actions argued to be *illegitimate*. A prescriptive constitution, then, is an argument that purports to show the appropriate bounds of political activity, an assertion that a constitutional norm exists and that, legally and politically speaking, it cannot be disobeyed. A prescriptive constitution is an attempt to determine the boundaries of the political.

Viewing the Roman constitution fundamentally as an argument gives the modern scholar a more dispassionate outlook on the tumultuous events of the late Roman Republic. It reminds us that constitutions are an inherently paradoxical concept. They have a fluid and dynamic nature as well as a stabilizing and static nature. For any time a truly constitutional argument is made, it follows that one party is charging another of violating ‘the’ constitution, of attempting to redefine the boundaries of what is acceptable in a particular state. This is that much truer in the case of a society with an unwritten constitution like the Roman Republic. For even written constitutions, no matter how carefully drafted, cannot completely forestall constitutional arguments. As much as modern scholars, activists, and politicians might wish to simply identify *their* constitution

with *the* constitution, even a written constitution is subject to numerous interpretations. It seems inevitable that there will be, in an electoral society, points of contention about what *the* constitution is, as well as what it requires on the one hand and what it forbids on the other. A doctrine of constitutionality, the idea that the boundaries of the political are fixed and unchanging, if accepted, creates arguments over precisely where those boundaries are (to be) located. Modern governments, and the United States is a prime example, attempt to remove these fundamental arguments from everyday, run-of-the-mill politics, but such efforts are, in the end, never entirely successful. Institutions like judicial review have come into being, precisely as attempts to remove the constitutional from the political. Neutral and expert judges serve as adjudicators between opposed constitutional visions, between different proposed visions for the legitimate state. Because of their neutrality and expertise, the idea that these judges will always rule on the basis of ‘the’ law and ‘the’ constitution, their decisions buttress the legitimacy of the state. But, as even the most rudimentary survey of a state’s constitutional history will show, constitutions, even written ones, change over time. New principles are proposed and, though perhaps viewed as radical at first, may eventually become accepted as settled constitutional doctrine. There is no way to entirely remove the constitutional from the political. The Roman Republic lacked even this polite legal fiction; not even the pretense of dispassionate review by objective experts existed. When Cicero asks his peers and fellows to respect *the* Roman constitution, he is asking them to respect *his* Roman constitution. He is asking the juries or the electorate to make an inherently political decision, to make real *one* constitutional vision. And there were certainly many others.

He accomplished this by founding his vision in a set of principles that (he thought) could and would be accepted by a winning coalition of Roman voters. He founded his constitutional vision in an idea of a *legitimate* and inherently *limited res publica*.

Finding a Place for Politics in the Roman Republic

The very electoral success of Marcus Tullius Cicero and his achievement of the consulship in 63 BCE would seem to belie the once common view that the world of the Late Roman Republic lacked politics in the modern sense. This view, originating with Mattias Gelzer, was taken up and refined by such renowned historians, for instance, as Ronald Syme and Lily Ross Taylor.³¹ The cornerstones of this view were, first, that Roman *factiones* or *partes* were not political parties in the modern sense, because they were never (or very rarely) arranged according to ideological or policy agreement, but simply around the people themselves and an ever-shifting series of alliances among the great Roman families. What mattered most in Roman politics, under this view, was which patrons could mobilize the greatest number of clients on an election day. Thus Roman elections, an undeniably central part of their whole political culture, were said to be almost completely free from ideology, as they featured neither competing policy ideas nor different conceptions of their state and how it ought to operate. *Do ut des*, the logic ran, and the tantalizingly complex world of Roman politics could be reduced to a series of open or clandestine alliances among the Roman nobility, often marked by dynastic marriages.³² Thus this school of thought portrays the Roman nobility as a unified entity

³¹ Gelzer, *Die Nobilität der Römischen Republik*.; Ronald Syme, *The Roman Revolution*.; Taylor, *Party Politics in the Age of Caesar*.

³² Ronald Syme, *The Roman Revolution*, perhaps the most influential 20th century historian of Rome, is indicative of this view, pg. 11: "The political life of the Roman Republic was stamped and swayed, not by

with a lockstep political mindset, the only alterations in political status would have come through the trading of favors for favors. But this model fails to explain the numerous and important figures who gained or sought power in the late Republic precisely by flouting the orthodoxy: Pompey the Great, Julius Caesar, Publius Clodius, for instance, all at one time or another gained powerful followings partially because they took a stance against the more traditional Roman nobility. Indeed, under the former view the electoral success of Marcus Cicero becomes an enigma. Compared to many of his contemporaries, Cicero lacked fame, ancestral clients, wealth, or military prowess to justify his electoral success. He nevertheless rose to the very top of the Roman political ladder, the consulship, and not just that, but in *suo anno*, the youngest age allowed by law. So we are justified in asking what propelled him to that position? One contributing fact lies in the political rhetoric he offered during his rise, that he, much as Pompey, Caesar, or Clodius, used his position as an outsider to Roman politics to his advantage. But his greatest skill, unlike their various gifts, lay in rhetoric. The political rhetoric he offered in his early, career-making speeches crafted and defined him as a candidate, contrasting him with his opponents as well as laying out for the Roman electorate the appealing vision of a constitutional and legitimate *res publica*.

This consensus on the nature of Roman politics as simply a matter of horse-trading, marriage alliances, and vote counting, however, began to attract a greater amount of skepticism and criticism beginning in the 1980s. It began to be argued that the

parties and programmes of a modern and parliamentary character, not by the ostensible opposition between Senate and People, *Optimates* and *Populares*, *nobiles* and *novi homines*, but by the strife for power, wealth, and glory. The contestants were the *nobiles* themselves, as individuals or in groups, open in the elections and in the courts of law, or masked by secret intrigue.”

relations of patron and client, which had been the unshakeable foundation of the earlier view, were far more negotiable and less predictable than had been assumed.³³ In addition, a much greater emphasis was placed upon the democratic elements of the Roman constitution, by scholars such as J.A. North who famously coined the phrase “frozen-waste theory” to describe the prior consensus.³⁴ But it was Fergus Millar whose work most powerfully revived the notion of democracy at Rome. He argued that scholars of the period had vastly underplayed the role of the Roman *populus*, literally ‘the people.’ But this term also possesses a more technical meaning for the Roman people as a sovereign body, acting through one or more of the Roman legislative assemblies. These assemblies, and not the Roman Senate, were, Millar emphasized, technically the legal sovereign of the Roman Republic, with one short exception.³⁵ More importantly, however, his work highlighted those debates in which the Roman nobility (consulars and the Senate in particular) took sides against the Roman electorate and yet lost.³⁶ That is not to say, however, that the Roman *populus* could be won over simply by appealing to the lowest classes. The way in which the assemblies themselves were structured actually distinctly favored certain groups within Roman society, giving much greater voting

³³ On the changing perception of the patron-client relationship in the Republic, see P. A. Brunt, *The Fall of the Roman Republic and Related Essays*, pg. 382-442.

³⁴ North, “Politics and Aristocracy in the Roman Republic”; North, “Democratic Politics in Republican Rome.”

³⁵ The exception being the time of the Sullan Republic (81-70 BCE). The most influential and provocative formulation remains that of Millar, *The Crowd in Rome in the Late Republic*, though see also Millar, “Politics, Persuasion and the People before the Social War (150-90 B.C.).” There have been some notable objections to this new emphasis on the democratic elements in Rome’s constitution, including Hölkeskamp, *Reconstructing the Roman Republic*; Morstein-Marx, *Mass Oratory and Political Power in the Late Roman Republic*.

³⁶ Most strikingly the repeal of important facets of the Sullan constitution in 70 and the Gabinian and Manilian laws appointing Pompey the Great, see Millar, *The Crowd in Rome in the Late Republic*, on which see pgs 49-72 and 73-94 respectively.

power to the wealthy classes, particularly the equestrians, than to the poor and urban.³⁷ If the Roman *populus* is in reality the sovereign body of the Roman Republic, then the career and success of an orator like Cicero make sense. For political power rested, to a greater extent than previously allowed, in the ability to persuade the Roman people.

This way of looking at the Roman Republic also leads us to ask how did an aspiring politician go about the difficult process of gaining the acclaim and support of the Roman people? It seems clear that a politician could appeal to the Roman people by pledging to protect their interests or reward their support, whether privately or publicly. Certainly there are more than enough examples of Roman politicians ‘buying off’ their voters, with either promises or payments.³⁸ But to attribute this motive (and this motive alone) to all voters on all occasions, however, as the frozen waste theory appeared to suggest, is an unrealistically cynical approach to politics. For it is obviously also possible to appeal to voters on a number of grounds: by appealing to principle, by proposing and supporting what they consider to be sound and sensible policies, or by demonstrating one’s competence as a magistrate, among many others. The more nuanced approach to Roman politics that is now being taken, which allows voters, and candidates, a multiplicity of motives, has many advantages. Perhaps the greatest of these, however, is that it allows scholars to approach the Roman Republic as a place of real ideological contestation, where a candidate’s proposals, positions, and public persona, as well as his

³⁷ The precise way in which these various assemblies were structured is quite complicated and the precise details need not be rehearsed here. See Taylor, *Roman Voting Assemblies from the Hannibalic War to the Dictatorship of Caesar*.

³⁸ Thus the charge of *ambitus*, improper vote seeking, which could be leveled for either bribery or excessive promises of public benefaction. That this happened is undeniable. In a notorious scandal, both consuls-elect for 65, Sulla and Autronius, were even barred from office after being convicted of just such electoral bribery. On the origin and history of *ambitus* as a charge, see Lintott, “Electoral Bribery in the Roman Republic.”

backroom dealings, might have influenced the course of elections. As T.P. Wiseman has recently argued, it is high time to put aside the “ideological vacuum,” the blinders which have obscured the more complicated reality of Roman politics for much of the 20th century.³⁹ The game of politics at in Republican Rome was in fact a competition for legitimacy and support, but how can we recover some of the richness and variety of those contests today? Luckily we have an invaluable resource in the early speeches of Marcus Tullius Cicero, which show how one politician attempted to establish his reputation and win the respect and support of the Roman people. The pre-consular speeches show how one, admittedly atypical, statesman, attempted to navigate the difficult waters of Roman politics, as well as formulate and promote an ideology that could appeal to voters across the political spectrum.

There has been a tradition among Roman scholars of treating Cicero’s speeches, and particularly his pre-consular speeches, as especially untrustworthy historical sources. They are examples of the rhetorician’s art, and therefore suspect as sources for any sort of truth.⁴⁰ As artifacts of the time and place of delivery, they do have much to tell us about Roman law, history, and society. Cicero’s pre-consular speeches, although they

³⁹ T. P. Wiseman, “Roman History and the Ideological Vacuum” who illustrates how the Roman Republic, although long considered ideological (“from Machiavelli to Mommsen, the history of the Roman Republic was above all ideological” pg. 6) was largely purged of ideology in the 20th century, esp. pgs. 28 ff; as North, “Politics and Aristocracy in the Roman Republic,” pg. 280, writes, the somewhat cynical emphasis on the motives of a politician (usually said to be followers, acclaim, or dictatorship in the case of a *popularis*), allows one to ignore the motivations of the Roman voter: “if you can concentrate the reader’s attention entirely on the question of Ti. Gracchus’ motives for proposing his bill, you can omit even to raise the more important question why the voters were supporting or even stimulating him in his campaign.”

⁴⁰ See, for instance, Lintott, *Cicero as Evidence*, a book whose overriding purpose is to provide guidance to historians attempting to use Cicero’s speeches and other writings. Even rhetorical studies are not immune to the suspicion of rhetoric. Gildenhard, *Creative Eloquence*, pg 171: “[...] [Cicero] of course spun, twisted, or obfuscated the actual facts of the matter whichever way he thought most conducive for his cause. In terms of advocacy, there is no contradiction between Cicero appealing to the truth and being economical with it.”

sometimes deal with notorious scandals (the prosecution of Verres in particular comes to mind), are also notable for the seemingly mundane nature of their content. The three speeches covered in this analysis, the *Pro Roscio Amerino*, the *In Verrem*, and the *Pro Caecina*, which deal with, respectively, a murder trial, a prosecution for extortion, and an inheritance dispute, would at first blush appear to be both non-political and non-ideological in nature. As trials, they are thought to deal with matters of fact, rather than principle. Then too, for pure drama and rhetorical fervor, of course, these speeches can hardly be said to match the fireworks of the *Catilinarians*, or for direct political influence, Cicero's later defenses of key political figures like Murena, Sestius, and Milo. Cicero's pre-consular speeches, however, are unique among his corpus in showing us a Roman politician on the rise. These speeches, uniquely, show us Cicero just as the young advocate was attempting to make himself known as a player in the 'game' of Roman politics and to craft a public persona that would appeal to Roman voters. Unlike many other aspiring Roman politicians, Cicero started his career as a 'new man' (*novus homo*) without the advantages of great wealth, military achievements, or an already-famous name. Instead, he assayed to build a political reputation for himself as an advocate in the Roman courts. This study looks at Cicero's early speeches as important part of a conscious effort to define himself before the Roman electorate. It locates an important facet of Cicero's early self-presentation that has, as yet, remained relatively unexamined: his continuing and consistent focus on the twin issues of legitimacy and constitutionality in the Roman *res publica*. Again and again in these speeches, Cicero returns to arguments over legitimacy. Each verdict becomes larger and grander than the facts of the

case. He makes them into stark choices between a just and legitimate *res publica* on the one hand, and an unjust, violent, and tyrannical *res publica* on the other. This argument serves a dual purpose, both as a rhetorical strategy helping him to win his cases and as a political strategy to make him known and help him to win Roman elections.

It is, of course, notoriously difficult to employ forensic speeches as sources of objective, historical facts. One must recognize that Roman advocates, and Cicero is no exception, wanted to win their briefs and occasionally took great liberties with the truth to achieve it. It is only prudent to treat the purported facts presented by any advocate with a dose of appropriate suspicion, as an advocate might even misrepresent an established point of law in the hope of winning his case.⁴¹ A great body of scholarly criticism has focused upon the forensic speeches of Cicero solely (or at least primarily) as examples of rhetoric and the gradual process of persuasion.⁴² This method of approaching Cicero's speeches, known as the persuasive process model, views the speeches as largely faithful records of the actual speech delivered and studies them as models of the practice of persuasion. Even seemingly digressive or extraneous arguments found in the speeches are argued to be in some way essential to the goal at

⁴¹ There are many examples of this trend to read against Cicero. See for instance Ayers, *The Speeches of Cicero's Opponents*; Alexander, "Hortensius' Speech in Defense of Verres"; Wiseman, *Catullus and His World*, pgs. 54-91; More recently see Dyck, "Evidence and Rhetoric in Cicero's 'Pro Roscio Amerino,'" Stroh, "De Domo Sua: Legal Problem and Structure," have attempted to prove that Cicero is either outright lying or at the very least seriously misrepresenting the truth in particular speeches.

⁴² The tentpoles of this style of the persuasive process model, in which a speech is seen as bending entirely towards its goal of persuading the audience are Stroh, *Taxis und Taktik* and Classen, *Recht, Rhetorik, Politik*. It is very commonly accepted among Ciceronian scholars, see, for instance, the introduction to Powell and Paterson, *Cicero the Advocate*, and the contribution by Riggsby. An overview the persuasive process model and some objections to it can be found in Leff, "Cicero's Pro Murena and the Strong Case for Rhetoric," pgs. 66-70. It has also been questioned, recently, by Vasaly, "Cicero, Domestic Politics, and the First Action of the Verrines," pg. 116-117.

hand, which was to win one's case.⁴³ In the case of Cicero, however, the advocate was at the same time the politician. He could hardly ignore the fact that these speeches were also his first opportunity to introduce himself, the *novus homo*, to the Roman people and to begin to shape his reputation or, we might even say, his political brand. While Cicero obviously wished to win his cases, he also obviously wanted to present himself and his political beliefs in the most favorable light possible. On this, Cicero's self-presentation, his pre-consular speeches are an invaluable tool. For however skeptical we may be of the individual facts behind these cases, the speeches are a perfect record of Cicero's political self-fashioning, of how he, as a politician, wanted the Roman voting public to think about him. This study of Cicero's self-presentation and political program, then, necessarily follows a different course from the persuasive process model. Rather than viewing everything in a Ciceronian speech as subordinate to the overarching goal of persuasion, it examines the push and pull between the roles of Cicero the advocate and Cicero the politician.

This is not to say that the goals of the politician and the advocate are mutually exclusive. The two pulls that a political advocate will feel, winning cases and winning votes, are not locked into a zero-sum game. With an intelligent strategy, of course, one can accomplish both goals at once. So by arguing that Cicero sometimes used his forensic cases to win future votes, whether by enhancing his reputation, by promoting his

⁴³ See, for instance, Crook, *Legal Advocacy in the Roman World*, pg. 163. A more complex picture of the interplay between the interests of client and advocate can be found in Burnand, "The Advocate as a Professional: The Role of the Patronus in Cicero's Pro Cluentio." He argues that while there might have existed certain 'pseudo-professional' Roman advocates who could devote themselves completely to their clients' interests, this is not true of Cicero, see pgs. 286-89.

own ideological positions and preferred policies, or by creating a political ‘brand,’ I am not arguing that such passages either detract or distract from his rhetorical goal of winning his case. We should not see his published speeches as simply monuments to his success as an advocate, they are also, quite pointedly attempted *interventions* in the politics of the day.⁴⁴ In point of fact, the result that Cicero achieves in his pre-consular speeches shows that his public character can contribute quite significantly to his persuasive goals. James May has noted the deliberate care that Cicero took in shaping his *ethos*, his character as a speaker, before Roman audiences throughout his career. This fashioning of character was, he notes, an essential aspect of Roman advocacy, one “often providing the chief source of proof in the speech.”⁴⁵ It was imperative for Roman advocates, in order to win their cases, to project their *auctoritas*, their authority and trustworthiness, and defend it against the inevitable challenges of their opponents. But this notion can be extended, however, to include not just the authority, dignity, and reputation (*auctoritas, dignitas, existimatio*) of the orator on which May’s study focuses, but also the political beliefs and opinions espoused by the advocate. For on multiple occasions in the pre-consular speeches, Cicero differentiates himself from his client and explicitly distances himself from the needs of the case at hand, seemingly in order to make a political point. One’s political reputation, provided it was widely-known, favorable, and consistent, could even help an advocate to sway a sympathetic jury.

⁴⁴ Habinek, *The Politics of Latin Literature*, pg. 11 and pgs. 69-87.

⁴⁵ May, *Trials of Character*, pg 11. For his arguments on Cicero’s *ethos* in his pre-consular speeches, see pgs. 13-49. Cicero himself later acknowledged the powerful effect that an advocate’s favorable reputation could have on the outcome of a judicial speech, *De Oratore* 2.182.

Expressing popular political opinions would be an obvious way to gain a jury's favor, but thinking of it in that way is to vastly oversimplify Cicero's strategy in making his speeches 'political.' For it would be obviously wrong to say that Cicero was simply mirroring the dominant viewpoints of his juries to gain their approval. A key part of his self-portrayal, in fact, is that he offers an idiosyncratic point of view. In these pre-consular speeches, he portrays a political world that is largely dominated, ideologically speaking, by the supporters of Sulla and by the dictator's opponents, often portrayed as a murky or clandestine opposition. It is a world dominated by two camps, as he describes it, and highly polarized between pro- and anti-Sullan viewpoints. Yet Cicero consistently refuses to portray himself as either a doctrinaire Sullan or a typical opponent of the regime, preferring to show himself occupying a principled middle ground between the two through a focus on legality, legitimacy, and constitutionality in the Roman *res publica*. This focus is something that sets Cicero apart from other politicians and helps him to create his own easily recognizable political stamp. In several instances, Cicero even explicitly differentiates himself from his client and distances himself from the needs of the case at hand, specifically in order to make a political point. Cicero thus fashions an image of himself in the minds of the Roman juror and voter at the same time, not solely as an advocate possessing experience, dignity, and authority; he also aims to create an image of himself as a man of principle deeply devoted to concepts of legitimacy and constitutionality. It remains an open question, however, whether and to what extent Cicero *actually* believed in such principles. It is only prudent to remain skeptical of a politician's public statements about personal convictions. There will always be, after all,

some distance between any actual historical person and the image they fashion for themselves in their rhetoric or art. So when Cicero portrays himself as a man holding consistent principles and convictions, we may certainly doubt whether he actually held these views or to what extent he lived up to them, but we cannot doubt that this is how he *wished to be seen*. In the final analysis, Cicero did not wish to be seen as a Sullan or as an unthinking opponent of the regime, but rather as a thoughtful and principled upholder of what I will term a Republican constitution. These twin characterizations, Cicero's world-building and self-fashioning in his early speeches, were a critical part of his later electoral appeal. The starting point towards Cicero's constitutionalism and concern for self-presentation can be found in his earliest work, the rhetorical handbook *De Inventione*.

Inventing the Law: *Lex* and *Ius* in the *De Inventione*

Cicero's youthful handbook on rhetoric, the *De Inventione*, is only infrequently studied outside of the field of the history of rhetoric, but it remains important as a reflection of Cicero's ideas following his rhetorical and legal education. Both Cicero's *De Inventione* and the other major rhetorical handbook of the period, the *Rhetorica ad Herennium* of an unknown author (hereafter referred to as the 'Auctor') appear to have been published at some point in the 80s BCE following the upheaval of the Social War (90-88 BCE).⁴⁶ The modern reticence to study Cicero's first published work can be

⁴⁶ Connolly, *The State of Speech*, pg. 66 n.127; Hubbell, *Cicero: De Inventione ; De Optimo Genere Oratorum ; Topica*, pg. vii-viii although fixing no definite date, speculates it may have been published in 87 BCE when Cicero was 19 years old. Kennedy, *The Art of Rhetoric in the Roman World, 300 B.C.-A.D. 300*, pg 106-110 believes it to have been published in 88 or even slightly earlier.

traced, in point of fact, to Cicero himself. When he returned to the subject of rhetoric in his *De Oratore* in 55 BCE, he famously slighted the work of his youth:

Vis enim, ut mihi saepe dixisti, quoniam, quae pueris aut adulescentulis nobis ex commentariolis nostris incohata ac rudia exciderunt, vix sunt hac aetate digna et hoc usu, quem ex causis, quas diximus, tot tantisque consecuti sumus, aliquid eisdem de rebus politius a nobis perfectiusque proferri (*De Oratore* 1.5).⁴⁷

Because those writings which ‘slipped’ out of my notebooks when I was a young man or a boy were rough and unfinished are hardly worthy of my current age and the experience which I have gained from pursuing so many important cases, you [Quintus Cicero] have been wanting, as you have often said, for me to put out something more polished and considered on the same topics.

This comment has led most to deride the work as juvenilia or, more commonly, to ignore it entirely.⁴⁸ While it can indeed be a rather dull and formal work to peruse, the *De*

Inventione is valuable in that it allows us a unique light in which to see the future orator.

For this is the only work Cicero published (whether it really ‘escaped’ or not) that was not a speech prior to the *De Oratore* some 30 odd years later. It allows us to see the young Cicero outside of a forensic or deliberative context; defeat or victory do not hang on his words. Instead, he attempts to lay out in a readily understandable fashion the principles and rhetorical tools that a young Roman would need to know to perform well in the courts. For our purposes, two aspects of this work are particularly important:

Cicero’s self-presentation, as seen in the introductory remarks defending rhetoric, and the presentation he gives of law (*ius*), statute (*lex*), and justice (*iustitia*) throughout the work.

These aspects will be shown to be in important ways distinctive to Cicero (or his

⁴⁷ The text is that of Wilkins, *Ciceronis De Oratore*.

⁴⁸ Hubbell, *Cicero: De Inventione ; De Optimo Genere Oratorum ; Topica*, pg. vii, likely still the most easily accessible text of the work, speaks dismissively of the *De Inventione* as “hardly more than an elaborate note-book in which he recorded the dictation of his teacher. To this he later added conventional introductions when he decided to publish. It is an immature work, stiff, didactic, and formal, and shows, except in the introduction, no promise of the opulence of style and breadth of thought which were to characterize the rhetorical works of his later years.”

teachers) by contrast with the contemporary *Rhetorica ad Herennium*. Cicero's vision of a constitutional state is dimly visible even here, in these insertions to his earliest and allegedly most derivative and uncreative work.

In the opening to the *De Inventione*, Cicero offers a lengthy defense of rhetoric as a vocation and, thereby, of his choices in studying and employing the art of rhetoric. He begins the work by addressing the very nature of rhetoric: "I have thought deeply and frequently on the question of whether fluency of speech and the intensive study of eloquence has brought about more good or more evil for people and states."⁴⁹ In this, he engages directly and immediately with the feud between the disciplines of rhetoric and philosophy, which had been raging since the time of Plato and the Sophists in Athens.⁵⁰ This is, he asserts, a question worth pondering, because rhetoric has been at least partially responsible for "the troubles of our republic"⁵¹ But at the same time, eloquence (*eloquentia*) has had significant positive effects as well. Through rhetoric, it has founded cities, ended wars, solidified alliances, and so on.⁵² In this long standing debate, Cicero refuses to choose sides. Reason and wisdom may be the gifts of philosophy, but they need rhetoric to be convincing; at the same time, rhetoric needs to be based on philosophy, or it is a useless exercise:

⁴⁹ *De Inventione* 1.1: *Saepe et multum hoc mecum cogitavi, bonine an mali plus attulerit hominibus et civitatibus copia dicendi ac summum eloquentiae studium.* The text used is that of Hubbell *Cicero: De Inventione*.

⁵⁰ For a brief historical overview of the ancient conflict between rhetoric and philosophy, see Kennedy, *The Art of Rhetoric in the Roman World, 300 B.C.-A.D. 300*, pgs 214-225; A very succinct summary can be found in May and Wisse, *Cicero on the Ideal Orator (De Oratore)*, pgs 20-26.

⁵¹ *De Inventione* 1.1: *nostrae rei publicae detrimenta*

⁵² *De Inventione* 1.1: *multas urbes constitutss, plurima bella restincta, firmissamas societates, sanctissimas amicitias intellego cum animi ratione tum facilius eloquentia comparatas.* "Many cities have been founded, many wars put to rest, many partnerships made firm, and many alliances kept intact; I understand that all of these were accomplished through logical reason, but made all the easier by eloquence."

Ac me quidem diu cogitantem ratio ipsa in hanc potissimum sententiam ducit, ut existimem sapientiam sine eloquentia parum prodesse civitatibus, eloquentiam vero sine sapientia nimium obesse plerumque, prodesse nunquam. (*De Inventione* 1.1)

And having pondered this topic for a long time, I am led by reason itself irresistably to this conclusion: that wisdom without eloquence offers states little profit, but eloquence without wisdom is at best unhelpful to states and at its worst very costly.

Cicero as author steps clearly into the picture, in a sense, as someone who has thought deeply (*diu cogitantem*) about the potential harm of rhetoric. But he refuses to disavow rhetoric. Instead, he will purify it by applying rhetoric solely to the truths of philosophy and the needs (1.1 *commoda*) of his country. This programmatic statement that rhetoric should serve the needs of reason and the ‘true’ interests of the state may seem to us a simple and somewhat obvious justification for learning rhetoric, but it is neither traditional nor conventional.⁵³ In the other surviving rhetorical handbook of the period, the *Rhetorica ad Herennium*, no lengthy philosophical justification is offered. That work justifies itself in a quick utilitarian manner, emphasizing the profit to be gained from the study of rhetoric.⁵⁴ Eloquence is justified as a field of study in the *Ad Herennium* for its profits to the speaker and the speaker alone. For Cicero, by contrast, eloquence, when used correctly and wisely, exists for the advantage of citizens and especially states.

⁵³ As Hubbell, *Cicero: De Inventione ; De Optimo Genere Oratorum ; Topica*, pg. vii holds.. May and Wisse, *Cicero on the Ideal Orator (De Oratore)*, pg. 26, point out this "special nature" of Cicero's attempt to reconcile philosophy and rhetoric, repeatedly virtually unchanged, in the later *De Oratore*.

⁵⁴ There is one quick suggestion of the philosophy behind the rhetoric in the *Ad Herennium*, but it is brief and even then the focus is on the rewards (*fructus*), 1.1: *non enim in se parum fructus habet copia dicendi et commoditas orationis, si recta intellegentia et definita animi moderatione gubernetur*. “For skill and ease in public speaking grants one significant rewards in itself, if it is kept in control by appropriate intelligence and purposeful moderation.” The text is that of Caplan, [*Cicero*] *Ad C. Herennium de Ratione Dicendi*.

Cicero endows eloquence with an important role in the very creation of civilization. Rhetoric becomes, for him, the foundation of both human society and the law. For in the time before law, as he represents it, only force and animal savagery reigned.

Nam fuit quoddam tempus, cum in agris homines passim bestiarum modo vagabantur et sibi victu fero vitam propagabant nec ratione animi quicquam, sed pleraque viribus corporis administrabant, nondum divinae religionis, non humani officii ratio colebatur, nemo nuptias viderat legitimas, non certos quisquam aspexerat liberos, non, ius aequabile quid utilitatis haberet, acceperat. (*De Inventione* 1.2)

For there was once a time, when human beings wandered in the fields just like beasts, and they looked for foods in the wild to sustain them. Nothing was done through mental reasoning, but they accomplished what they needed through physical strength. At that time they did not appreciate the reasons behind divine religion or the duty humans owe each other. No one had looked upon legitimate marriages, nor had any man looked for certain upon children that were his own, nor had anyone come to understand what value a just system of law offered.

The world before eloquence and, by implication, law is one of barbarism. It is characterized by wildness (*bestiarum modo*), irrationality (*ratione animi quicquam*), force (*viribus corporis*), and even the absence of family ties and marriage (*non certos quisquam aspexerat liberos*). The solution to all this violence and uncivilized behavior is rooted in the foundation of a code of laws (*ius aequabile*). But how was this primordial society to change? For Cicero, the answer lies in the cultivation of eloquence and wisdom, the reconciliation of rhetoric and philosophy. Cicero posits a theoretical ‘great man of wisdom’ (*quidam magnus videlicet vir et sapiens, De Inventione* 1.2) who finally convinced humanity to put aside their bestial primacy in favor of rationality, civilization, and, importantly, law:

Profecto nemo nisi gravi ac suavi commotus oratione, cum viribus plurimum posset, ad ius voluisset sine vi descendere, ut inter quos posset excellere, cum iis se pateretur aequari et sua voluntate a iucundissima consuetudine recederet, quae praesertim iam naturae vim optineret propter vetustatem. (*De Inventione* 1.3)

Unless swayed by weighty and persuasive speech, of course no one who was the strongest would have been willing to trust himself to law without violence or to allow himself to be made equal with those whom he could defeat and to willingly let go of his happy and customary supremacy, which had been the way of things for so long that it almost had the force of nature.

Thus this primordial strong-man who once dwelt in the anarchic state of nature, subjecting all to his capricious whim, was persuaded by eloquence to give up his primacy and instead “lower himself” (*descendere*) to law without violence (*ad ius... sine vi*). This was not just a trick by a sophistic rhetorician, but is represented as in the interests of all, for it allowed humanity to find *ius aequabile quid utilitatis haberet* (“what value a just system of law offered”) to all society.

In the *De Inventione*, Cicero gives rhetoric a place of fundamental importance to the creation and maintenance of human society. It becomes the foundation of fairness and justice precisely because it *persuades* the strong to yield to the needs of society in general. Eloquence remains, however, intimately linked with philosophical truth and rational discourse. Joy Connolly has recently emphasized the way in which both Cicero’s *De Inventione* and the *Rhetorica ad Herennium* partake in a rationalizing trend in Republican discourse. They are not, as she points out, simply rehashes of earlier Greek rhetorical theory, but rather, through their insistence on certain shared rules of rational argument, are actually attempts to *alter* previous Republican practices, which had focused on achievement, status, and charisma:

The Latin treatises constrain the expression of authority by insisting that it agree with rules of logical argument and a learnable code of proper style. This is the significance of Hellenistic rhetorical theory for the republic; the modeling of civic performance, the externalization of the internal dialogues that constitute good political judgment. This amounts to a critical intervention in traditional oratorical practices.⁵⁵

Thus she sees this new emphasis on rationality, on reducing politics and political speech to a “learnable code” of rhetoric as a new turn in Roman political thought. The handbooks, in teaching young Romans how to argue properly, carry with them a newly minted ideology. This new republican ideology was the faith that political disputes could and should be resolved by rational argumentation and the idea that the quality of speech was more important than the person of the speaker. Accordingly, the two handbooks are very similar. Much of the advice they give and the lessons they purport to teach are extremely similar, for they are very much in agreement about the rules of argument. But the fact that the two works largely agree on how to argue does not entail that they agree on all matters. Imprinted in both works are a few fundamental premises, important concepts that the works are forced to define on their own authority, such as law (*ius*) and justice (*iustitia*). Such concepts are not, in fact, completely subject to rational argument; they are not rational or logical in nature, but ideological. As we shall see, Cicero’s *De Inventione* and the *Rhetorica ad Herennium* differ rather crucially on their vision of the law (*ius*), its components, and how they are to be weighted. In general, Cicero offers a legitimating evolutionary perspective, while the *Auctor* presents a more practical empiricist view of law.

⁵⁵ Connolly, *The State of Speech*, pg. 67, cf. pgs. 65-76.

The rhetorical treatises of Cicero and the *Auctor* are especially important for a view of Roman law precisely because they attempt to be textbooks rather than speeches. Thus they are able to present their definitions of law free from any of the normal concerns facing the Roman advocate. The two authors are thus free from concerns about whether they will win their cases, how their definition will appear to an audience, or whether a client would approve. In presenting their definitions of the law they are seeking simply to enlighten students with what they perceive to be the true nature of the law. Both conceive of it to be an essential bit of learning for the Roman advocate, but nonetheless differ significantly in what the law really is. Cicero defines *ius* when discussing how one should argue on the ‘legal issue’ (*negotialis*), that is, when the argument centers upon the nature of the civil law itself. Cicero defines the components of law (*ius*) as follows:

Utrisque aut etiam omnibus, si plures ambigent, ius ex quibus rebus constet, considerandum est. Initium ergo eius ab natura ductum videtur; quaedam autem ex utilitatis ratione aut perspicua nobis aut obscura in consuetudinem venisse; post autem adprobata quaedam a consuetudine aut vero utilia visa legibus esse firmata. (*De Inventione* 2.65)

For each side (or every side, if there are more than two) must consider what are the components of the law (*ius*). Accordingly, its origin seems to have been drawn from nature; then certain principles, some clear and some obscure to us, passed into custom because of their usefulness; and later, moreover, those things that were approved by custom or which appeared truly useful were strengthened through the use of statutes.

As this is a handbook for aspiring orators, Cicero’s book gives advice on how to argue either side of such an issue. He advises both sides, those arguing either for or against, to use his definitions of the components of the law, appealing to it as an objective (or at least effective) presentation. Cicero’s definition emphasizes the origin of law in the

principles of nature. And although he later acknowledges that these principles of ‘natural law’ (*naturae ius*) are hardly applicable to the ‘legal issue’ because they are “not implicated in civil law cases” (*neque in hoc civili iure versantur*) and “unfamiliar to most audiences” (*a vulgari intellegentia remotiora sunt*),⁵⁶ he nonetheless demonstrates that this almost philosophical explanation is essential to a proper understanding of law. Thus, for him, the law (*ius*) first arises from nature, then, for reasons either obvious or obscure, is embodied in customary law (*consuetudine*). The final category, statute law (*legibus*) is remarkably constrained compared to modern notions. It is, in Cicero’s understanding composed only of those principles which have undergone this entire evolutionary process, those principles which “were approved by custom or which appeared truly useful.” There is no room for legislative innovation in Cicero’s definition of law, as such principles are not really *created* by statutes, but simple recognized or literally “strengthened” (*firmata*) by being written into statutes. This portrayal of the law (*ius*) as something which is *recognized* rather than *created* is far from singular in Cicero’s *De Inventione*. He associates *ius* fairly directly with the abstract principle of justice (*iustitia*). When he further on comes to define *iustitia*, he repeats, virtually phrase by phrase, his earlier definition of *ius*.⁵⁷ Once again, the legislative process is not

⁵⁶ *De Inventione* 2.67

⁵⁷ *De Inventione* 2.160: *Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem. Eius initium est ab natura profectum; deinde quaedam in consuetudinem ex utilitatis ratione venerunt; postea res et ab natura profectas et ab consuetudine probatas legum metus et religio sanxit.* “Justice is a mindset that grants each man his appropriate due while also defending the greater good of the community. It has its origin in nature; then certain principles came into custom because of their usefulness; and later the fear and binding force of laws sanctioned those principles which have arisen from nature and those which have been approved by custom.”

understood as a creative one, but rather as a discovering and sanctioning of customary behaviors that already exist and themselves arise from the law of nature.⁵⁸

In contrast to Cicero's *De Inventione*, the other rhetorical handbook of the period, the *Rhetorica ad Herennium*, switches the position of customary and statute law offered by Cicero. Where statute law, in Cicero, is a strengthening of custom, in the opinion of the *Auctor*), custom is simply another form of statute. Thus the *auctor* defines *ius* at the same moment, when covering the 'legal issue' (he uses the term *absoluta*) as simply a list of its components:

[Ius] constat igitur ex his partibus: natura, lege, consuetudine, iudicato, aequo et bono, pacto (*Rhetorica Ad Herennium* 2.19)

The law consists then of these components: nature, statute, custom, precedent, equity, and contract.

For the *Auctor* of the *Rhetorica ad Herennium*, law (*ius*) is made up of a number of components. How precisely these components fit together or rank is left unclear. With the empirical list of components he offers, how would one decide if the principles of contract and statute, for instance, were to come into conflict? Or the principles of equity and custom? He is, after all, well aware of two similar arguments: first, that two written statutes may be in conflict with one another and, second, that statutes, as written, may be, or at least may be argued to be, ambiguous. In point of fact, he gives advice on how to deal with both these difficulties.⁵⁹ These possibilities are obliquely acknowledged in his

⁵⁸ Gildehard, *Creative Eloquence*, pg. 191, has also identified this difference between the conception of law in Cicero and the *Auctor*, remarking that Cicero "operates on a significantly higher level of conceptual sophistication." He too uses the term "evolve" to describe this process, but thinks of it in purely chronological terms, i.e. natural law existed before customary law, and so on. This chronological emphasis ignores the important role that each stage of law (natural, customary, statutory) plays in legitimizing the next stage.

⁵⁹ On contradictory *leges*, see 2.15; on ambiguous laws 2.16.

discussion of disputes between the spirit (*voluntas scriptoris*) and the letter (*scriptum*) of the law.⁶⁰ But the discrepancy between the spirit and the letter of the law is, for the author of the *Ad Herennium*, only apparent, *dissidere videbitur*. He advises the orator supporting the spirit of the law to point out that it conflicts with statute, custom, or natural law, but only, and this is critical, when one willfully misunderstands the intent of the author:

Ab sententia sic dicemus: primum laudabimus scriptoris commoditatem atque breviter, quod tantum scripserit quod necesse fuerit; illud quod sine scripto intellegi potuerit non necessario scribendum putarit. Deinde dicemus calumniatoris esse officium verba et litteras sequi, neglegere voluntatem. Deinde id quod scriptum sit aut non posse fieri aut non lege, non more, non natura, non aequo et bono posse fieri, quae omnia noluisse scriptorem quam rectissime fieri nemo dicet; at ea quae a nobis facta sint iustissime facta. (Ad Herennium 2.14)

And in favor of the intent, we will argue like this: first we will praise the appropriate brevity of the [text's] framer, who wrote only what was necessary, that he did not deem it necessary to write down whatever could be understood without writing. Secondly, we will say that only a shyster would say we should follow the letters of a text, and ignore its intent. Thirdly, we will say that what was written down is either impossible, or cannot be done without violating statute, custom, nature, or equity, since no one will say that [law's] author had any intention of violating any of these; but that whatever we have done was, in fact, completely just.

The foundational argument here is that there is some universal consensus on the law.

After all “everyone will agree” (*nemo dicet*) that the drafter of a law would have dared to countermand statute, custom, nature, or equity. It is, instead, an argument that the author obviously wanted the law to be in harmony with the various components of *ius*. No allowance is made for the possibility of an unjust statute. Nor does it offer any advice for what to do when a law's clearly expressed intent is contrary to the notion of *ius*. It is not

⁶⁰ Or other legal documents, for instance, wills. 2.13: *cum voluntas scriptoris cum scripto dissidere videbitur*. “When the intent of the writer appears to differ from what he wrote.”

the law the *Auctor* advises one to challenge, but merely the interpretation (*sententia*) of one's opponent. The passage continues:

Deinde contrariam sententiam aut nullam esse aut stultam aut iniustam aut non posse fieri aut non constare cum superioribus et inferioribus sententiis aut cum iure communi aut cum aliis legibus communibus aut cum rebus iudicatis dissentire. (Ad Herennium 2.14)

Then we will say that our opponent's interpretation is invalid, foolish, or unjust, or that it is impossible or that it is inconsistent with earlier or later decisions, the public law [*ius*], or with other statutes (*lex*) or previous legal precedent.

So this defense of the spirit of the law is based upon a crucial assumption – that the text of any particular law or legal document, properly understood, is indeed consistent with notions of justice, natural law, or precedent. It is only when they are cleverly misunderstood, i.e. by one's dishonest opponents, for instance, that such laws *appear* to contradict with each other or with the other components of *ius*.

There is as well an especially significant difference in how the two authors, Cicero and the unknown *Auctor*, treat the categories of customary and statutory law. For the author of the *Ad Herennium*, customary law was, in a sense, a derivative or stand-in of statutory law. It was simply “a practice which, without need of a statute, has acquired statutory force by common usage.”⁶¹ It is simply statutory law without a statute. It possesses the same legal force, although perhaps more difficult to identify and define. Cicero, by contrast, makes customary law a much larger and more powerful category. His definition endows custom with a powerful normative force:

Consuetudine autem ius esse putatur id, quod voluntate omnium sine lege vetustas comprobavit. In ea autem quaedam sunt iura ipsa iam certa propter vetustatem. Quo in genere et alia sunt multa et eorum multo maxima pars, quae praetores

⁶¹ Ad Herennium 2.19: *Consuetudine ius est id quod sine lege aequae ac si legitimum sit usitatum est.*

edicere consuerunt. Quaedam autem genera iuris iam certa consuetudine facta sunt; quod genus pactum, par, iudicatum. (*De Inventione* 2.67)

Customary law is considered to be that which old age and the will of all have approved without the need of statute. In this there are certain *iura* (rights) which have become absolutely fixed by the lapse of time. There are many other rights in this class, including the largest part of those rights which are embodied in the Praetors' edicts. Certain types of law (*ius*) have become fixed by unchanging custom; among these are contract, equity, and precedent.

What was for the *Ad Herennium* a mere lack or an absence of statute is, for Cicero, the more authoritative and powerful source of law. This customary law is authoritative not just because of its expedience (*ex utilitatis ratione* 2.65) or its age (*propter venustatem*), but also because it possesses, unlike statute, the sanction of universal consent (*voluntate omnium*). Despite its position in the middle of the triad of nature, custom, statute, custom becomes the most robust and useful category of law. Natural law remains important for Cicero; it is an undeniable absolute.⁶² It is, however, not usually germane to disputes of civil law.⁶³ By contrast, Cicero's treatment of statute within the *De Inventione* is so brief as to be almost dismissive:

Iam iura legitima ex legibus cognosci oportebit. (*De Inventione* 2.68)⁶⁴

Rights granted by statute will have to be learned from (reading) the statutes.

⁶² *De Inventione* 2.65: *ac naturae quidem ius esse, quod nobis non opinio, sed quaedam innata vis adferat.* "And the law of nature is not given to us by opinion, but by a certain inborn instinct.

⁶³ *De Inventione* 2.66: *Ac naturae quidem iura mihi ipsa quaeruntur ad hanc controversiam, quod neque in hoc civili iure versantur et a vulgari intellegentia remotiora sunt.* "The laws of nature are not often referred to in this type of argument, because they are not treated in the civil law and are usually outside the understanding of common people."

⁶⁴ Cicero's other mention of the topic in the *De Inventione* is similar in demoting statute law, focusing only upon its procedural qualities. *De Inventione* 2.162: *Lege ius est, quod in eo scripto, quod populo expositum est, ut observet, continetur.* "Statute law is that which is contained in a document which has been published for the approval of the People [in their legislative Assemblies]." Thus statutory law, which is based only in the will of the Legislative Assemblies, lacks a great deal of the implicit legitimacy that Cicero grants to natural and customary law.

So, in Cicero's conception, customary law, including the Praetor's Edict, is not simply a stopgap measure for places where statute does not exist. It becomes instead a more expansive and almost more legitimate source of law. Alone of Cicero's three types of law it is easily understood, unchanging, and supported by universal consensus.

Discovering the Constitution: Law, Rhetoric, and Politics

This study proposes to examine the intertwined fields of Roman law, rhetoric, and politics as displayed in select early speeches of Cicero. It breaks new ground in seeking to examine not what *the* Roman constitution objectively *was* – even written constitutions must allow a certain degree of evolutionary change – but rather how a broadly understood discourse of legitimacy and constitutionality functions within Cicero's rhetoric. It understands constitutions not simply as objective, static constructs that could be appealed to in order to legitimize oneself and one's actions, but also subjective arguments over the nature and limitations of a legitimate government. This crucial difference has been hidden by the paradox of constitutionality, protected as it is by a polite fiction. For while a constitution affects to be a pre-existing, inalterable, and everlasting legal doctrine handed down by previous generations, it is nonetheless continually being shaped and changed (at times slowly, at others radically) by the competing needs and desires of the present. A constitution, understood in this sense, is not just the plan or composition of a government, but rather a set of rules and norms that must be *argued* to be beyond the reach of everyday politics. It is thus a conception that is at once fragile and fixed, continually contested and yet each rhetorical and political victory is no radical revolution,

but always, in the eyes of its proponents at least, more an affirmation of the (pre-)existing order.

The vision of a Roman constitution that Cicero created in his rhetoric has proven to be one of the most lasting and influential visions, both in Roman history and in the later Western canon of political thought. His vision was not, however, alone. The Roman Republic was a mass of competing visions, of competing sources of authority, and politicians of various stripes hoping to gain the support of the electorate and their peers. It seems clear many others besides him had their own visions as well of the *res publica*, founded to a greater or lesser extent in aristocratic privilege, religious authority, military success, or popular sanction. The political opponents that Cicero faced in his career had their own legitimating conceptions, their own definitions of the contested *res publica*. As we shall see, the opponents of Cicero's rise, men such as Sulla, Chrysogonus, Verres, Hortensius, and Piso, rested the *res publica* on rival foundations. At times, they won the day, but Cicero's unique conception, preserved in his speeches, has outlasted them all. For he conceived of the Roman state, of its lawful limits and legitimate structure, of its *constitution*, in a way fundamentally different from his colleagues and contemporaries. This doctrine is at once an important advance in the conceptual idea of the state and its legitimacy, as well as a consciously pursued political strategy. Our examination begins with this constitution and constitutional doctrine at its virtual nadir, the period following the devastating and absolute victory of Lucius Cornelius Sulla. And yet even at this critical period, when all things were in the hands of

one man, Cicero nonetheless put himself and his constitutional vision on a clear collision course with the Sullan constitution.

CHAPTER TWO

Legitimacy and the *Res Publica Sulla Vivo*:

Cicero's *Pro Roscio Amerino*

Cicero first made his name known to the Roman *populus* as an advocate in the courts, and no case provided a greater boost to his career than his defense of the young Sextus Roscius of Ameria. The case provided the orator with a fantastic opportunity to promote himself not only as an advocate,⁶⁵ but also as an aspiring politician in the eyes of the Roman people. In this public oration, however, Cicero has a greater ability to define himself than he did in his early education and youthful publication of the *De Inventione*, for the nature of the occasion forced him to take on several issues of great political importance: the Sullan re-establishment of the courts, the proscriptions, and even the legitimacy of the Sullan regime as a whole. This case also allowed him to establish a public *persona* as an especially brave advocate, one willing to come to the defense of a helpless victim. But the case also aided his career by granting him the chance to take a stand against the interests of the powerful ruling faction of Rome, that surrounding the victorious general L. Cornelius Sulla.⁶⁶ In this, however, it was necessary to speak very cautiously. Sulla's forces were then in the ascendant, and his rule over the Roman state indisputable. Nevertheless, Cicero's published defense of Sextus Roscius takes a stand upon several great political issues, including the place of the Roman nobility and

⁶⁵ So Cicero recognized much later in his *Brutus* 312. *itaque prima causa publica pro Sex. Roscio dicta tantum commendationis habuit, ut non ulla esset quae non digna nostro patrocinio videretur.* "And so my first public case, which was said for Sextus Roscius, gained so much admiration that our skill as advocate was deemed equal to any other case." The text of the *Brutus* comes from Augustus S. Wilkins, ed., *M. Tullii Ciceronis Rhetorica* (New York: Oxford University Press, 1922).

⁶⁶ Cicero would later reflect on the advantage of representing the helpless and oppressed against the powerful, and cite the case of Roscius as one clear example from his own career. *De Officiis* 2.51, Michael Winterbottom, ed., *De Officiis*.

Equestrian Order, the recent civil war, and the infamous proscriptions that Sulla had unleashed against his political enemies. At a time when the memory of civil war and the Sullan executions were still fresh, Cicero casts himself as a loyalist to the regime, but of a specific kind. He is careful to fashion himself as a ‘true’ loyalist, rather than a petty partisan. He pronounces himself loyal to Sulla’s re-founded republic and to the *causa nobilitatis* rather than Sulla himself (or any other political figure). By appealing to an ideal and legitimate *res publica* rather than Sulla’s real state, Cicero’s rhetoric of loyalty, however, opens up the possibility of an immanent critique of the Sullan regime. The vision of legitimacy and a legitimate *res publica* allows him to thread the needle of loyalty and disloyalty. It allows Cicero to present himself simultaneously as a loyal Sullan and yet also appeal to the enemies of the Sullan settlement as a critic of its worst abuses. And, furthermore, this appeal to the legitimate *res publica* has the practical effect of cautioning Sulla and his followers that there are both legal and pragmatic reasons to stay within the boundaries of legitimacy.

The Sullan Settlement and the Rhetoric of Loyalty

In 82 BCE, the political landscape of the Roman world was forever changed by the return to Italy of the ‘rogue’ general Lucius Cornelius Sulla from his victory over Mithridates of Pontus.⁶⁷ It was a surprisingly swift victory over the forces of the government at Rome, but one which would have great consequences. After his entry into the city, Sulla was appointed by his followers to the office of Dictator. In itself, this was

⁶⁷ A general overview of the period can be found in Crook, Lintott, and Rawson, *The Cambridge Ancient History*. Vol. 9, pgs. 165-207. Views on Sulla and his legacy have been somewhat controversial. Most assessments are not favorable. Keaveney, *Sulla: The Last Republican* attempted to rehabilitate the dictator's reputation. Flower, *Roman Republics*, pgs. 117-134 has recently highlighted the importance of the differences between Sulla's reformed republic and the republic as it had existed previously.

a significant innovation in that it revived a constitutional office which had not been used since 202 BCE.⁶⁸ Adding to the innovative nature of this office, however, was its title: *legibus scribendis et rei publicae constituendae causa*, thus Sulla was appointed ‘Dictator for writing laws and establishing the republic’. This office and its title, while giving Sulla a set of specific legal powers, was also a public statement of Sulla’s supposed goals. In itself, the descriptor was a carefully crafted bit of political propaganda justifying Sulla’s appointment to what was, at the time, a still legal office that had nonetheless fallen into disuse. He was empowered to rewrite the statutes of Rome (and did so extensively),⁶⁹ but publicly proclaimed the intention of all this legislative activity: the re-establishment of the Roman *res publica* on a firm foundation.⁷⁰

The great issue of the day, however, was what form this *res publica* would take. In general, Sulla’s reforms had a strikingly aristocratic cast. Some of the particulars of this restructuring are not clear due to the paucity of reliable evidence from this period, but three major innovations seem clear. The Sullan legislation restored Senators to their position on juries,⁷¹ abolished the rights of Tribunes of the Plebs to propose legislation, and similarly debarred anyone serving as Tribune from pursuing the other offices of the

⁶⁸ TRS Broughton, *The Magistrates of the Roman Republic*. The last dictator appointed before Sulla was a Gaius Servilius Geminus in 202 BCE, appointed Dictator *comitiorum habendorum causa* (“in order to hold the elections”). Thus the office of dictator had been in abeyance for 120 years.

⁶⁹ As Williamson notes, the two dictators *legibus scribendis*, Sulla and Julius Caesar are responsible for proposing and passing 33 laws (some 14% of the laws known to be passed in the period from 91-44 BCE). Callie Williamson, *The Laws of the Roman People Public Law in the Expansion and Decline of the Roman Republic*, pg. 17. This is even more impressive considering the short time period that both men occupied this office (82-79 BCE and 46-44 BCE respectively).

⁷⁰ Flower, *Roman Republics*, pg. 117-134. provides a brief outline of the significant ways in which Sulla altered Rome’s governmental institutions and persuasively argues that Sulla in fact attempted to build a reputation as a Roman lawgiver.

⁷¹ In the preceding period the jury composition in the Republic went back and forth between equestrians and senators on several occasions. Sulla’s reform was a definite attempt to turn the clock back, removing the equestrians from the juries seemingly permanently.

Roman Republic. All in all, this had the effect of altering Rome's legal institutions to give more legislative authority (and initiative) to the Senate and its officers, the Consuls, and while removing it from the 'popular' (in the sense of responding to the Roman *populus*) legislative assemblies and their officers, the Tribunes of the Plebs. The new regime certainly appealed to principle to justify its position, by casting itself as the defender of the traditional 'nobility' (*causa nobilitatis*), but nevertheless took pains to avoid entirely alienating either the Italian Allies or the lower classes of Rome.⁷² At the same time, however, the regime attempted to shore up support through violence and threat as well as legitimation. It instituted the infamous proscriptions, by which the Sullan regime hired out the murder of its opponents and, further, provided for the confiscation of their property and the disenfranchisement of their heirs. In this way, it seems, the regime attempted to provide for its continued rule in two ways, first by asserting its legitimacy on traditional Roman grounds of nobility and legality, and second, by removing potential opponents from the political scene by violence.

Cicero's defense of Sextus Roscius, the *Pro Roscio Amerino*, was delivered in 80 BCE, in the direct aftermath of the new Sullan settlement. Sulla himself was no longer dictator, having relinquished that office at the end of 81 BCE. He nonetheless occupied the office of consul in 80, and, as depicted in the speech, retained an outsized influence over the political destiny of the Roman Republic. In approaching Cicero's speech, it is

⁷² Frier, "Sulla's Propaganda" illustrates the ways, both in writing, coinage, and monuments that Sulla attempted to shape his public perception among fellow Romans, especially the nobility and the Italian Allies and, in general, the success of this method after the surprising collapse of the Cinna regime. Badian, "Waiting for Sulla" has pointed out how the source tradition, generally hostile to Cinna, has made it perhaps too easy to see Cinna's regime as a *dominatio* and thus Sulla's victory as a justified restoration. This was, he rightly points out, an extremely contested question at the time.

important to place it within the context of the Sullan settlement. It was delivered at a time when the legitimacy of this new Sullan dispensation was highly contested, even if most open criticism of the new regime had been decidedly muted by the proscriptions. One of Cicero's earliest surviving speeches, the *Pro Roscio Amerino*, provides an extraordinarily valuable insight into this world, because the facts of the case he undertook forced him to deal openly with the infamous proscriptions.

The facts of the case, as presented in Cicero's defense, are somewhat complicated. A certain Sextus Roscius (the elder) was found murdered in Rome in 81 BCE. Under normal circumstances, his son, Sextus Roscius (the younger) stood to inherit his valuable farm properties located along the Tiber River outside of Rome. Nevertheless, the elder Roscius' name was subsequently found to be on the list of those proscribed by the Sullan regime. For this reason the property of the elder Roscius was confiscated by the Roman state and sold at a public auction to Magnus, Capito, and a freedman of Sulla named Cornelius Chysogonus while the younger Roscius was disenfranchised. The younger Roscius was thus evicted from the property, disinherited, and forced to live at the house of his father's patron and friend, the noblewoman Caecilia Metella. At the instigation of Magnus and Capito, the younger Roscius was additionally charged with the murder of his father, parricide, and made to answer the charge before the newly established Roman murder court, the *quaestio de sicariis et veneficiis*.⁷³ Accordingly, Roscius the younger now faced an even harsher punishment than disenfranchisement and disinheritance, as the punishment for parricide was execution.

⁷³ Erich S. Gruen, *Roman Politics and the Criminal Courts, 149-78 B.C.*, pgs. 258-264 gives an overview of the history of the murder court and the changes made by Sulla .

Thus any defense of Roscius on the charge of parricide could in no way avoid directly addressing the distasteful and controversial Sullan proscriptions.

Yet, there is something very surprising about Cicero's approach to this trial. As Zetzel has noted, Cicero strikingly begins his defense not with his client or his case, but rather with himself.⁷⁴ With the memory of the punishing proscriptions still fresh in the minds of his audience, Cicero nevertheless adopts a stance of independence from the Sullan regime and its most fervent supporters. Throughout the defense, he hews carefully to a strategy of constructive (and loyal) criticism, that is, criticism whose purpose, he states, is to aid the regime in gaining, and holding onto, the loyalty of the Roman people. He constructs a rhetoric of loyalty which is simultaneously a test and a challenge to the Sullan regime. The Sullan regime, he argues, cannot afford to take the loyalty of the Roman people for granted, but instead must earn it through its actions. It is a speech whose central concern is to distinguish between the concepts of loyalty, on the one hand, and legitimacy, on the other. Cicero frames his defense on an important political question: Will we govern Rome as victorious Sullans or as legitimate Republicans? He asserts that jury's decision in Roscius' case will be a crucial indicator of the position of the regime to the Roman people.

Thus the speech, as it survives, has two goals. First, it has the obvious goal of gaining the acquittal of Sextus Roscius. Secondly, it has the personal goal of winning support and gratitude for Cicero the advocate. As a prospective candidate for Roman political office, Cicero uses this opportunity to publicly state and promote his political positions. And so, although he shies away from directly criticizing Sulla or impugning

⁷⁴ Zetzel, "A Contract on America," pg. 426.

the rightness of Sulla's cause in the recent civil strife, Cicero still shows himself willing to criticize the excesses of Sulla's partisans and hangers-on. Throughout this private defense of Roscius on a charge of murder, Cicero puts, in a limited sense, the new Sullan regime on trial by promoting a doctrine of "conditional legitimacy." That is, he asserts repeatedly that the Sullan regime, its judges, senators, and other magistrates deserve the deference and allegiance of the Roman People, but *if* and *only if* it lives up to its ideological promises to "restore the *res publica*." Should it fail to do so, Cicero holds up the specter of further resistance (and even hints at a revolution) from the Roman People and the powerful Equestrian class.

This position was a bold choice, to say the least, but one with significant potential payoffs for Cicero as an advocate and as a politician. Firstly, it would aid Cicero in depriving the 'real villains' of the case (the forces behind the prosecution: Capito, Magnus, and Sulla's freedman Chrysogonus) from the protection of the regime. Because his defense deliberately refuses to attack the regime itself, it cannot be attacked or disregarded as disloyal. But the rhetoric of loyalty that Cicero creates also allows him an opportunity to present himself publicly as that rare political quantity, a politician more concerned with doing what is right than what is expedient or expected. Thus this forensic debut has the significant political purpose of defining Cicero as someone who is loyal to Sulla and his new republic but also has the strength of character to publicly oppose *any* potential abuses.⁷⁵ He uses the case itself and the notoriety surrounding the event, the

⁷⁵ Ibid, pg. 442, seems to imply Cicero is disassociating himself even further, presenting himself as a standard bearer of legality and *bona fides* who is presenting himself as a third option between the Marians and Sullans: "Cicero comes forward not just as the advocate of Roscius, but as the advocate of fairness, honor, and contracts. Neither Marius nor Sulla had protected those values; perhaps someone whose main

first murder case presented before the new standing courts established by Sulla, the *quaestiones perpetuae*, to help him establish a reputation for justice and bravery in the face of power. This strategy begins with how he characterizes himself and the situation of the trial itself in his exordium.

Fashioning the Orator, Fashioning the World

In the exordium of the *Pro Roscio Amerino*, Cicero embarks on a prolonged characterization of the trial at hand, the atmosphere around the court itself, and of his own personality and character. His strategy is to defend his defense of the younger Roscius, to excuse himself in his role as advocate for the things that he must say in order to defend his client. In doing so, Cicero indirectly criticizes the excesses of the Sullan regime without, he hopes, causing offense to the faction currently in power. The critical eye that he casts on the regime's errors is not muted. The critique offered in the extant speech is, in fact, so bold that at least one scholar has been bothered by it.⁷⁶ This critique, however, is not limited to explicit mentions of Sulla, his faction, or the infamous proscriptions. A significant part of Cicero's criticism is contained in his portrayal of the Sullan *'res publica'* that surrounds this case. Cicero describes both his role and the circumstances that have led up to the trial in a way that would dangerously undermine the legitimacy of Sulla's government. In the speech we have, he consistently holds up for the

attachment was to Scaevola's *societas vitae* would be able to do so." He certainly differentiates himself from Sulla and especially the proscriptions, but, as I argue, he attempts to be a reformer within the Sullan system, rather than an outsider or revolutionary.

⁷⁶ Berry, "The Publication of Cicero's 'Pro Roscio Amerino.'" concluded that, because of this criticism of Sulla, the speech as written was too dangerous. He argues that it was altered must have been published later due, after Sulla's death. Contrast that with the views of Kinsey, "Cicero's Speech for Roscius of Ameria" who finds no criticism of Sulla in the speech and Buchheit, "Ciceros Kritik an Sulla in der Rede für Roscius aus Ameria" who identifies clear criticisms of Sulla, but assumes Cicero nevertheless delivered the speech we have.

inspection of the reader/listener a world of fearful men and simmering conflict.⁷⁷

Cicero's defense, however, must walk a very narrow line – for, as he presents it, he does not wish to re-ignite this conflict, but rather to lay out rules to avoid conflict. This is throughout an immanent critique, the advice of a loyal insider, ostensibly designed to appeal the regime by strengthening its legitimacy. But, at the same time, it also proposes a policy of making the new Sullan dispensation, in certain vital ways, acceptable to its supporters and even its foes by seeking a middle-ground: legitimacy. His defense, as he presents it, hopes not to undermine the legitimacy of Sulla and his party, but rather to change the *loci* of its legitimacy – that is, to (re-)found the state in justice, rather than violence, in open and public trials, rather than secret conspiracies and state-sanctioned murder.

On the surface, Cicero's speech opens with a characterization of his own role as advocate. He repeatedly asserts that he intends his defense to remain scrupulously *nonpolitical*. In his introduction, he deftly characterizes both himself and the case at hand as innocent of any latent political motive. Instead, he paints himself as a young and inoffensive speaker, who has stepped forward to make sure that the young Sextus Roscius

⁷⁷ Berry, "The Publication of Cicero's 'Pro Roscio Amerino,'" as mentioned above, believes the critical passages were too inflammatory to have been delivered while Sulla was alive. In my view, however, it is difficult without external evidence to distinguish between statements said at the trial and those added for publication. In this case, I simply take the text of the *Pro Roscio* as it exists, noting that it may well have been different from its orally delivered version, but that the written version shows, at the least, how the orator wanted the speech to be remembered, and that it was similar enough to the actual for contemporary readers to recognize as the same speech. Thus I see these indications of possible hostility to Sulla or criticism of him not, like Berry, as signs that it was only published after Sulla's death, but as a sign of Cicero wanted the speech to be remembered as critical of the regime. It is the orator's act of self-fashioning (or even retroactively re-fashioning) his reputation and the memory of these event that is important in examining Cicero's political presentation.

is not abandoned in his time of need.⁷⁸ Other, wiser and more experienced advocates, he notes, have already declined to take this dangerous case. Cicero, in fact, begins his defense of Roscius by explaining why they have felt it necessary to refuse:

Credo ego vos, iudices, mirari, quid sit, quod, cum tot summi oratores hominesque nobilissimi sedeant, ego potissimum surrexerim, is, qui neque aetate neque ingenio neque auctoritate sim cum his, qui sedeant, comparandus. Omnes hi, quos videtis adesse in hac causa, iniuriam novo scelere conflatam putant oportere defendi, defendere ipsi propter iniquitatem temporum non audent. Ita fit, ut adsint propterea, quod officium sequuntur, taceant autem idcirco, quia periculum vitant.⁷⁹ (*Pro Roscio Amerino* 1)

I suppose that you all, jurymen, are wondering why it is that I have stood up when so many extremely skillful orators and noble men remain seated, since I cannot be compared with the men who are seated, neither in age, nor talent, nor influence. All these men, whom you see present at this case, believe that an injustice, one kindled by a new type of crime, ought to be defended against, though they do not dare to defend him personally because of the injustice of our times. That is why they are here; they are doing their duty, but they remain silent, because they are afraid of the danger.

Cicero co-opts the very presence of these more experienced or eminent advocates, whose presence at the trial becomes a sign, not simply of interest in the case, but of tacit support. Cicero does not wish to give offense if he claimed to be the best orator or the greatest advocate. At this point in his career, of course, he is obviously neither. As he tells it, these better men, more noble or more experienced, would willingly defend Sextus, were it not for the dangerous political situation that surrounds the case. In this short opening, Cicero begins to construct for his listeners/readers, simultaneously, complementary visions of himself and the world of this trial. He is only given the chance to be Roscius' advocate because of the characteristics of the rhetorical world he constructs. He begins

⁷⁸ May, *Trials of Character*, pg. 21-22 has outlined how Cicero employs this inoffensive self-characterization to turn his potential weakness (inexperience) into a positive (freedom to speak and frankness).

⁷⁹ The Latin text of the speech is that of Clark, *M. Tulli Ciceronis Orationes*.

boldly, by characterizing the situation surrounding the trial as the “*iniquitatem temporum*,” that is, literally, the “injustice of our times.”⁸⁰ This *iniquitas*, in his treatment, is both palpable and intangible. It is palpable, in that it has already served to scare away any other potential advocates. But it is also intangible because Cicero’s brief treatment leaves it so intentionally vague. Is it the proscriptions? The trial itself? The ambiguity of this mention invites the listeners to supply their own answer, and the one that suits them best.

This fear that has deterred all other potential advocates is fleshed out further in Cicero’s subsequent treatment. This vague fear has a greater affect on those of higher stature in the republic, particularly those noble and experienced orators seated around the tribunal.

Quia, si qui istorum dixisset, quos videtis adesse, in quibus summa auctoritas est atque amplitudo, si verbum de re publica fecisset, id, quod in hac causa fieri necesse est, multo plura dixisse, quam dixisset, putaretur. (*Pro Roscio Amerino* 2)

Since, if any of these men had spoken, the men whom you see here and who have the greatest influence and dignity, if they had said one word about politics (*de re publica*), something which he would have to do in this case, then he would have been thought to have said more than he really did.

The fear, then, that has forced away other advocates is the fear of saying something ‘political’ (*de re publica*) in Roscius’ defense. Cicero is continuing his strategy of deliberate vagueness. He has not said a single word as yet about the charge of parricide, the evidence, or the prosecution’s speech, but instead chooses to tantalize the audience

⁸⁰ Buchheit, “Ciceros Kritik an Sulla in der Rede für Roscius aus Ameria” believes this passage, among others, represents a “bitter irony” (*herbe Ironie*) on Cicero’s part. I believe Cicero is speaking truthfully. He simply chooses to emphasize a plausible fear in the minds of his listeners or readers as part of a deliberate characterization of the Sullan world. Sulla’s reaction to the verdict was not predictable and could easily have been devastating.

with a mystery: what is so dangerous and potentially subversive about this trial? The mystery is even further heightened if we consider briefly the atmosphere after the prosecution's speech. For, if we can believe Cicero's report, the prosecutor, Erucius, centered his accusation on Roscius' character. Erucius argued that Roscius murdered his father because their relationship was deteriorating (32), that Roscius *pater* planned to disinherit his son (52), and that many other murders were committed in that chaotic time (93).⁸¹ Erucius's speech, again, if we believe Cicero, has not touched on politics at all. No one, it appears, expected the defense to head in this direction. Cicero even mockingly describes Erucius' reaction to these introductory remarks, and especially to his first mention of the main conspirator and an influential freedman of Sulla, Cornelius

Chrysogonus:

Respirare visus est quod non alius potius diceret. Coepi dicere. Usque eo animadverti, iudices, eum iocari atque alias res agere ante quam Chrysogonum nominavi; quem simul atque attigi, statim homo se erexit, mirari visus est. Intellexi quid eum pepugisset. Iterum ac tertio nominavi. (*Pro Roscio Amerino* 59)

[Erucius] seemed to breathe a sigh of relief that only I was speaking against him. I began to speak. I noticed at that point, judges, that he was joking around and doing other little things right up until I named Chrysogonus. As soon as I mentioned that name, the man went rigid, he seemed to be flabbergasted. I understood what had pricked him. So I named him a second and a third time.

Then commences a fever of activity, as messengers begin running back and forth bearing messages of warning for Chrysogonus. The surprise and perhaps outrage put onto Erucius' face gives further credence to this fear;⁸² for in his telling neither Erucius nor

⁸¹ Ayers, *The Speeches of Cicero's Opponents*.

⁸² So May, *Trials of Character* pg. 25: "This vignette, drawn so skillfully, casts a convincing light upon Cicero's version of the facts, corroborates his portrayal of Erucius and the powerful man behind the scene, and underscores his own dauntless courage.

Chrysogonus had even prepared for this eventuality, so confident were they that no one would dare to expose this mercenary conspiracy. They felt themselves so protected by their connection to Sulla, by the fear everyone had of challenging him, and by the hopelessness of Roscius' defense.

For the speech, this becomes a central problem – how can one defend Sextus Roscius without accidentally causing offense or publicly opposing the Sullan regime? Cicero's answer to this conundrum is pitch perfect. At once, it allows him to characterize himself positively, as the brave advocate, and the world around him, a world of fear, looming injustice, and potential violence.

Ego autem si omnia, quae dicenda sunt, libere dixerō, nequaquam tamen similiter oratio mea exire atque in volgus emanare poterit. Deinde quod ceterorum neque dictum obscurum potest esse propter nobilitatem et amplitudinem neque temere dicto concedi propter aetatem et prudentiam. Ego si quid liberius dixerō, vel occultum esse propterea, quod nondum ad rem publicam accessi, vel ignosci adolescentiae meae poterit. tametsi non modo ignoscendi ratio verum etiam cognoscendi consuetudo iam de civitate sublata est. (*Pro Roscio Amerino* 3)

But if I say freely all the things which must be said, my speech could never go out and gain traction among the people in the same manner. Then, because anything said by these others cannot be hidden, because they are great and noble, and cannot be excused for being spoken carelessly, because of their age and prudence; but if I say anything with too much freedom (*liberius*), it may either be altogether concealed, because I have not yet been active in public affairs (*ad rem publicam*), or it may be pardoned on account of my youth. Although not only the reason one shows mercy, but even the custom of legal examination have already been destroyed in our state.

Cicero is only able to take the case himself, because he is 'small-fry' next to these important and able men. He avers that a competent defense cannot and should not avoid the political ramifications of defending Sextus Roscius.⁸³ A good defense of Roscius would necessarily have to touch on one of the most divisive and contentious political

⁸³ Vasaly 2002 pg 80-82.

issues of the day: the Sullan proscriptions. Other advocates could not do the case justice on account of a vague and unspecified fear of “saying more than they really had said.” But Cicero claims a special dispensation on account of his age and inexperience to speak truthfully on any topic and even perhaps “with too much freedom (*liberius*).” Someone or something, it is deliberately left vague, is putting a limit upon this freedom to speak boldly. His characterization of himself and the world of the trial hints that an advocate (or a jury) would be right to be intimidated and reticent. The challenge of the speech, then, is to persuade the jury, like himself, to rise above their fear and give the ‘correct’ verdict.

His speech is thus not aimed at a neutral or impartial jury, but one that is both prejudiced towards Sulla and mindful of the recent proscriptions. He creates a vivid false dichotomy for his listeners to choose between, and one that favors him: either side with the prosecutors and injustice, or with Cicero and courageously risk offending the regime. A more influential advocate could have chosen to deliver the very same arguments. Such an advocate, Cicero argues, would have run significantly greater risks; for the very words, spoken by an established politician, would be taken as a clear political statement.⁸⁴ But Cicero chooses to present himself quite differently. He is a safe vessel for these necessary opinions. Even if he should stray into inappropriate or subversive opinions, it can be forgiven on account of his youth. Even his lack of standing serves as a

⁸⁴ For instance, two years after the speech, the consul of 78, Aemilius Lepidus, took several measures to ameliorate the effect of the proscriptions and rescind some of Sulla’s more hated reforms. He was eventually branded an enemy by his *Sullanus* colleague Lutatius Catulus and, in the end, became a rebel. See Hayne, “M. Lepidus (Cos. 78): A Re-Appraisal.” Many of the positions Lepidus advocated, such as restoring the Tribune’s right to legislate, recalling Sullan exiles, and re-enfranchising the people of Etruria, were later shared by Cicero in safer times.

guarantee. His opinions will, for that reason, fail to inflame the Roman populace (*nequaquam tamen similiter oratio mea exire atque in volgus emanare poterit*). He begins his speech by acknowledging these potential threats of speaking against the regime, but, importantly, he carefully casts them all as counterfactual *in his case*. These risks are potential, but only in the hands of an influential and politically-connected advocate. In the hands of this young and inoffensive Cicero, however, they are simply idle fears. The jury might be afraid of siding with him, but only if he were a larger player on the political scene, if he had more experience and greater renown. But the impetuous young advocate presents himself as simply too insignificant to matter. He is merely a dutiful advocate, who has taken up a case that many *would*, but no one else *can* do safely in the politically-charged Sullan world he conjures.

Cicero presents himself briefly as a stereotype, an impulsive but all in all harmless young advocate. Rhetorically, he considers it a point in his favor that his defense speech, unlike those of a more famous orator, can be more easily concealed from the Roman people. In no way, he says, will his speech be on the lips of the Roman people, or his opinions repeated in the streets.⁸⁵ The actions of such a youth can naturally be pardoned. All of this gains him needed leeway to say what he needs to say, and without casting himself as an opponent of Sulla or the regime. It is all an apologetic preface to the critical opinions the nature of the case demands. Having gained this crucial leeway, he uses it immediately to offer a damning assessment of politics in Sulla's Republic:

“tametsi non modo ignoscendi ratio verum etiam cognoscendi consuetudo iam de civitate

⁸⁵ This is not to say that he did not wish the speech and his role in it to be remembered. Its publication clearly shows that he saw his role in the speech as an important moment in the shaping of his public persona.

sublata est" (3), or: "although not only the reason one shows mercy, but even the custom of legal examination have already been destroyed in our state." With this statement, Cicero criticizes the regime, but with an obvious purpose. As the trial of Roscius is the first to take place before the new Sullan murder court, it is the very first chance to restore these two republican ideals, mercy and fair trials, to the state.⁸⁶

The logic of the Sullan regime up to this point has, even in the most favorable analysis, been lacking in pardon and fair trials. The recently concluded proscriptions were the surest sign of this. But Cicero presents the jury with the opportunity to turn the page on this disaster, and instead to embrace two supposedly universal Roman 'Republican' characteristics: the logic of pardon (*ignoscendi ratio*) and the custom of holding public trials (*cognoscendi consuetudo*). Through his skillful characterization of both his role as advocate and of the world surrounding the trial, Cicero makes the desired acquittal appear all the more heroic, emphasizing, once again, his own personal bravery and the current dire straits of the Sullan *res publica*. What is especially fascinating about this critique is that it is designed to appeal to all sides of the political spectrum. It appeals to any of Sulla's opponents, in that it hints at the recent failings and excesses of the regime. But at the same time it is cast in such a way as to appeal to Sulla and his supporters themselves as the fulfillment of their ideology: they can, with their verdict, restore a series of Republican values and institutions: bravery and devotion to truth, in the

⁸⁶ *Contra Berry*, "The Publication of Cicero's 'Pro Roscio Amerino,'" pg. 82-83 who believes this contradicts Cicero's argument and, further, that the statement is "not appropriate to the to the period of the trial, since that was of course held under due process of law." Instead, he offers that it refers only to the chaotic period before Sulla's dictatorship. I agree instead with Buchheit, "Ciceros Kritik an Sulla in der Rede für Roscius aus Ameria," pg. 577 that the statement should be read as a criticism of the Sullan regime. I believe, however, that the thrust of the statement is not solely to criticize, but to push the jury to live up to the ideological promise of the regime. Sulla and his followers promised to restore the courts, Cicero says, and this is the perfect opportunity to prove their devotion to these republican principles.

person of Cicero, pardon and fair-dealing, in their own verdict, as well as the Republican tradition of public and just trials, all of which had been lost in the swirl of retribution and recrimination. The trial which was supposed to be so very nonpolitical becomes instead extremely political. In Cicero's hands, a guilty verdict would not just condemn Roscius, it would publicly condemn the whole Sullan regime of putting aside its stated principles.

The Power of the Precedent: The Stakes of Trying Roscius

Cicero's critique is given additional rhetorical weight because of the situation of the trial. Roscius' case was the very first to be argued before the newly re-established *quaestio de sicariis et veneficiis*. These standing courts had been suspended during the chaotic time of Sulla's return to Rome in 82 BCE. Only after a reform of the court system did Sulla allow the *quaestiones perpetuae* to resume operation. Cicero uses the event of this first trial to his advantage, by drawing throughout the speech a hard contrast between the past lawlessness and the possibility of a new Rome with an established, respected, and independent system of courts. The former world is hyperbolically described as ultra-violent; there murders could be committed openly and with virtually no fear of legal repercussion. The people of Rome, he argues, are eager to put an end to this terrible chapter. Their supposed zeal to re-establish the courts and rule of law is even presented as a potential threat to Cicero's case. Thus the court is surrounded by a large crowd of eager onlookers all hoping for bitter and severe (*acria ac severa*) judgments.⁸⁷

⁸⁷ Quanta multitudo hominum convenerit ad hoc iudicium, vides; quae sit omnium mortalium expectatio, quae cupiditas, ut acria ac severa iudicia fiant, intellegis. Longo intervallo iudicium inter sicarios hoc primum committitur, cum interea caedes indignissimae maximaeque factae sunt; omnes hanc quaestionem te praetore manifestis maleficiis cotidianoque sanguine dignissimam sperant futuram. Etenim quid aliud hoc iudicio temptatur nisi, ut id fieri liceat? (11)

“You [addressing Fannius, the Praetor in charge of the court] see how large a crowd of people has come to this trial. You understand how every person is waiting on the result, how great is their desire that the

The jurors might be inclined, Cicero predicts, to convict Roscius, the first defendant, simply to prove that the new courts *can* convict anyone and show their judgments to be *acria et severa*, harsh and severe.. Thereby he ascribes an admirable motive to the jurors, that is, that they too hope to reassert the power of the courts and restore the legitimacy of the court. This reflexively harsh judgment, however, must be put aside.

In the minds of many jurors, Cicero muses, a conviction will show strength, while an acquittal will show weakness and acceptance of illegality. So he acts quickly to foreclose this thought, so damaging to his defense. What matters is not gaining a conviction, but seeing that justice is done. A conviction of such a manifestly innocent man, he asserts, will only spur other false accusations. He argues that the Roman people will see even worse crimes and greater illegality if the jurors convict Sextus Roscius. Such a verdict, he confidently predicts, would be opening the door for criminals to exploit even the legal system itself to commit their crimes:

Petimus abs te, M. Fanni, a vobisque, iudices, ut quam acerrime maleficia vindicetis, ut quam fortissime hominibus audacissimis resistatis, ut hoc cogitetis, nisi in hac causa, qui vester animus sit, ostendetis, eo prorumpere hominum cupiditatem et scelus et audaciam, ut non modo clam, verum etiam hic in foro ante tribunal tuum, M. Fanni, ante pedes vestros, iudices, inter ipsa subsellia caedes futurae sint. (*Pro Roscio Amerino* 12)

We want this from you, Marcus Fannius, and from you, O judges – that you punish crimes as severely as possible, that you resist these outrageous men as courageously as you can, that you realize this fact: unless you show your will in this case, the greed and criminality and recklessness will burst all boundaries. There will be more murders, not only in secret, but even here, in the forum, before

judgments issued be harsh and severe. After a long moratorium, this is the first murder court to be held, although, in the interval, the most outrageous and horrible killings have been committed; everyone are hoping that, with your Praetorian guidance, this court will stand up against the obvious wickedness and daily bloodshed. For what else is being attempted in this court, except that such acts receive your sanction?"

your own tribunal, Marcus Fannius, right before your feet, judges, and among the benches you are sitting on.

In this way, Cicero broadens the apparent scope of the case, making it not a single trial of a single defendant, but a crucial test-case of the newly re-opened Roman courts. Unless the jurors return a verdict favorable to Cicero, the foundations of the legal order will be completely overturned. Injustice and justice will be reversed, and abhorrent crimes, he predicts, will become frequent occurrences.

Cicero then links this prophesied reversal of just and unjust, legal and illegal, to the case of Roscius. In a series of pointed sentences that contrast the wicked and grasping “they” (*ei*) with the long-suffering and restrained “he” (*is*), that is Roscius, Cicero shows that the nature of the case reverses even the role of prosecutor and defendant:

Accusant ei qui in fortunas huius invaserunt, causam dicit is, cui praeter calamitatem nihil reliquerunt; accusant ei, quibus occidi patrem Sex. Rosci bono fuit, causam dicit is, cui non modo luctum mors patris attulit, verum etiam egestatem; accusant ei, qui hunc ipsum iugulare summe cupierunt, causam dicit is, qui etiam adhoc ipsum iudicium cum praesidio venit, ne hic ibidem ante oculos vestros trucidetur; denique accusant ei, quos populus poscit, causam dicit is, qui unus relictus ex illorum nefaria caede restat. (*Pro Roscio Amerino* 13)

The accusers are the ones who have snatched up another’s goods, while the defendant is the one with nothing left but calamity; the accusers are the ones who benefitted from the death of Sextus Roscius’ father, while the defendant is the one afflicted not just with grief at his father’s death, but also poverty; the accusers are the ones who wanted to strangle this man, while the defendant is the man who is forced to come to this court with a guard, fearing he might be slain before your very eyes; lastly, they accusers are the ones whom the Roman people want punished, while the defendant is the only one left alive after their unholy slaughter.

Throughout the speech, Cicero repeatedly asks the question of *cui bono* (who benefits?), as a way of exonerating his client.⁸⁸ After all, if Roscius the younger was after his father's property, he obviously failed, while the accusers Magnus, Capito, and Chrysogonus were currently in possession of Roscius' estates. In this way Cicero manages to smear the accusers as murderers based solely on the observation that they hold the property. This fact, however, hardly proves that the accusers were involved in the murder.⁸⁹ It may simply indicate that they took advantage of a favorable situation to acquire some well-situated farms along the Tiber River at a bargain price.

Virtually the entirety of the case, then, hinges on blurring the line between the separate crimes of parricide and the abuse of the proscriptions allegedly committed by Chrysogonus and the prosecution. Cicero completes this masterful blurring of the lines, of removing the case from its actual content (the case against Sex. Roscius) and transforming it into a case about public affairs and the current state of the Roman Republic, in his transition into the *narratio*:

Atque ut facilius intellegere possitis, iudices, ea, quae facta sunt indigniora esse, quam haec sunt, quae dicimus, ab initio res, quem ad modum gesta sit, vobis exponemus, quo facilius et huius hominis innocentissimi miserias et illorum audacias cognoscere possitis et rei publicae calamitatem. (*Pro Roscio Amerino* 14).

And so that you may more readily understand, judges, that these deeds are even worse than these we mention, we will lay it out from the beginning how this was accomplished, so that you can understand more easily the sufferings of this most

⁸⁸ He attributes this bit of wisdom to the consul Lucius Cassius Longinus, section 84: *L. Cassius ille quem populus Romanus verissimum et sapientissimum iudicem putabat identidem in causis quaerere solebat 'cui bono' fuisset*. "the famous Lucius Cassius, whom the people always considered the wisest and most honest judge, was accustomed in cases brought before him to ask 'who benefitted?'"

⁸⁹ Dyck, "Evidence and Rhetoric in Cicero's 'Pro Roscio Amerino'" argues this most fully. He points out that it is still possible that Roscius had his father murdered, but was prevented from taking the property by the ex post facto proscription of his father, pg. 28.

innocent of men, the audacity of his accusers, and the calamity of the republic.

Cicero continues his contrast between the two parties, accusers and defendants are again reversed. But his stated goal stands out in this *partitio*. He wants these jurors to learn three distinct things from the following narration of the ‘facts’ of the case: the misery of this man (*huius hominis miserias*), the audacity of his accusers (*illorum audaciam*), and finally the calamity of the republic (*rei publicae calamitatem*). This too, is left intentionally vague and the jury is free to pick their own preferred interpretation of what exactly the calamity in question is; how exactly the case of Roscius could affect the entirety of the Roman *res publica* is left mysteriously unclear.

The Calamity of the Republic

Cicero thus concludes his exordium, the introductory remarks intended to gain the listener/reader’s attention and favor, with an enigmatic nod to the *rei publicae calamitas*. The phrase has generated little scholarly interest or comment, especially given its emphatic position at the end of Cicero’s exordium.⁹⁰ But the phrase, as given, clearly outlines the stakes of the case at hand. Fundamentally, then, Cicero defines three goals that his defense speech wishes to emphasize, the sufferings of Roscius, the corrupt audacity of the prosecutors, and the political disaster (*rei publicae calamitas*) that the whole affair represents. But this political disaster, it should be pointed out, can be seen to point two ways. Firstly, one may think of it pointing towards the past and the destruction

⁹⁰ Dyck, *Pro Sexto Roscio ad loc.* points out that the phrase expands Roscius' personal *calamitas* into a larger general calamity; only Buchheit, “Ciceros Kritik an Sulla in Der Rede Für Roscius Aus Ameria” pg. 579 has noticed the critical nature of Cicero’s phrasing: “In diesem größeren Rahmen also sieht Cicero die aktuelle Ruchlosigkeit. Von der *calamitas* des Staates zu sprechen, ist sicher kein Ehrenerweis für den *dictator legibus scribundis et rei publicae constituendae*. Wir begegnen also schon in der Einleitung kritischer Distanz auch gegenüber Sulla.”

wrought in the wake of Sulla's victory. Certainly the phrase is being used to evoke, as Dyck comments, the deplorable fate of the younger Roscius,⁹¹ and also the state's loss of him as a potentially productive and loyal member of society. Cicero will, in the rest of his defense, attribute this calamity at least partially to the Sullan proscriptions. As we will see, however, he will be very cautious to attribute it not to Sulla himself as much as to the abuse of his followers, such as Chrysogonus. Much more importantly, however, this political disaster points forward and serves as a warning to the jury of injustices to come.

The calamity of the past, the victory of Sulla and the destruction and death that came along with it, can be deplored, and are, but cannot be changed. These calamities are explicitly and emphatically not a part of this trial. Instead, much as Cicero had foretold murders occurring before the very seats of the justices, he now prophesies serious political consequences to ruling against Roscius. Once again, this avowedly non-political speech has put political matters at center stage. The true calamity lies in the possibility for this case and the abuses it represents, to become the norm of Roman justice. It lies in the arbitrary abuse of power, without check or restraint of law, to punish opponents (or, in this case, even loyalists) of the Sullan regime. Cicero's goal is to turn this case into a kind of referendum on the need for courts at all and also on what sort of courts will exist following Sulla's settlement of the state. Will the courts become a mere device for executing political enemies? Will such judicial murders be allowed to pass unpunished in the Roman Forum itself? This is perhaps hyperbolic outrage, but the central point is a powerful one. The courts, Cicero here asserts, must be independent and

⁹¹ Dyck, *Pro Sexto Roscio, ad loc.*

be allowed to exercise their own judgment. The true *rei publicae calamitas* is not Roscius' punishment or even execution, but in the precedent that this would set for the courts and for the current state of Roman justice. If even great and powerful nobles are afraid to defend Roscius now, the situation will be far worse after his condemnation. Cicero's rhetorical calamity is for the Roman courts to become mere tools to enforce the illegitimate dominance of a faction rather than to be bodies that serve justice.

The political calamity of this case, however, is bound up in more than the independence of the courts. Just as Cicero ties the calamity to a notion of serving justice in this case, he also ties it closely to the ideological foundations of the Sullan regime. Specifically, his rhetoric ties the case to the twin notions of (partisan) loyalty and the *causa nobilitatis* (the cause of the nobility). His portrayal of the Sullan world is clearly obsessed with the issue of loyalty, both to Sulla and to the *res publica*. He takes the time to prove, at great length, both his own and his client's loyalty to the new regime. Within the *narratio*, Cicero's first argument is to explain why the elder Roscius could not possibly have been proscribed by the regime, at least, not according to the laws.

Hic cum omni tempore nobilitatis fautor fuisset, tum hoc tumultu proximo, cum omnium nobilium dignitas et salus in discrimen veniret, praeter ceteros in ea vicinitate eam partem causamque opera, studio, auctoritate defendit. Etenim rectum putabat pro eorum honestate se pugnare, propter quos ipse honestissimus inter suos numerabatur. Postea quam victoria constituta est ab armisque recessimus, cum proscriberentur homines atque ex omni regione caperentur ei, qui adversarii fuisse putabantur, erat ille Romae frequens atque in foro et in ore omnium cotidie versabatur, magis ut exsultare victoria nobilitatis videretur quam timere, ne quid ex ea calamitatis sibi accideret. (*Pro Roscio Amerino* 16).

As [the elder Roscius] had been a supporter of the nobles at every moment, especially in this most recent disturbance, when the position and even safety of all nobles was in the balance, he, more so than others in his district, defended this faction and its cause with effort, zeal, and influence. For he believed that it was

right to fight for the honor of those whose efforts had led him to be numbered the most honorable among his peers. After the victory was declared and we fell away from fighting, when people were still being proscribed and when those who were suspected of being enemies were being hunted down in every region, Roscius was frequently at Rome, and was spending time every day in the Forum and in full view of everyone. So he appeared to be rejoicing in the victory of the nobility, rather than to be in fear that some sort of disaster should befall him from it.

Cicero proves the point with an appeal to loyalty. He calls the court itself, as it were, as witnesses to the public reputation of his client's father. Thereby he focuses the issue of the trial upon the proscription and its legality rather than the ostensible charge, the murder of Sextus Roscius the elder.⁹² The legality and legitimacy of the proscriptions themselves is, sensibly, tabled. Instead the defense focuses upon the victory of the nobles and its results. The victors rejoiced, and the vanquished feared reprisals and violence. Cicero attaches no especial blame to Sulla and the side of the victors for this result, but simply uses it to prove that the elder Roscius was a true partisan and supporter of the victorious nobility. In addition, he gives Roscius the elder more than one rationale for supporting the winning side. He worked for their cause because their standing (*dignitas*) and even their survival (*salus*) were at stake. But he also had a more personal reason for supporting the nobility, he owed them a debt of gratitude. For, as Cicero remarks, he owed his own standing to the intervention or influence of the Roman nobility (*rectum putabat pro eorum honestate se pugnare, propter quos ipse honestissimus inter suos numerabatur*). Cicero concludes this section by calling the jury as witnesses to Roscius' public behavior, to the fact that he rejoiced in their victory and frequently appeared in

⁹² Dyck, "Evidence and Rhetoric in Cicero's 'Pro Roscio Amerino'" notes how little effort Cicero spends establishing an alibi for Roscius the younger or refuting the charges of hiring out the murder. This leads him to conclude that Roscius might well have been guilty, and this strategy of Cicero's a smoke-screen to distract the jury. See also Vasaly, *Representations* pg. 156-172 on how Cicero uses the Roman stereotype of the innocent rustic to prove his client's innocence, rather than the facts of the case..

public, showing no fear of being placed on Sulla's proscription lists. After all, not only was Roscius a supporter of Sulla, he supported the cause materially (*opera, studio, auctoritate*) and more than his fellows (*praeter ceteros*).

This bare description, however, does not explicitly deal with the full extent of the Sullan proscription, it nevertheless hints at the fear the period generated and even the mistakes that were made in its execution. In fact, it is this expectation of fear that makes Cicero's case for him. If the elder Roscius had been an opponent of the regime, his presence at Rome would only have reminded his enemies of his existence. Any opponent of Sulla, the argument assumes, should have been afraid to set foot in the Roman Forum in that period and thus court a death sentence. The world of the proscriptions is, once again, a world of fear for Sulla's opponents. Roscius' loyalty to Sulla is demonstrated by his distinct lack of fear to celebrate the cause of the nobility. The argument even emphasizes the rightness of that cause, since the opposing side sought their destruction. But the world of the proscriptions is also a world of mistakes. The proscriptions, in Cicero's telling, are not perfect. After all, the victorious Sullans are shown rounding up, not "their enemies" but those "who were suspected of being enemies" (*qui adversarii fuisse putabantur*). Even in his statement of loyalty, Cicero hints at the possibility for both error and abuse. This will prove crucial in helping him criticize the proscription of Roscius, without also directly criticizing Sulla and the victory of his faction.

Loyalty and Legitimacy: The *Causa Nobilitatis*

In the suspicious atmosphere of the trial, Cicero is also quite careful to demonstrate his own loyalty to the regime. This again helps to define the rhetorical

world around the trial, since Cicero's argument shows that he fears potential retribution. The speech assumes that Cicero will be allowed to speak freely and critically (*liberius*) only if this loyalty is proven. This task is made difficult by the facts of Cicero's involvement. Cicero acknowledges that he personally took no part in the actual fighting of the civil war. He is, however, concerned to show himself to be a kind of moderate, a supporter of Sulla's side, but also an advocate for peace and reconciliation:

Sciunt ei qui me norunt me pro mea tenui infirmaque parte, postea quam id quod maxime volui fieri non potuit, ut componeretur, id maxime defendisse ut ei vincerent qui vicerunt. Quis enim erat qui non videret humilitatem cum dignitate de amplitudine contendere? (*Pro Roscio Amerino* 136)

People who do not know me are nevertheless aware that I, in my own small and insignificant way, once my chief desire, peaceful settlement, could not be achieved, that I bent my efforts to aid the side that won. For who did not understand that the base and humble were struggling with the dignified for power?

The entirety of the previous civil war, the struggles between the partisans of Marius and Sulla, Cinna and Octavius, Sulla and Carbo, is rhetorically reduced to a pithy statement: that the low (*humilitatem*) were fighting against the dignified (*cum dignitate*). In a choice between those without offices, experience, or status and the traditional Roman nobility, Cicero chose the latter. Though Cicero had hoped for peace, for some sort of coming together of these separate interests (*ut componeretur*), he characterizes that hope as, in the end, impossible. The opposing side and its support of baseness, then, can be dismissed. But the complimentary term *dignitas* carries with it a responsibility. It becomes a quality that the winning side must live up to and earn. It is a necessity to make the new Sullan government, as it were, into a *Res Publica* for Romans of all stripes. At least one true sign of its return, in Cicero's view, will be the reassertion of a bold and

independent judiciary willing to acquit Roscius ‘on the evidence’ rather than convict him to please Sulla or his partisans.

This professed loyalty to the cause of the nobility allows Cicero great latitude to attack the failings of the regime. Cicero’s criticism of Sulla’s regime within the speech consists largely in demanding that it live up to its own ideological propaganda. If it claims to have restored the republic, then it must continue to support those policies that make the government so distinctly “Republican.” It must restore the nobility and those with dignity to their appropriate positions, rather than allow persons of humble extraction, like the former slave Chrysogonus, to lord their new-found status over free men. It is the jury that has the power to enact this, for in Cicero’s telling, this ‘restoration’ of the republic is contingent. An acquittal here will reassert the sovereignty of the Roman people over their own courts. On the other hand, if they are too afraid to do so, they will be betraying the true cause of the nobility. And what’s more, they will actually undermine their own legitimacy as a ruling class. They will, in effect, prove the charges of their worst critics – that their rule will be simply the oppression of one class by another:

Sin autem id actum est et idcirco arma sumpta sunt ut homines postremi pecuniis alienis locupletarentur et in fortunas unius cuiusque impetum facerent, et id non modo re prohibere non licet sed ne verbis quidem vituperare, tum vero in isto bello non recreatus neque restitutus sed subactus oppressusque populus Romanus est. Verum longe aliter est; nil horum est, iudices. Non modo non laedetur causa nobilitatis, si istis hominibus resistetis, verum etiam ornabitur (*Pro Roscio Amerino* 137-38)

But if all this happened, if arms were taken up just so that the worst of us could enrich themselves with the wealth of others and assault the property of every other person, and if we are prohibited, not just from stopping it, but even from uttering a protest, then that war of yours was waged not to renew and restore the

Roman people, but to subjugate and oppress them. But that is far from the truth of it, judges; none of this is so. Your resistance to these men will not harm the cause of the nobility, indeed, it will be a great triumph for it.

As Dyck notes, Cicero here raises a “darker alternative possibility, only to dismiss it,”⁹³ but it is important to note that even that dismissal of this possibility has a great deal of rhetorical force. His rhetoric of loyalty re-casts the case in a way favorable to him. No longer is it a case of Sullan vs. opponent, but of true nobility vs. blind partisanship. His portrayal depicts the *causa nobilitatis* taking back its rightful place in the state, but implies that it must be a nobility of merit, rather than simply a nobility of birth. Only a correct and just decision in this case will close the book on the proscriptions and the plundering of the property of others and restore the right and legitimate rule of the Roman people. To criticize, furthermore, is not always to harm. Indeed, his presentation suggests that accurate and honest criticism will serve only to fortify and strengthen the position of the ‘right’ nobles by making their position not just strong, but legitimate.

Cicero further attacks any unthinking support of conviction as a blind and misguided form of loyalty to the true ‘cause of the nobility.’ His argument sets up this potential viewpoint not as wrong, per se, but rather as mistaken. His argument carefully delineates the fine line between opposition to Chrysogonus and opposition to Sulla, that is, he makes clear that there is a difference between opposing particular wicked men in the cause and opposing the cause itself. He is enabled, thereby, to tap into aristocratic resentment against Sulla’s freedman Chrysogonus in particular. The inclination to support Sulla’s cause by supporting all its members becomes another perverse reversal of the true *causa nobilitatis*. For while he speaks of Sulla and Sulla’s noble faction as a necessary

⁹³ Dyck, *Pro Sexto Roscio*, ad loc.

corrective to restore the Republic and the Roman people, Sulla's freedman and influential supporter Chrysogonus is characterized without hesitation as a corrupt, grasping former slave and social climber. He thus attacks Chrysogonus as an ostentatious art collector (133), and a prodigal whose household oozes with un-earned extravagance;⁹⁴ he also expresses outrage at how this 'overly coiffed dandy' holds bands of freeborn citizens in his thrall in the forum.⁹⁵ By supporting Chrysogonus, Cicero asserts, the jury would be, in fact, overturning the cause of the nobility and in fact turning the republic over to the unjust tyranny of a slave.⁹⁶

This criticism represents more than just an opportunistic personal attack or an attempt to rouse class resentment. He attempts to mobilize this aristocratic and class-based bias against the 'jumped-up' freedman, but this attack remains an immanent critique, and Cicero is again quick to emphasize his credentials with the current regime. Nevertheless, Cicero openly expresses doubt that his jurors can separate criticism of Chrysogonus from criticism of the current Roman government, saying:

Quae vero efficiat et quae conetur si velim commemorare, vereor, iudices, ne quis imperitior existimet me causam nobilitatis victoriamque voluisse laedere. Tametsi

⁹⁴ In hac vita, iudices, quos sumptus cotidianos, quas effusiones fieri putatis, quae vero convivia? honesta, credo, in eius modi domo, si domus haec habenda est potius quam officina nequitiae ac deversorium flagitiorum omnium. (134)

With a way of life like this, gentlemen, can you imagine what daily expense, what extravagance is involved, and what festivities take place? They are respectable ones, naturally, in a house of this kind – if it can in fact be called a house, and not a factory of vice and lodging for every type of scandal.

⁹⁵ Ipse vero quem ad modum composito et dilibuto capillo passim per forum volitet cum magna caterva togatorum videtis, iudices; videtis ut omnis despiciat, ut hominem prae se neminem putet, ut se solum beatum, solum potentem putet. (135)

And take a look at the man himself, gentlemen, how, with his hair carefully styled and soaked in perfume, he flits about the forum, escorted by a large band of (real) citizens in togas! See how he looks down on everyone, how he thinks that no one is more important than he is, how he considers that only he is successful, and only he is powerful."

⁹⁶ For more on Chrysogonus as Tyrant, see Buchheit, "Chrysogonus als Tyrann in Ciceros Rede für Roscius aus Ameria"; For the same strategy applied to the corrupt governor Verres, see Thomas D. Frazel, *The Rhetoric of Ciceros "In Verrem,"* pg. 166-181.

meo iure possum, si quid in hac parte mihi non placeat, vituperare; non enim vereor ne quis alienum me animum habuisse a causa nobilitatis existimet. (*Pro Roscio Amerino* 135)

If I wanted to recall everything [Chrysogonus] is doing and is trying to do, I am afraid, jurymen, that some ignorant person might think that I wanted to oppose the cause (and the victory) of the nobility. Although it is my right to criticize it, if anything done by this faction seems unacceptable to me; for I am not afraid that anyone would think that my heart is out of step with the cause of the nobility.

In Cicero's attack here, Chrysogonus has two important qualities. Firstly, he is through his connection with Sulla closely associated with the regime. Secondly, he is guilty of a number of offenses and evil deeds. In this clever *praeteritio*, Cicero professes to know of more than he can safely recite, for to do so might make him seem an opponent of the *causa nobilitatis*. But he declines to share them, preferring instead to emphasize his credentials as a loyal supporter of Sulla's victory. For in his presentation, only an "ignorant" person (*imperitior*) could even think of doubting his loyalty, or see such criticisms as attacks on Sulla and the regime. He asks the Sullans to live up to their own propaganda, since they appear to profess allegiance to the principle of free speech. Thus Cicero finds for himself the "right" (*meo iure*) to criticize the ruling party. This right is, it appears from the speech, both a privilege granted by his indisputable loyalty to Sulla's achievement and yet, simultaneously, a sort of Roman 'constitutional right' – a custom he deems absolutely essential to the Republic. Without this freedom to speak one's true opinion and criticize those in power, there quite simply is no *res publica*, but instead the arbitrary rule of one man, or of some limited faction. It would be the rule of force, rather than law. In this way, Cicero is enabled to use the Sullan faction's own ideological

agenda, that this was a war to ‘restore’ the nobility to their proper position, in service to his own agenda: the restoration of a true or legitimate *res publica*.

Sulla’s Unique Position: Praise and Blame

Nevertheless, as the speech presents it, Cicero does not take complete advantage of this freedom to criticize the state of Sulla. He notably backs away from any direct criticism of the person of the dictator Sulla himself. As has been frequently noted, his presentation of the dictator Sulla is in its general outlines a positive one.⁹⁷ From his first mention of the dictator, Cicero offers nothing but praise, saying of Sulla “whose name I mention with the greatest respect.”⁹⁸ He subsequently frees Sulla from all blame, and denies the dictator had knowledge of the criminal conspiracy against Roscius on every point. Thus when a deputation from the town of Ameria came to see Sulla in order to discuss Roscius’ estate, Cicero claims that their attempt to see the dictator in person was foiled by Chrysogonus (25-26). Indeed, he portrays Chrysogonus as absolutely desperate to prevent Sulla from knowing about these goings-on: “But [Chrysogonus] was so completely frightened that he would have preferred death to Sulla finding out about this matter.”⁹⁹ Thus Sulla is imagined as a powerful and honorable figure in the Roman state.

⁹⁷ So Dyck, “Evidence and Rhetoric in Cicero’s ‘Pro Roscio Amerino’”; Vasaly, “Cicero’s Early Speeches”; Berry, “The Publication of Cicero’s ‘Pro Roscio Amerino’”; *contra* Buchheit, “Ciceros Kritik an Sulla in der Rede für Roscius aus Ameria,” who believes these statements, because they do not accord with Cicero’s presentation of Sulla’s dictatorship in his later career, must be deeply ironic.

⁹⁸ *Pro Roscio Amerino* 6: *Bona patris huiusce Sex. Rosci, quae sunt sexagens, quae de viro fortissimo et clarissimo L. Sulla, quem honoris causa nomino, duobus milibus nummum sese dicit emisse adulescens.* “A young man claims to have purchased this property valued at six million sesterces which used to belong to this man’s father, Sextus Roscius, from Lucius Sulla, whose name I mention with the greatest respect”

⁹⁹ *Pro Roscio Amerino* 26: *Usque adeo autem ille pertimuerat, ut mori mallet, quam de his rebus Sullam doceri.*

The fact of this conspiracy becomes almost a badge of honor to him, for Cicero evinces no doubts that Sulla would have prevented it, if he had only been informed.¹⁰⁰

Cicero's narrative further defends the dictator on the grounds that Sulla simply does not, in the midst of so many important political affairs, have time to watch over every one of his followers and all his activities.¹⁰¹ The general's special and unprecedented role within the state is repeatedly emphasized in order to escape criticizing Sulla or his cause, while still criticizing the crimes of his freedman Chrysogonus. Nevertheless, this depiction, perhaps unintentionally, illustrates one of the failings of Sulla's one-man rule – that even he cannot observe and correct all the abuses that inevitably occur. This situation is, Cicero avows, regrettable, but quite simply cannot be helped. In a particularly vivid flight in the peroration, Cicero compares the dictator's rule to that of Jupiter, king of the gods:

Nemo est enim qui nesciat propter magnitudinem rerum multa multos partim improbante, partim imprudente L. Sulla commisisse. Placet igitur in his rebus aliquid imprudentia praeteriri? Non placet, iudices, sed necesse est. Etenim si Iuppiter Optimus Maximus cuius nutu et arbitrio caelum terra mariaque reguntur saepe ventis vehementioribus aut immoderatis tempestatibus aut nimio calore aut intolerabili frigore hominibus nocuit, urbis delevit, fruges perdidit, quorum nihil pernicii causa divino consilio sed vi ipsa et magnitudine rerum factum putamus, at contra commoda quibus utimur qua fruimur spiritumque quem ducimus ab eo nobis dari atque impertiri videmus, quid miramur, iudices, L. Sullam, cum solus rem publicam regeret orbemque terrarum gubernaret imperique maiestatem quam armis receperat iam legibus confirmaret, aliqua animadvertere non potuisse? nisi hoc mirum est quod vis divina adsequi non possit, si id mens humana adepta non sit. (*Pro Roscio Amerino* 130-131)

¹⁰⁰ This may, in fact, be true. Plutarch's *Life of Crassus* 6, we hear that when Crassus, out of greed, attempted to proscribe a man not on Sulla's list, Sulla refused to trust him with public business again.

¹⁰¹ Cf. Vasaly pg. 78-81. In section 22, Cicero compares Sulla's task in running the state to a master running a household. Through no fault of their own, both are unable to avoid having a "wicked slave or freedman" in their employ.

For there is no one who does not know that on account of the immensity of his business, many men did many things that Sulla disapproved of or that he knew nothing about. Is it right, then, that in these matters anything should be passed over without the ruler knowing it? It is not right, O judges, but it is inescapable. In truth, if Jupiter Optimus Maximus, by whose will and command the heaven, the earth, and the seas are governed, has often by too violent winds, or by harsh storms, or by too much heat, or by intolerable cold, injured men, destroyed cities, or ruined the crops; we do not think that any of this destruction is part of a divine plan to cause injury, but is simply the result of the power and magnitude of the affairs of the world; but on the other hand we see that the advantages which we have the benefit of, and the light which we enjoy, and the air which we breathe, are all given to and bestowed upon us by him; how can we wonder that Lucius Sulla, when he alone was governing the republic, and administering the affairs of the whole world, and strengthening by his laws the majesty of the empire, which he had recovered by arms, is also unable to notice everything? Unless this is strange that human faculties lack a power which divine force cannot attain.

Cicero thus distances Sulla from the number of criminals who have taken advantage of his return in order to settle old scores or abuse the period of lawlessness for their own gain. Sulla may be, at least in some sense, indirectly responsible for the actions of his underling, but his sin, if one even exists, is one of omission. Even in that, he frees Sulla from judgment, for it is simply the inescapable (*necesse*) consequence of having all powers concentrated in one man's authority. Cicero instead puts the blame squarely and solely on the shoulders of the freedman Chrysogonus. The abuses of Chrysogonus become, then, not a problem brought about by Sulla or his followers, but problems which arise from the nature of rulers in positions of great power. The comparison to Jupiter allows Cicero to focus on the positives that this period of strife has given rise to – namely, that it has in a sense restored the light that we enjoy and the air that we breathe, for Sulla has the potential to restore to the Romans a legitimate Republic. If, however, Sulla or his followers choose to defend Chrysogonus, they betray this crucial mission. Sulla's achievement may have been purchased with a great deal of blood and human

suffering (as it had to be), but they become the storms that water and fertilize the fields of this reborn Republic

Waiting in the Wings?: True Nobility and the Equestrian Order

Thus the challenge that Cicero's subversive opinions present is not, in fact, a threat to the Sullan party, but instead represents an opportunity to repair the damaged reputation of the ruling class. Much depends upon the outcome of this case, because it will serve as a proof to both friends and foes of the ruling party that their rule is just or legitimate. The powerful place of the nobles within the state is not guaranteed by birth or wealth but rather by their ability to govern the Roman people appropriately. In fact, it is their tendency to partisanship and uncritical support of 'their side' (and Chrysogonus) which threatens the standing of the entire ruling class. This becomes a powerful critique of the aristocracy under Sulla's dictatorship, but one which Cicero is very careful to keep conditional. The jury cannot allow themselves to be deluded into a false dichotomy, for it is not a choice to be loyal by supporting Chrysogonus or to be treasonous and support Roscius:

Etenim qui haec vituperare volunt Chrysogonum tantum posse queruntur; qui laudare volunt concessum ei non esse commemorant. Ac iam nihil est quod quisquam aut tam stultus aut tam improbus sit qui dicat: 'Vellem quidem liceret; hoc dixissem.' Dicas licet. 'Hoc fecissem.' Facias licet; nemo prohibet. 'Hoc decrevissem.' Decerne, modo recte; omnes approbabunt. 'Hoc iudicassetem.' Laudabunt omnes, si recte et ordine iudicaris. (*Pro Roscio Amerino* 138)

For those who wish to criticize these matters [*causa nobilitatis*] complain that Chrysogonus has too much power; while its supporters want to say that he has none. And now there is no reason why anyone should be so foolish or wicked that he would say: "I wish it were allowed; I would have said this." It is allowed, so say it! "Oh, I would have done this." It is allowed, so do it! No one is stopping you. "I would have voted this way." So vote! Do it correctly; everyone will

approve. “Well, I would have judged the case this way.” Well, everyone will praise you, so long as your judgment is right and correct.

If the *res publica* is really in the hands of the Roman People, and not in the hands of an oppressive and vindictive ruling class, then that will be shown most of all in the free speech and unhampered debates of the Roman nobility. They must be heroic, much like Cicero’s depiction of himself, and willing to speak their minds free from any fear of punishment. A real *res publica* will allow the nobles to speak their minds, as Cicero’s repeated assertions of *licet* (it is allowed) show. Indeed, independent action should not just be tolerated, but, he asserts, it deserves high praise from Sullans and anti-Sullans alike.

Cicero’s concern with doing ‘true’ justice and restoring the real *res publica* is motivated not simply by a philosophical concern, it also has a clear pragmatic aspect. For only by giving the right verdict in this case can the ruling faction truly demonstrate their fitness to rule and prove to all that a genuine republic has been restored. The state of emergency is over, Cicero asserts, and this must be demonstrated in their verdict:

Dum necesse erat resque ipsa cogebat, unus omnia poterat; qui postea quam magistratus creavit legesque constituit, sua cuique procuratio auctoritasque est restituta. Quam si retinere volunt ei qui reciperarunt in perpetuum poterunt obtinere; sin has caedis et rapinas et hos tantos tamque profusos sumptus aut facient aut approbabunt nolo in eos gravius quicquam ne ominis quidem causa dicere, unum hoc dico: nostri isti nobiles nisi vigilantes et boni et fortes et misericordes erunt, eis hominibus in quibus haec erunt ornamenta sua concedant necesse est. Quapropter desinant aliquando dicere male aliquem locutum esse, si qui vere ac libere locutus sit, desinant suam causam cum Chrysogono communicare, desinant, si ille laesus sit, de se aliquid detractum arbitrari, videant ne turpe miserumque sit eos qui equestrem splendorem pati non potuerunt servi nequissimi dominationem ferre posse. (*Pro Roscio Amerino* 139-140)

As long as it was necessary and the situation itself demanded it, one man [Sulla] held absolute power; but after he created our magistracies and established our

laws, our former responsibilities and authority were restored to us. If those who recovered these wish to retain it, they will be able to retain it forever. But if they either participate in or approve of these acts of murder and rapine, these enormous and prodigal expenses—I do not wish to say anything too severe against them; not even as an omen; but this one thing I do say; unless those nobles of ours are vigilant, and virtuous, and brave, and merciful, they will have to abandon their honors in favor of those who have these qualities. Let them, therefore, cease at least to say that a man speaks treasonously, if he speaks truly and with freedom; let them cease to make common cause with Chrysogonus; let them cease to think, if Chrysogonus be injured, that some injury has been done to them; let them see how shameful and miserable a thing it is that they, who could not tolerate the splendor of the Equestrian order, should be able to endure the domination of a most worthless slave.

The interruption of the courts, the drastic changes in the constitution, and the proscriptions all belong firmly to the past. Cicero does not criticize the past, but rather concludes that these drastic actions were necessary (*necesse*) and demanded by the situation (*res ipsa cogebat*). Nevertheless, Sulla's greatest achievement appears to be that he restored the Roman elite their traditional authority (*auctoritas*) and their self-governing responsibilities (*procuratio*). This is not, however, a grant of absolute power indefinitely. Cicero says that the nobles *can* retain this pre-eminence, and permanently too (*in perpetuum*), but only on the condition that they show themselves worthy of it. They must demonstrate several essential qualities: vigilance, virtue, bravery, and mercy. But what's more, if they fail, if they cannot demonstrate their fitness to rule, then there is another party ready and waiting in the wings: The Equestrian Order.

The ruling noble class must give something up if it hopes to be accepted by the Roman people and to make its continued rule appear legitimate in their eyes. It must give up its partisan zeal and the false loyalty to a person (Sulla, Chrysogonus) rather than to a truly noble cause, the *causa nobilitatis*. They must stop seeing wicked utterances

(*dicere male*) when someone dares, like Cicero, to boldly tell them the truth. Cicero even verges on making a threat to this new ruling order, stating that unless they live up to their own propanganda, they will be overthrown and replaced by those who can: “unless those nobles of ours are vigilant, and virtuous, and brave, and merciful, they will have to abandon their honors in favor of those who have these qualities.” If there is to be a nobility in this new *res publica*, then it must continually earn that position. It must be a nobility of virtues, rather than a nobility of birth. For only then will it be a legitimate ruling class, and one able to hold its position forever (*in perpetuum*). Their rule will nevertheless be subject to judgment of the Roman people. The recent conflict is put into sharp relief, as a kind of conflict between the nobility and the Equestrian order, over who had the most right to rule. The final irony is biting, that this noble faction which refused to even come to terms with the Equestrians (“who could not tolerate the splendor of the Equestrian order”) has done so only to submit instead to the licentiousness and domination of a slave like Chrysogonus.

As Cicero presents it, the *res publica* is suffering greatly from the excessive partisanship of the noble class. Their class interest, greed, and injustice is creating a dangerous deficit of legitimacy in the eyes of the Roman People. This criticism, however, is not intended to overthrow, but instead to reform. It is possible for the Roman nobility to become once again a meritorious, deserving, and legitimate ruling class. To do so, however, they must become like Cicero’s noble ally Marcus Messalla, who saved Roscius the younger from assassination and guaranteed that he would at least be alive to face a jury:

Nimirum, iudices, pro hac nobilitate pars maxima civitatis in armis fuit; haec acta res est ut ei nobiles restituerentur in civitatem qui hoc facerent quod facere Messalam videtis, qui caput innocentis defenderent, qui iniuriae resisterent, qui quantum possent in salute alterius quam in exitio mallent ostendere; quod si omnes qui eodem loco nati sunt facerent, et res publica ex illis et ipsi ex invidia minus laborarent. (*Pro Roscio Amerino* 149)

It was on behalf of this idea of nobility most of all that the vast majority of our citizens took up arms. They wanted to restore to the state the sort of nobles who would do what you see Messalla doing – nobles who would defend the life of an innocent man, who would resist injustice, who would rather demonstrate their power in saving a life, rather than destroying one. If all of those born to this privilege acted the same way, the *res publica* would be suffering less from them, and they suffering less from resentment.

It is the failure of the ruling class to rule justly and mercifully that has brought the state to its current crisis. They have, in the past, failed to live up to their own code of nobility, and Cicero points out the obvious consequences of those failures: the resentment of the Roman People. Yet the nobility that Sulla has placed in charge still has a chance to redeem itself by showing the virtues of Messalla. That is, it can demonstrate its right to rule by saving the innocent, fighting back against injustice, and showing that the time for blood and retribution is over. If they succeed, the *res publica* will be more secure, and the nobles themselves far safer in their continued rule.

A New Proscription: A Just Verdict and the Potential for Healing

Cicero had begun his defense of Roscius by denying he had any overt political motive or wished to say anything too political or dangerous. By the time he has reached the peroration of his speech, however, he cannot help himself; the defense becomes almost entirely political. In fact, the defense turns into a deliberative exercise to make the jury think more about the political ramifications of their decision than the innocence of the young Roscius (which is simply assumed as proved by this point). Cicero's

comments on the Sullan regime and the *causa nobilitatis*, in fact, have become so potentially subversive that he must make one thing clear:

Verum haec omnis oratio, ut iam ante dixi, mea est, qua me uti res publica et dolor meus et istorum iniuria coegit. Sex. Roscius horum nihil indignum putat, neminem accusat, nihil de suo patrimonio queritur. Putat homo imperitus morum, agricola et rusticus, ista omnia quae vos per Sullam gesta esse dicitis more, lege, iure gentium facta. (*Pro Roscio Amerino* 143)

But this whole speech, as I have already said, is my own. The *res publica*, my own grief, and the injustice of these men has compelled me to say these things. Sextus Roscius, on the other hand, does not feel any indignation at this state of affairs; he is not accusing anyone; he does not even complain about (the loss of) his property. He, a man inexperienced in world affairs, a farmer and a rustic, thinks that all these things which you say were done by Sulla were in line with our custom, our laws, and by the law of nations.

Cicero ascribes none of these thoughts to his client Roscius, thereby accomplishing two tasks at once. Firstly, by the contrast with himself and his political fervor as advocate, he makes Roscius the more sympathetic character. Unlike Cicero, Roscius' concern is limited to the outcome of this particular case, and he takes no stand at all against the Sullan settlement. It is not only in line with Roman custom, in this view, but even statute law (*lege*) and even the way of the world, the *ius gentium*. He seeks only to be acquitted of the unfair and unsubstantiated, Cicero asserts, charge of parricide. Secondly, however, this passage shows Cicero at work establishing his own persona before this jury and the Roman people more broadly. He is once again the brave advocate who has forced by the circumstance of the case and his duty to the defendant to make clear some potentially unpalatable truths; for it is not his own inclination, but his grief (*dolor*), their injustice (*istorum iniuria*), and his concern for the republic as a whole (*res publica*) which has forced him to air some of his political commitments. In such a delicate position both

Cicero, the bold young advocate, and Roscius, the inexperienced rustic, must throw themselves on the mercy of the court, if their defense has caused Cicero to speak too freely (*liberius*).

Cicero's rhetoric of loyalty has allowed him to reach his desired goal, detaching Chrysogonus from Sulla and re-fashioning Roscius' case to his own advantage. To support Chrysogonus, or fail to support Roscius, are now a litmus test of one's loyalty to Sulla, in a narrow sense, but more so to the greatness of Sulla's professed achievement, the restoration of a legitimate *res publica* to the Roman people. It is Chrysogonus in this view who has betrayed both Sulla and the true *causa nobilitatis* that he represents: "You do an injustice [i.e. to Sulla], Chrysogonus, if you put a greater hope of retaining your purchase in killing this man [Roscius], than you do in the achievements of Lucius Sulla."¹⁰² Similarly, it is the jury's responsibility to act independently and thus bring to life Sulla's true achievement, which rests not in the ferocity of the proscriptions, but in the goodness and mercy which Sulla has supposedly resuscitated:

si non satis habet avaritiam suam pecunia explere, nisi etiam crudelitati sanguis praebitus sit, unum per fugium, iudices, una spes reliqua est Sex. Roscio eadem quae rei publicae, vestra pristina bonitas et misericordia. Quae si manet, salvi etiam nunc esse possumus; sin ea crudelitas quae hoc tempore in re publica versata est vestros quoque animos - id quod fieri profecto non potest - duriores acerbioresque reddit, actum est, iudices; inter feras satius est aetatem degere quam in hac tanta immanitate versari. (*Pro Roscio Amerino* 150)

If it is not enough for [Chrysogonus] to satisfy his greed with our money, if his cruelty will only be satisfied with our blood, then there is one refuge left to us, there is a single hope left to both Sextus Roscius and to the *res publica* as well, and it lies in your traditional goodness and mercy. If this still exists, then even now we can be saved; but if the cruelty which still dwells in our republic at this

¹⁰² Facis iniuriam, Chrysogone, si maiorem spem emptionis tuae in huius exitio ponis quam in eis rebus quas L. Sulla gessit. (146)

time has rendered your souls as well (and this is, I know, impossible!) too harsh and bitter, then we're finished, judges. It would be better to live one's life among wild beasts than to be immersed in such barbarism.

The case of Sextus Roscius, as we can see, is expanded into a litmus test, not just of the jury's loyalty to Sulla and true nobility, but of their very humanity. What Sulla has done must be seen, Cicero urges, not as an innovation, but crucially as a restoration. It is only if the jury can show their "traditional" or "old-fashioned" (*pristina*) goodness and mercy that the *res publica*, and Roscius too, can have any hope of continued life. The cruelty of the proscriptions, however, has put even that under threat, and, yet more threatening, it still has the potential to spread and do further damage. For this cruelty still exists (*hoc tempore... versata est*), and can only be, and must be, stamped out by the jury's votes. Cicero makes no bones about the threat that continued violence carries for their society, as he says, if they continue, *actum est* ("we're finished"). The cruelty and violence of the proscriptions, should they be allowed to continue, threaten more than just Sulla's enemies, they threaten the very bonds of human civilization. It is difficult to imagine a harsher judgment on the Sullan proscriptions, particularly from an advocate who bills himself as a loyal supporter of the new regime. Cicero, however, directs his indignation¹⁰³ carefully towards the future and, rather than recriminate past deeds, attempts to spin the case as a way for the jury to (safely) take a stand against the violence which was still occurring (*hoc tempore*).

By convicting Roscius, Cicero argues, the jury would be not just sanctioning the recent proscriptions, but hypothetically beginning a new and worse round of them.

¹⁰³ Solmsen, "Cicero's First Speeches," pg. 550, long ago noted the rhetorical 'heat' of Cicero's peroration: "the terrific crescendo of the epilogue where Cicero fans the indignation of the audience to a white heat."

Unlike the first, that targeted armed opponents or material supporters, these would threaten even the children of the proscribed:

Quod si id vos suscipitis et eam ad rem operam vestram profitemini, si idcirco sedetis ut ad vos adducantur eorum liberi quorum bona venierunt, cavete, per deos immortalis! iudices, ne nova et multo crudelior per vos proscriptio instaurata esse videatur. (*Pro Roscio Amerino* 153)

But if you take up [the prosecution's] cause and publicly declare your support for this policy, if you are seated there so that the children of the proscribed might be led before you, beware, by the immortal gods, o judges, that a new and much crueler round of proscriptions should appear to have been touched off by your vote.

The issue most crucially before the jury is one of sanctioning and the problem of attaching their authoritative *imprimatur* to these proceedings, which Cicero characterizes as a new and much crueler set of proscriptions. Berry, noting that this would appear to contradict the argument that the elder Roscius was never proscribed, insists that this stridently critical passage could not have been a part of the defense speech as it was actually delivered.¹⁰⁴ But Cicero here is thinking more generally. If the child of Roscius, a known supporter of the Sullan faction who was never proscribed, can still be condemned, then what hope have the children of those legally proscribed? The intent of this passage is to serve as a more emotional warning to the noble jury of what could result, and that they would be at fault. Thus a vote for conviction would be a public declaration (*profitemini*) that this new 'nobility' is more interested in partisan loyalty than justice, and more interested in protecting its own than in furthering the interest of justice. What is worse, this hypothetical new round of proscriptions "would appear" (*esse videatur*) to be done, not by a rogue general, but with the agency and consent of the jury

¹⁰⁴ Berry, "The Publication of Cicero's 'Pro Roscio Amerino,'" pg. 84-85.

itself (*per vos*). The guilt could not be shifted away. By voting for conviction they will be showing themselves to be not just collaborators with this outrageous behavior, but actually its instigators, thus undermining their claim to legitimacy.

Perhaps the greatest threat of continued purges and violence lies, however, in the hearts of the Roman people themselves. Cicero finishes the speech with a rousing conclusion centering not upon Roscius' case or the particulars of his innocence, but rather on the effects that a conviction might have upon the Roman people. The jury must take a political stand here,¹⁰⁵ Cicero argues, and show that they have risen above the violent urges of civil strife, if only to teach the same mercy to the Roman people by their example.

Vestrum nemo est quin intellegat populum Romanum qui quondam in hostis lenissimus existimabatur hoc tempore domestica crudelitate laborare. Hanc tollite ex civitate, iudices, hanc pati nolite diutius in hac re publica versari; quae non modo id habet in se mali quod tot civis atrocissime sustulit verum etiam hominibus lenissimis ademit misericordiam consuetudine incommodorum. Nam cum omnibus horis aliquid atrociter fieri videmus aut audimus, etiam qui natura mitissimi sumus adsiduitate molestiarum sensum omnem humanitatis ex animis amittimus. (*Pro Roscio Amerino* 154)

Not one of you is unaware that the Roman people, who were once considered extremely lenient towards their enemies, are suffering at this moment from cruelty here at home. Remove this from the citizen body, o jury, do not allow it to dwell in this *res publica* any longer. That cruelty is not just evil of itself, because it has killed so many citizens in such an atrocious way. But no, through continued exposure to suffering, it wears away the pity from the hearts of even the most merciful people. For when we see or hear something horrible happening all the time, even those of us who are the mildest by nature do, through the continual repetition of harm, lose all sense of humanity from our souls.

Thus the speech ends with an appeal to restore mercy and tolerance to the Roman republic, not just for philosophical reasons, but for practical ones as well. Even though

¹⁰⁵ As Vasaly, "Cicero's Early Speeches," pg. 82-83 notes, these are Cicero's "most memorable" political comments in the speech, and so serve to define both himself and his political persona.

Sulla has left the dictatorship, the period of lawlessness has left the *res publica* still suffering from this period of violence and retribution. Crucially, it is not Sulla who can remove it, but rather the jury which is asked to heal this injury affecting the Roman people. The jury must show instead that they have come to understand the logic of pardon (*ignoscendi ratio* – see pg. 12) and wish to restore the custom of free and fair trials (*cognoscendi consuetudo*), both of which had been lost in the Roman state under Sulla. There is, however, a threat lying behind this statement: the looming specter of continuing violence and barbarism. The proscriptions and the suffering and troubles they inspired strike at their very humanity, reducing the Roman people metaphorically to savage and pitiless beasts. Cicero presents the jury with the opportunity to help end the cycle of violence, to strengthen the humanity in the hearts of the Roman people, and set them back in charge of a true *res publica* after Sulla.

Conclusion: Republican Legitimacy and the *Pro Roscio Amerino*

Whether one views the *Pro Roscio Amerino* as politically significant or not, there is no denying that Cicero pursued an intentionally political strategy to win Roscius an acquittal. Whether one views that strategy as a smokescreen over Roscius' guilt or as an essential and unavoidable portion of the defense, there is no denying that Cicero clearly labored to present himself, as advocate, and his political positions, as aspiring politician, in the best light possible. For all of Cicero's disclaiming of a political motive, the speech heavily implicates the political situation of the day and demands immediate action from the jury. The speech, however, does not rely upon a simple dichotomy between Sulla's supporters and opponents, but rather attempts to persuade through a reliance on the

professed ‘Republican’ principles of the victorious Sullan faction, specifically principles that would appeal both to the victors and the vanquished alike. The heart of the strategy is its immanent critique of the regime: if the victors have restored a legitimate *res publica*, then they must live up to their promises to restore the courts, to let the ‘true’ nobility rule, and to look out for the interests of the Roman people without becoming lost in partisanship and issues of loyalty.

The speech as it stands also forces the nobility to come to terms with the legacy of the proscriptions. Although Cicero avoids criticizing them directly, he is absolutely clear in his position against a further purge and the likely results: a breakdown of the regime’s still tenuous legitimacy and the potential to spark further violent resistance from the Roman people. What must be proved, if a genuine *res publica* is to emerge from the ashes, is that the Roman nobility is loyal not to itself and its narrow interests, but to the Roman people as a whole. The case of Roscius, in this argument, presents them with a crucial test. If they show themselves willing and able to punish even their own for violating the laws, then perhaps they deserve the trust and faith of the Roman people. To do otherwise, Cicero argues, would be a betrayal of their declared motives, a perversion of justice, and a short spiral into violent anarchy. The speech becomes, in his skillful rhetoric, a potent reminder of what the Republic is, and also of what it could be – a state where no one is afraid to speak his mind and which possesses an aristocracy of true merit, founded on a virtuous, merciful, and wise Senatorial class. Only in this way can the power that nobility now hold be made to last.

CHAPTER THREE

Redeeming Sulla's Republic:

Cicero's Political Program in the *Verrines*

Cicero had asserted his loyalty to the Sullan *res publica* in his defense of Roscius of Ameria, but only if the new dispensation lived up to its promises to be a legitimate *res publica*. This political positioning helped to define the ambitious young advocate. It is difficult to imagine that the political beliefs he professes in that celebrated defense were not a significant factor in his early electoral successes. At the earliest age allowed by Sulla's *Lex Annalis*, which set down minimum ages for the Roman magistracies, Cicero was entrusted by the Roman people with the office of quaestor in 75 BCE. In that position, he served under the praetor Sextus Peducaeus as a financial officer based in western Sicily. While there, he forged connections with the Sicilians which would serve him in good stead later in life, but also aimed to increase his renown at Rome. He later reflected in his defense of Plancius of 54 BCE that he worked very hard to earn the respect of the Sicilian provincials, and also oversaw the shipment of a large quantity of grain to Rome when prices were quite high. He recalls, however, that the Roman people in general took little notice of these achievements, and he was even mistakenly assumed to be the quaestor of a different province (Africa) upon his return.¹⁰⁶ Rather than be deterred from politics, Cicero took the opposite lesson from the experience, that is, that a politician without a great name must work even harder to gain the notice of the Roman electorate.

¹⁰⁶ *Pro Plancio* 64-66.

sed ea res, iudices, haud scio an plus mihi profuerit quam si mihi tum essent omnes gratulati. nam postea quam sensi populi Romani auris hebetiores, oculos autem esse acris atque acutos, destiti quid de me audituri essent homines cogitare; feci ut postea cotidie praesentem me viderent, habitavi in oculis, pressi forum; neminem a congressu meo neque ianitor meus neque somnus absterruit. (*Pro Plancio* 66)¹⁰⁷

But this situation, judges, well, perhaps it benefitted me more in the end than if everyone had been congratulating me at that time. From this I learned that the ears of the Roman people are fairly deaf, but their eyes are sharp and focused. I stopped thinking what people were going to hear about me: I made certain that they saw me every day in person, I lived before their eyes, I forced my way to the forum; Neither my doorman nor my need for sleep kept anyone from seeing me.

What Cicero reveals in this self-effacing anecdote is his obvious desire for political advancement and the route which he would take to achieve it. He refuses to have his achievements defined by someone else's words, by another politician's insulting comment or even praise. Cicero will define himself, his achievements, and his politics before the eyes of the Roman people themselves in the Forum.

Cicero's greatest opportunity to define himself before the Roman people came five years later, in the year 70 BCE, when he launched the prosecution of the notoriously corrupt and politically connected former governor of Sicily, Gaius Verres. Viewed in its entirety, this prosecution was a massive undertaking, comprising 7 speeches in total (The *Divinatio in Caecilium*, 1st Action, and the five speeches of the 2nd Action). The speeches also allowed Cicero the opportunity to take on the then leading advocate of the Roman bar, Quintus Hortensius Hortalus. When Cicero triumphed and Verres went off into exile rather than face the charges, he gained not only the appreciation of the Sicilians, but also unofficial recognition as the most capable advocate in Rome. This prosecution, however,

¹⁰⁷ The text of the *Pro Plancio* is that of Clark, *Orationes Vol VI: Pro Tullio, Pro Fonteio, Pro Sulla, Pro Archia, Pro Plancio, Pro Scauro*.

was about far more than a mere rhetorical contest; it also had clearly articulated political goals and motivations.

Cicero continues in the seven speeches of the Verrines to advocate for the political program, his feelings *de re publica*, that he had articulated in his earlier speeches. The lynchpin of his rhetorical strategy, and his political program, is the necessity of re-legitimizing, in the eyes of the Roman people, the continued power and influence of the Senatorial class over the Republic. But just as in the *Pro Roscio*, this continued influence is conditional. It is entirely predicated upon the notion that the authority of the Senatorial class is based not upon birth or wealth alone, but upon its merit and virtue. An acquittal of Verres will be, he forecasts, the final straw that proves the Senate to be incapable of legitimately ruling the *res publica* and the Roman people in an impartial and prudent manner. Only a conviction, Cicero argues, will show the Roman people (and especially hidden opponents of the Senate) that the Senate indeed has the true capacity to rule in a disinterested manner and to look out, not just for themselves, but for the long-term well-being of the Roman people and the *res publica* itself.

Thus Cicero returns, again and again throughout the Verrines, to the worry that the Senate might fail this critical test and, thereby, prove itself unworthy and illegitimate. That is, that it will prefer to take the side of a manifest criminal, robber, rapist, and even tyrant like Gaius Verres (as Cicero portrays him) rather than the real needs of the Roman citizens and their empire abroad. By the time of Cicero's early career, however, the Roman people had begun to lose respect for this advisory body, considering it to be corrupt, out of touch, and self-interested. Cicero does not actually deny these charges,

but rather uses them to call the Senate, as a whole, to re-legitimize itself in the eyes of the Roman people. But, while Cicero did achieve his goal of sending Verres into exile, his speech is commonly thought not to have had a great or lasting political impact.¹⁰⁸ I believe this viewpoint, while perhaps true, misses the point. For Cicero worked very hard to publish and publicize the written version of these speeches. In doing so, he publicizes not just his rhetorical skills, but also his political positions and ideological commitments. The preserved, written speeches indeed appear to exaggerate his own importance in the overturning of the Sullan constitution and makes a *monumentum* of his attempts to stay the popular tide. Particularly through his discussions of the legitimacy or illegitimacy of laws, of magistrates, and of their actions, Cicero attempts to define himself in the public eye as a moderate reformer, a firm believer in the Senate's authority, but one convinced of the need for a *legitimate* Senate. In Cicero's rhetoric, the case becomes a trial not of Verres, whose guilt can be assumed, but of the Roman senatorial juries. Only with a correct verdict can they demonstrate their commitment to justice, their willingness to protect citizens and allies alike, and their obedience to the laws over themselves. So Cicero uses the published version to define and re-define his own (perhaps minor) role in these great affairs, but these discussions of politics should not, however, be regarded solely as a means of self-definition within a larger speech with a multitude of other goals. In the preserved speeches, these acts of political self-definition must be viewed as a central part (and often *the* key part) of his persuasive strategies.

¹⁰⁸ This has been argued, most recently, by Ann Vasaly in "The Political Impact of Cicero's Speeches" from *The Cambridge Companion to Cicero*, Cambridge 2013.

Perniciosa Rei Publicae, Vobisque Periculosa: Framing the Case against Verres

The 70s BCE were a period of increasing political conflict between the upholders of the Sullan dispensation and its opponents. Throughout this turbulent decade, the reforms which had been instituted by Sulla at sword point were slowly chipped away at, particularly those which were intended to diminish the power of the popular assemblies and their officers, the Tribunes of the Plebs. Fergus Millar rightly points out that the period from 80 to 70 BCE was “the only time in the history of the republic since (at least) the early third century when the people did not possess the unrestricted right to legislate.”¹⁰⁹ Indeed, much of the political activity of this decade is devoted to restoring this traditional right. In 75 the consul C. Aurelius Cotta brought forward and passed a measure allowing Tribunes to pursue further elective office, thus rescinding the Sullan ban.¹¹⁰ The year 74 was dominated by the actions of the tribune L. Quinctius, who demanded the restoration of the full *tribunicia potestas* and railed against the corruptibility of the Senatorial courts that Sulla had put in place.¹¹¹ The final death knell of the Sullan system, however, would come in 70 BCE when, with the apparent blessing of the two consuls, Pompey and Crassus, two significant reforms were passed. Tribunes

¹⁰⁹ Millar, *The Crowd in Rome in the Late Republic*, pg. 49. The rest of this paragraph is heavily indebted to his analysis of the period at pg. 49-72.

¹¹⁰ Cicero’s commentator Asconius informs us of this, and even that the law was passed against the wishes of the nobility (*nobilitate invita* 67C), while Cicero, in a fragment of the *Pro Cornelio* (found in Asconius) tells us that Sulla’s supporters were determined to hold onto every facet of Sulla’s dispensation: *qui non modo cum Sulla verum etiam illo mortuo semper hoc per se summis opibus retinendum putaverunt, inimicissimi C. Cottae fuerunt, quod is consul paulum tribunis plebis non potestatis sed dignitatis addidit* (78C) “they (the Sullans) who not only with Sulla, but even after his death always thought that they had to hold onto this with the greatest exertions, became the most ferocious enemies of Gaius Cotta because that man, as consul, had added some little bit to the standing, not the power, of the Tribunes of the People.. The Latin text is that of Clark, *Q. Asconii Pediani Orationum Ciceronis quinque enarratio*. See also Sallust’s speech of the radical tribune Licinius Macer in 73 BCE (*Histories* 3.48.8-12).

¹¹¹ See the *Pro Cluentio*, especially 28-37 for Cicero’s later reflections on the agitation of this radical tribune. Clark, *M. Tulli Ciceronis Orationes*.

were once again allowed to propose legislation directly to the popular assemblies.

Second, the composition of juries was changed, from fully Senatorial to having members drawn equally from the Senate, the Equestrians, and the *Tribuni Aerarii*, whose wealth was just under the Equestrian census. Cicero's prosecution of Verres took place between the two great reforms of 70, when the right to legislate had already been restored, but while the issue of jury composition was still being hotly debated. In the published speeches, Cicero does not shy from taking a position on these polarizing debates, but rather aligns himself as a moderate supporter of, as Millar aptly calls it, "the demand for the restoration of sovereignty."¹¹²

Just as in the *Pro Roscio Amerino*, one of Cicero's primary concerns within the Verrine orations is the restoration not of Senatorial power, but rather of the legitimacy and good repute of the Senate. This legitimacy was shaky enough, imposed as it was by the force of the dictator, but had been undermined especially, he asserts, by the flagrant and public corruption of the Senatorial juries. The trial at hand, that of Gaius Verres, becomes a 'heaven-sent' opportunity to rehabilitate the (Sullan) Senatorial Order in the eyes of the Roman people and their foreign subjects alike. Thus Cicero opens the first action of the Verrines:

Quod erat optandum maxime, iudices, et quod unum ad invidiam vestri ordinis infamiamque iudiciorum sedandam maxime pertinebat, id non humano consilio, sed prope divinitus datum atque oblatum vobis summo rei publicae tempore videtur. Inveteravit enim iam opinio perniciose rei publicae, vobisque periculosa, quae non modo apud populum Romanum, sed etiam apud exterarum nationum, omnium sermone percrebruit: his iudiciis quae nunc sunt, pecuniosum hominem, quamvis sit nocens, neminem posse damnari. (In Verrem 1.1)

¹¹² Millar, *The Crowd in Rome in the Late Republic*, pg. 49.

Our chief desire, judges, and indeed the only thing which could most of all help to diminish the resentment felt for your (Senatorial) order and the bad repute of your courts, appears to have been given to us, not by some human plan, but from on high, and offered to you at this critical time in the life of our republic. For a long time now a pernicious sentiment has persisted, one that is destructive, that is, to the republic and dangerous for you personally. And this opinion has spread, not just among the Roman people, but even among foreign nations, and is on everyone's lips: that our courts, in their current form, are completely incapable of condemning a wealthy man, no matter how guilty he may be.

From the very first sentence of the first action, Cicero cleverly assumes the manifest guilt of Verres and reframes the trial. His rhetorical strategy is not concerned with determining Verres' guilt or innocence, but with making the case into a trial of the Senatorial Order and the Senatorial juries that had been put in place by the dictator Sulla. And to bolster his claim, he holds before this jury of Senators the prospect that their verdict, if unjust, might give ammunition to more radical reformers, men like the tribune L. Quinctius or others, who were already working to strip the Senate of its prerogative and restore the Equestrians to the courts. Thus from the very outset the Senate suffers from *invidia* (resentment) and its courts from *infamia* (ill-repute or disgrace). The case of Verres becomes the only way (*unum*) to dispel these passions and restore the damaged reputation of the Senate. His second sentence goes on to explain why this case is nearly a heaven-sent opportunity for the senators. Cicero tells his jury that there is a certain sentiment (*opinio*) among the people which has even "grown old" (*inveteravit*) among them, becoming a piece of common wisdom (*omnium sermone percrebruit*). Enigmatically, Cicero holds off on explaining exactly what this opinion is, for dramatic effect, only revealing at the end of the period just what this subversive and threatening opinion is: that no wealthy person (such as Verres) can be condemned in Sulla's courts.

By attributing this “subversive opinion” to some unspecified others (both at home and even abroad), Cicero cleverly avoids putting this criticism of the Roman courts and the Senatorial Order in his own mouth. He is thus able to avoid providing evidence on the point, such as the notorious trials of Oppianicus or the several convictions of Senators for judicial corruption. This has led at least one scholar to speculate that the opinion Cicero cites here is false,¹¹³ but Cicero’s rhetorical gambit gains more from the implication than it would from a lengthy list of corrupt verdicts. The speech is not concerned with the judicial corruption of the past, much as his strategy in the *Pro Roscio* refused to deal directly with the proscriptions themselves. Instead the speech wants to prove that a conviction will be a way for this Senatorial jury to prove this opinion wrong for practical reasons, since it is both “subversive to the *res publica*” (*perniciosa rei publicae*) and “dangerous to yourselves personally” (*vobisque periculosa*). Thus he defines a conviction as both a patriotic duty (to save the republic) and a personal necessity (to save themselves). For if the Senate as a body loses its position in the state, what will happen to individual senators? The implication is not pretty.

So Cicero is not criticizing Sulla’s redesign of the Roman courts, but rather the *potential* effects of an acquittal of Verres, an obviously guilty man. He is thus able to frame himself as a moderate critic, and is able to use the threat of other more extreme reformers to spur the Senatorial jury members to action in this case. As Vasaly points out, Cicero’s loyalty and support of the Sullan state is represented as conditional in

¹¹³ Gruen, *The Last Generation of the Roman Republic*, pg. 29-35, basing his argument on the paucity of known convictions for judicial corruption in the period; Brunt, “Patronage and Politics in the Verrines,” pg. 287-88, however, rightly rebuts this argument: “It is quite immaterial whether this belief was substantiated by many convictions for judicial bribery; indeed the more corrupt the courts, the less likely was it that an individual senator would be condemned for taking bribes.”

nature.¹¹⁴ Only in the case that the Senatorial jury acquits Verres will they lose the respect and support of the Roman people and of Cicero himself. A correct verdict, in his opinion, will restore them to their proper standing:

De quo si vos vere ac religiose iudicaveritis, auctoritas ea, quae in vobis remanere debet, haerebit; sin istius ingentes divitiae iudiciorum religionem veritatemque perfregerint, ego hoc tam adsequar, ut iudicium potius rei publicae, quam aut reus iudicibus, aut accusator reo, defuisse videatur. (In Verrem 1.3)

If you judge him truly and conscientiously, then you will retain your rightful authority; but if his great riches overwhelm the truth and the conscience of the courts, I will make sure that the court is seen to have failed the republic, rather than the accused lacked the right judges or the accuser lacked the right defendant.

An incorrect verdict will be, he prophesies darkly, a source of aid and comfort to the enemies of the Senatorial Order. But Cicero presents himself as a consistent supporter of this Senatorial regime. He characterizes their authority over the state here as ‘rightful’ (*quae in vobis remanere debet* “which ought to remain in your possession”). It is only if the Verres’ great wealth should “overwhelm” (*perfregerint*) the truth and binding authority (*religionem*) of the courts that the Senate will lose its authority in the eyes of the Roman people. In that (unlikely) case, Cicero claims, he will personally lead the charge; for his rhetoric has the power to control the public perception of this trial. All the elements of this ‘heaven-sent’ opportunity are present. The right accuser (Cicero), the notoriously guilty defendant (Verres), and an upright jury. And he threatens that, in the unlikely case of an acquittal, he will lay the blame where it belongs: on the Senatorial jury.

Cicero connects his criticism to another current political issue: the rights of the Tribunes of the Plebs. Sulla had viewed the powers that the Tribunes had acquired

¹¹⁴ Vasaly, “Cicero’s Early Speeches,” pg 101-102.

(especially the power to independently propose legislation before the Assemblies) as a dangerous tool in the hands of demagogues. But the Tribunes had long held these traditional powers and there were many in the Roman populace who resented their curtailment by Sulla.¹¹⁵ The notion of popular sovereignty, that the *populus Romanus* ruled themselves in a *res publica* through their various assemblies, remained a powerful one. Earlier in the year 70, with the proposal and passage of the *lex Pompeia Licinia*, this right had been restored to the Tribunes. This was a momentous alteration in Roman politics, and one which is rightly pointed to as the demise of the Sullan system.¹¹⁶ But Cicero subordinates even this revolution in the political life of the republic to the need for judicial reform:

Moneo praedicoque — id quod intellego — tempus hoc vobis divinitus datum esse, ut odio, invidia, infamia, turpitudine, totum ordinem liberetis. Nulla in iudiciis severitas, nulla religio, nulla denique iam existimantur esse iudicia. Itaque a populo Romano contemnimur, despiciuntur: gravi diuturnaue iam flagramus infamia. Neque enim ullam aliam ob causam populus Romanus tribuniciam potestatem tanto studio requisivit; quam cum poscebat, verbo illam poscere videbatur, re vera iudicia poscebat. (In Verrem 1.43-44)

I warn you and I predict – which I understand well – that this moment has been given to you from on high so that you may free your whole order from the hatred, resentment, infamy and shame it suffers. It is believed that there is no severity in your judgments, no authority, and that no courts worth the name exist at all. And so we are condemned by the Roman people, we are despised: we burn in the harsh fires of unending infamy. It was for this reason, and no other, that the Roman people began to seek the restoration of the Tribunician power with such zeal; although when they demanded this restoration, it was only a nominal demand, in point of fact they wanted the restoration of the law courts.

¹¹⁵ Stockton, “The First Consulship of Pompey,” argues that there was even majority support in the assemblies for the restoration of *tribunicia potestas* by 73, but that enactment was prevented for several years by the Senate. He speculates that this repeal was only possible because it was supported by the consuls Pompey and Crassus, as well as the threat of force represented by their loyal armies.

¹¹⁶ E.g. Brunt, “Patronage and Politics in the Verrines”; Vasaly, “Cicero, Domestic Politics, and the First Action of the Verrines”; *contra* Gruen, *The Last Generation of the Roman Republic*, pg. 29-35.

Cicero's case— the prosecution of Verres and the place of the Senators on juries — is consistently framed as a greater scandal and a greater threat to the health of the republic than even the agitation for popular sovereignty. Instead, the trial of Verres becomes a lifeline by which the Senate may free itself from hatred, resentment, infamy and shame. But once again the problem is not judicial corruption, *per se*, but rather the effects that the *belief* in judicial corruption causes for the republic. The problem is so extensive that even the existence of 'real' courts is doubted (*nulla... existimantur esse iudicia*). At the same time, Cicero places himself within the Senatorial Order (*contemnimur* — “we are condemned,” *flagramus* — “we burn”), and yet frames the issue of judicial corruption — that “pernicious sentiment” (*opinio perniciosa* — In Verrem 1.1) that no wealthy man can be convicted — as the truest and greatest threat to the Senate's lasting authority. Thus even the movement for the restoration of the Tribunes, an issue seemingly unrelated to Verres' guilt or innocence, becomes another facet of the demand of the Roman people for respectable courts of law. Only by declaring Verres guilty can the Senate satisfy the real (*re*) and most pressing demands of the Roman people, as opposed to their nominal (*verbo*) wishes.

The Sullan Senate: Is this a Republic?

The first Verrine oration was, by all accounts, a fantastic success for Cicero, both practically and politically. Before turning to the witnesses and myriad evidence he had assembled in Sicily, he had forthrightly stated both the outlines of the case against Verres and laid out the political reasons why a Senatorial jury needed to turn against one of its own. In actuality, both Cicero's rhetoric and the mountain of evidence were so damning

to Verres' case that the former praetor fled the city, choosing to live out his life in exile rather than face the almost certain conviction to come. The actual historical case was over and this signal success made Cicero's early career. He had, after all, rhetorically defeated the previous champion of the Roman bar, Quintus Hortensius Hortalus, in open court, thus earning a reputation as Rome's top legal advocate and a record of staunch opposition to the corruption and abuse in the Roman government, especially the Roman provinces.¹¹⁷ The success of this first oration, however, was not enough for Cicero or his public image. He wanted to memorialize not just his victory in the first Verrine, but also find some public gratitude in exchange for his vast efforts in assembling the evidence against Verres and daring to take a stand against this corruption. Consequently, Cicero determined to publish this evidence in a series of fictional continuations of the case, the 5 'speeches' that constitute the second Action of the Verrines. So whereas the *Divinatio in Caecilium* and the *Actio Prima* of the Verrine orations were delivered in a Roman court, the remainder were not. Instead, the 'speeches' as written represent a sort of alternate history of the case, and one in which Verres remained in Rome to contest the charges against him.

The Senatorial jury, as Cicero frequently admits, had already heard much of the evidence presented in the second *actio*, albeit in a less rhetorical form, during the evidence portion of the first *actio*. Nevertheless, it was clearly important to Cicero to preserve that evidence in a published form. It was not enough for him for the Roman people and the Senators to remember those days in court in which the evidence was

¹¹⁷ He would later use this reputation to great effect in his later speeches, including to defend a likely corrupt provincial governor in the *Pro Flacco* as well as promote Pompey as the incorruptible antidote to the Senate in the *De Imperio Gnaei Pompei*.

recited. In its written form, this fictional second action would remain both fixed and accessible, a true monument to Cicero's achievement in the trial. Just as he did in the *Pro Roscio Amerino*, Cicero presents a representation of the world of the trial.

Throughout, he carefully constructs a world threatened by corruption which can only be remedied by an indisputable verdict against Verres and a demonstration of the moral character of the Senatorial Order. This is not just an attack on one provincial governor and his malfeasance, but, as Cicero frames it, a defense of the Senatorial Order and of the Roman court system intended to achieve justice.¹¹⁸ Even though Verres in reality fled justice, and the Senate did convict him, Cicero's orations against him continue to emphasize the political implications of this trial. Once again, the focus is on the issue of legitimacy in the eyes of the Roman people and the threat that the Senators in the jury and the system of courts itself will lose their standing and authority if they acquit such an obviously guilty man.

The most powerful presentation of this overall strategy, moreover, is to be found in the first speech of the second *action*, where Cicero discusses Verres' career before becoming governor of Sicily, and especially his egregious term as the urban praetor in Rome. Thus it focuses with the greatest intensity upon the threat that Verres represented to the Senate's rule, as his career (and the *exemplum* it created) undermined the foundations of Roman society and law. He did those both by his outrageous crimes, such as extortion, rape, and theft, but also and especially through his perversions of the Roman court system, by issuing crooked decisions himself as praetor, altering the praetorian

¹¹⁸ Some have doubted whether Roman courts were really interested in achieving a just verdict. Like all courts, they were, of course, fallible institutions, but as Riggsby, "Did the Romans Believe in Their Verdicts?" argues, they were generally assumed to be aiming towards that end.

edict unreasonably and, we might even say, unconstitutionally, and by his actions to abuse the legal process in his defense. While it might be tempting to class these latter crimes as insignificant, in comparison with theft and extortion for instance, Cicero makes them a central piece of his prosecution rhetoric. A crime like extortion, after all, does not substantially affect the legitimacy of the *res publica*. Even if it goes unpunished, it can simply be a failure of the jury to rightly tally the evidence. But a ‘crime’ such as issuing a crooked judgment, or, as Cicero alleges, altering the praetorian edict to allow a crooked judgment to be ‘legal’ strikes at the very foundation of the legal order. There is a distinct danger to the *res publica* and the Senatorial Order in particular if they allow the institutions of the state to be delegitimized. Cicero’s attacks on Verres in Verrines 2.1 (known as the *De Praetura Urbana* – On his urban praetorship), before he became governor of Sicily, are not simply an opportunistic attack on his early career, but a denunciation of the threat his career poses to the legitimacy of the Senatorial Order. Verres’ horrifying behavior at Rome as a judge and official becomes both a vivid foreshadowing of the tyrant he will become in Sicily,¹¹⁹ as well as the most dangerous way in which he undermines the authority of the Senate before the Roman populace. As he did in the First Action, Cicero in the *De Praetura Urbana* emphasizes the memory and judgment of the Roman people. He focuses particularly on how they witnessed these injustices themselves, and at the same time the Senate’s apparent indifference. If Verres is allowed to escape conviction, Cicero threatens, then the Senate will not. Instead, the Roman people will consider them to be complicit even in his horrible abuses. Thus the

¹¹⁹ On the ascription of Verres as a tyrant, see Thomas D. Frazel, *The Rhetoric of Cicero’s “In Verrem”* pg. 125-186, esp.164-172; See also Dunkle, “The Greek Tyrant and Roman Political Invective of the Late Republic” pg. 160-62.

trial becomes a trial of great political moment, and a moment of decision for the Senatorial jury. Does it possess the political will to protect the real interests of the *res publica* and the *populus Romanus*, or will it be seen to abandon such claims and surrender its legitimacy?

In the opening of the *De Praetura Urbana*, Cicero nods to the fictive nature of this oration against Verres and acknowledges the public esteem he hopes to gain from publishing the results of his efforts. Interestingly, he also frames this as due praise of the jury of senators as well:

Nam si iste id fecisset quod prius statuerat, ut non adesset, minus aliquanto quam mihi opus esset cognosceretur quid ego in hac accusatione comparanda constituendaque elaborassem; vestra vero laus tenuis plane atque obscura, iudices, esset. (*In Verrem* 2.1.2)

For if the defendant had done what he had earlier decided, that is, to refuse to appear, then the effort which I have taken in preparing and setting up this accusation would be less recognized than I desired. Indeed, the praise you deserve, judges, would obviously be slight and even unknown.

Thus Cicero provides a self-interested rationale for this extensive literary production:

Verres' departure from the city before a second *Actio* could be held deprived both himself and the Senatorial jury the chance to condemn him in open court after a full hearing of the evidence. By writing up this *monumentum* of his undelivered speeches, however, Cicero could make clear the credit that he deserved, as orator, and that the jury deserved for judging Verres fairly. His stated rationale for this speech centers on the justified praise (*laus*) and public recognition (*minus... cognosceretur*) that he and the Senate have lost on account of Verres' quick departure. The speech, then, becomes an attempt to remedy that situation and restore the praise owed to both jury and advocate.

Cicero, just as he had in the *Pro Roscio*, classes himself entirely as a genuine defender of the Senatorial Order, that is as a reformer rather than a revolutionary. He thus stands between the Senate and the Roman people, calling the Senate to change its ways and, at the same time, counseling the Roman people to have patience for this reform.¹²⁰ Nevertheless, Cicero utilizes the fearful prospect of revolution in order to goad the jury to conviction. The prosecution of Verres becomes the crucible, as it were, in which the Senate's claims to legitimate authority are to be tested:

Absens si esset iste damnatus, non tam sibi consuluisse quam invidisse vestrae laudi videretur. Neque enim salus ulla rei publicae maior hoc tempore reperiri potest quam populum Romanum intellegere, diligenter reiectis ab accusatore iudicibus, socios, leges, rem publicam senatorio consilio maximo posse defendi. (*In Verrem* 2.1.4)

For if (Verres) had been condemned in his absence, people would think that he did not so much wish to save himself as to begrudge you (the Senatorial jury) your deserved praise. For at this time there is no greater guarantee of the safety of our republic than that the Roman people understand that, once jury selection has been done properly, the allies, the laws, and the republic can indeed be defended by the Senate, its greatest advisory body.

Some scholars have doubted the factuality of Cicero's presentation of the Aurelian law on jury selection and the debates surrounding it.¹²¹ Thus, this view runs, Cicero exaggerated the popular support for such a bill as well as the effect the trial of Verres would have in shaping its popular perception. If Cicero was telling the truth, after all, that conviction would restore the people's confidence in Senatorial juries, then why was the Aurelian law, which gave equestrians place on these juries, nevertheless passed? It is

¹²⁰ So too Vasaly, "Cicero, Domestic Politics, and the First Action of the Verrines" pg. 127-28, relating this to his discussion of judicial bribery in the First Action: "Cicero is at pains, therefore, to frame his criticism of the senate's handling of the courts in a way that separated him from the popular demagogues."

¹²¹ Gruen, *The Last Generation of the Roman Republic* pg. 29-33; Thomas N. Mitchell, *Cicero, the Ascending Years* pg. 134-35; For an opposing view, see Vasaly, "Cicero, Domestic Politics, and the First Action of the Verrines."

interesting to note that here Cicero offers a defense of his own against that charge. He says, counterfactually, that, had Verres fled from the trial, which he in fact did, the Senate would have been deprived of their due credit for condemning him after a rigorous defense. But only a complete trial, fictively represented in the speeches of the Second Action, would have fully inoculated the Senate against the charge of judicial corruption. Indeed, Cicero says, the problem lies in the public perception of the Roman people. For the greatest “guarantee of the safety of the republic” (*ulla salus rei publicae*) lies in the understanding of the Roman people (*populum Romanum intellegere*). It is only a guilty verdict, and a well-publicized one at that, which will convince the Roman people to again accept the Senate’s authority and grant to it its true position as the greatest council defending the republic, its laws, and foreign allies.

The relationship between the Senate and the Roman people, in the speech, is one of fear and mistrust. The Roman people are portrayed as an unstoppable force demanding the punishment and conviction of Verres as evidence of the Senate’s right to rule. And Verres, even though a member of that order, must be sacrificed to appease that desire:

Nam quis hoc non intellegit, istum absolutum dis hominibusque invitis tamen ex manibus populi Romani eripi nullo modo posse? Quis hoc non perspicit, praeclare nobiscum actum iri si populus Romanus istius unius supplicio contentus fuerit, ac non sic statuerit, non istum maius in sese scelus concepisit — cum fana spoliavit, cum tot homines innocentis necavit, cum civis Romanos morte, cruciatu, cruce adfecerit, cum praedonum duces accepta pecunia dimiserit — quam eos, si qui istum tot tantis tam nefariis sceleribus coopertum iurati sententia sua liberarint?
(*In Verrem* 2.1.9)

For who does not understand the fact that (Verres) even if he should be acquitted against the will of gods and men alike, cannot be snatched from the hands of the Roman people. Who does not realize that we will be fortunate indeed if the

Roman people prove to be content in punishing him alone, and do not rather decide that he did not commit the greater crime against them – although Verres has despoiled temples, murdered so many innocents, although he brought death, torture, and the cross to Roman citizens and released pirate chieftains for a bribe – compared to those judges if they acquit him, overwhelmed as he is by his numerous and horrifying crimes?

Verres, then, cannot be saved at all. Even the attempt to ‘save’ him is represented as violent and dangerous. He would need to be “snatched” (*eripi*) out of the very hands of the Roman people. Cicero comes very close here, albeit in a very complex periodic sentence, to forecasting violence and an outright lynching. The Roman people will have their justice, he asserts, and the jury must choose between saving one of their own (note the repeated use of *istum* for Verres which identifies him with the Senate Cicero is addressing), on the one hand, and calming the righteous anger of the Roman people. It is not Cicero, however, who harbors this opinion, but the Roman people. They would have to be behaving quite admirably (*praeclare*) if they did not blame the Senate in the case of an acquittal. Indeed, they would be likely to blame the Senate of an even greater crime (*scelus maium*) than even the temple robbing, bribery, and murders committed by Verres: corruption. They will instead decide (*statuerit* – with all the legal overtones of trial and punishment) that the jury of senators committed the worse crime in freeing such an obviously guilty man.

The Roman people, he asserts, have rights and particular concerns within the state. They will be particularly concerned to protect the rights of citizenship (*civitas*) and freedom (*libertas*).¹²² They will act, he predicts, with particular ferocity because of

¹²² The connection between *civitas* and *libertas* is one he later echoes in his *Pro Caecina* as well. *Pro Caecina* 95-96.

Verres' worst crimes against the Roman people – his notorious executions of Roman citizens without trial:

Ex hoc quoque evaserit: proficiscar eo quo me iam pridem vocat populus Romanus. De iure enim libertatis et civitatis suum putat esse iudicium, et recte putat. Confringat iste sane vi sua consilia senatoria, quaestiones omnium perrumpat, evolet ex vestra severitate: mihi credite, artioribus apud populum Romanum laqueis tenebitur. (*In Verrem* 2.1.13)

Let us say he escapes from this [prosecution] as well: I will go where the Roman people have long been inviting me. For the Roman people think that judgments touching the right of freedom and citizenship are uniquely their own prerogative, and it thinks rightly. So if Verres should employ violence to break free of the Senate's better judgment, say he forces a way through all our tribunals, say he flies free from your severity: believe me, he will be held quite fast in the chains of the Roman people.

Because of Verres' abuses of Roman citizens, including sentencing them to death and hard labor in the stone quarries, Cicero predicts that the Roman people will never let him escape. In fact, they have even been "inviting" Cicero "for a long time" (*iam pridem vocat*) to join them in something more extreme, perhaps threatening a trial before the Roman Assemblies themselves. It is almost as if Cicero is threatening to 'radicalize' himself and join with the demagogues and revolutionaries if the jury refuses to convict. Cicero, as the Aedile-elect of 69, will have some ability to please the people in the coming year, but nothing could possibly compare to the "service" (*munus*) of convicting Verres in their eyes.¹²³ Thus he makes clear just what a temptation such a trial could be

¹²³ *In Verrem* 2.1.14: *Hanc ego causam cum agam beneficio populi Romani de loco superiore, non vereor ne aut istum vis ulla ex populi Romani suffragiis eripere, aut a me ullum munus aedilitatis amplius aut gratius populo Romano esse possit.* "While I plead this case for the benefit of the Roman people from this high position, I am not afraid that any force can save him from the votes of the Roman people, or that any service of my Aedileship could be greater or more pleasing to the Roman people."

to the wrong prosecutor, who, unlike himself, might allow the Roman people to take the matter into their own hands.¹²⁴

At the same time, Cicero emphasizes his own ‘moderate’ *bona fides* throughout the beginning of the speech by focusing on what ‘real’ revolutionaries might be hoping for in this case. And furthermore, by playing up the contrast between his own views and those of these unnamed ‘revolutionaries,’ he asserts the essential conservativeness (in a Sullan sense) of his own views and actions in this case. He calls his prosecution a ‘revival’ of an ancient custom (2.1.15: *veterem consuetudinem rettuli*) and his moderation and impartiality in conducting the investigation in Sicily, when he might have been more self-interested (2.1.16-17). He also compliments the current make-up of the jury, calling them the most splendid and dignified jury to be assembled since the Sullan settlement.¹²⁵ Verres’ conviction will serve as a buttress to the Senate’s authority over the Roman people. Cicero emphasizes that the real revolutionaries, on the other hand, must be praying for Verres’ acquittal and, I think, we can readily see here the specter of the renewed civil strife, between the Senate and its opponents. Cicero’s strategy is to dissociate himself from such men, but nevertheless to emphasize the very real threat they could pose to the Sullan settlement and the Senate’s position within it:

¹²⁴ Cicero similarly broaches the issue of lynching in his discussion of one of Verres’ judgments as Urban Praetor. In recounting Verres’ decision against the freedman Trebonius, Cicero says Verres complained that a freedman was inheriting from a wealthy Roman knight, and complains “O modestum ordinem, quod illinc vivus surrexerit!” “What a humble order! After all, Verres departed there still alive.” (*In Verrem* 2.1.124)

¹²⁵ Verrines 2.1.18: “Ita reieci iudices ut hoc constet, post hunc statum rei publicae quo nunc utimur simili splendore et dignitate consilium nullum fuisse.” “In jury selection I made my choices such that it is clearly obvious that there has been no jury of equal splendor and dignity since the founding of this state of the republic which we now enjoy.” It is not exactly clear whether he refers to the Sullan settlement or some earlier period, although I incline towards the former in this context.

Verum vobis dicam id quod intellexi, iudices. Homines scitote esse quosdam quos tantum odium nostri ordinis teneat ut hoc palam iam dicent, se istum, quem sciant esse hominem improbissimum, hoc uno nomine absolvi velle ut ab senatu iudicia per ignominiam turpitudinemque auferantur. (*In Verrem* 2.1.23)

But I will tell you what I have come to know, judges. You should know that there are certain men who have such a hatred for our (senatorial) order that they have been openly saying for a long time that they want [Verres], whom they know is an obviously guilty man, to be absolved in this court for this reason: so that the courts will be taken away from the Senate because of the ignominy and disgrace of this decision.

This supposition, that there were still anti-Senatorial sympathizers among the population of Rome, was a reasonable fear for the year 70 BCE. Despite the victory of Sulla and his new Senate in Italy, open opposition to that government had continued for some time. Quintus Sertorius, a prominent Marian, had continued military operations against Sulla's generals, largely successfully, until his death by treachery in 73 BCE, a mere three years before this prosecution. Espousing the Marian cause, even after their defeat on the battlefield, seems to have become something of a dangerous, but potentially advantageous political tactic. Pompey the Great, when he obtained all the correspondence of Sertorius, which allegedly contained subversive letters from great men at Rome, famously burned it without reading.¹²⁶ In the same vein, two years after the trial of Verres, the Plutarch reports that Julius Caesar gave a funeral oration for his aunt Julia who was also the wife of Gaius Marius. In doing so, he also took out the *imagines* of Marius and thus tapped into the grievances and resentment of those who had favored the Marian cause.¹²⁷ When some Sullan partisans objected, the gathered crowd managed to shout them down with their applause. The Marian cause, then, had been temporarily

¹²⁶ Plutarch *Life of Pompey* 20, *Life of Sertorius* 27

¹²⁷ Plutarch - *Life of Caesar* 5.

cowed into silence, but despite the proscription, it was still far from eliminated. Rather, the Senate (some members more than others) feared their continued operation and influence as a sort of fifth column within the state.

Within the *De Praetura Urbana*, Cicero uses this situation, and even the presence of the defeated Marians and other opponents of the Senatorial *res publica*, to bolster his own argument. In his telling, The Senate has the opportunity in this trial to re-make their reputation and to become not just a Sullan Senate, but a Senate for the whole Roman people. Verres' great wealth has had no influence on Cicero, nor has it had any sway over the Roman people. The Senate are the last to be tested. But already in the bearing and reputation of this august body, Cicero finds hope that they too will pass the test of legitimacy:

nam comitiis meis, cum iste infinita largitione contra me uteretur, populus Romanus iudicavit istius pecuniam, quae apud me contra fidem meam nihil potuisset, apud se contra honorem meum nihil posse debere. Quo quidem die primum, iudices, citati in hunc reum consedistis, quis tam iniquus huic ordini fuit, quis tam novarum rerum iudiciorum iudicumque cupidus qui non aspectu consessuque vestro commoveretur? (*In Verrem* 2.1.19)

For at my election, when [Verres] was using his limitless wealth against me, the Roman people decided that his money, which had had no power to deter me from my honest course, should not deter them from electing me (as aedile). On that first day, judges, when you were summoned to this place to sit in judgment of this defendant, who was there that was so hostile to this (senatorial) order, so desirous of revolution, new courts, and new judges that he was not moved at the sight of you and your assembled body?

Cicero recalls the first day of the first Action, as he looks out over the Senatorial jury.

He imagines that company of jurors as so dignified and upright that even their very image moves their enemies, and inspires patriotism in even the most seditious hearts. They have, then, an opportunity to be a Senate, but not just a Senate looking out for their own

interests, but one that truly represents the interests of the whole Roman people. As Cicero tells it, nothing less than the legitimacy of the entire *res publica* hangs on this single verdict. Within the first hour of the trial, he says, Verres lost his hope of corrupting the jury. It did not take long for the Roman people to render their judgment:

Id sum adsecutus... ut primo die testium tanto numero citato populus Romanus iudicaret isto absoluto rem publicam stare non posse. (*In Verrem* 2.1.20)

I prosecuted the case in such a way that on the on the first day, given the evidence of the witnesses I summoned, the Roman people judged that a *res publica* could not survive if he was absolved.

The greatest threat that Verres poses, then, is that an acquittal will undermine the legitimacy of the Roman senate. Should they decide this case wrong, as Cicero represents it, it will be the final straw undermining their rule. The Roman people have decided that the *res publica* will not survive an acquittal (*isto absoluto*). What precisely this means, whether civil war, revolution, or a descent into mob justice, is left unclear. What is clear, however, is that even moderates, like Cicero himself, will be driven to seek other leaders than the Senate if they wish to inhabit a real *res publica*.

Polarization and Betrayal: Taking the Sullan Side?

Cicero's rhetoric longs for and attempts to promote a 'genuine' *res publica* for all Romans with its legitimacy anchored in the approval of the *populus Romanus*. Roman politics during the 70s, however, were in reality very contentious years. Throughout this decade there were a number of political battles over the shape and even survival of the Sullan settlement. Cicero's rhetoric, while claiming to find a middle ground by re-legitimizing the Senatorial Order, dared not ignore this political reality entirely. It is worth remembering, however, that Cicero was not forced to deliver the speeches of the

Second Actio, but instead intentionally chose to publish these fictive speeches afterwards.¹²⁸ There was thus no need to respond to any particular argument that could be offered by the defense, unless Cicero felt that such a response was necessary for the verisimilitude of the finished product. In the *De Praetura Urbana*, Cicero addresses in brief Verres' career before becoming the provincial governor of Sicily. It was, of course, traditional in Roman forensic oratory to recount the evil career or morals of one's opponent. But in Verres, Cicero takes on a difficult problem. Unlike Cicero himself, who took no part in the Sullan Civil War, Verres had taken an active role in the conflict. Verres' loyalty to Sulla and the *causa nobilitatis*, and thus the Senate, could be represented as clearer than Cicero's own. This represented a distinct threat to Cicero's self-presentation as champion of the 'Senatorial' Cause.

Faced with a situation in which his own devotion to the Senatorial cause could be represented as suspect, Cicero nevertheless chooses to engage the issue. In fact, Cicero turns the situation to his own advantage by using it to deplore the polarization and partisanship of the Roman political world. Just as he had turned his own youth and inexperience into an advantage in the *Pro Roscio Amerino*, Cicero now turns Verres' contributions to the Sullan cause into a liability by questioning his motives and making him out to be a dishonorable turncoat. Verres, like Cicero, had spent the decade of the 80s in Italy while Rome was being ruled by L. Cornelius Cinna. Unlike Cicero, however,

¹²⁸ The date and purpose of this publication remains a source of scholarly debate. Brunt, "Patronage and Politics in the Verrines" believes the purpose to have been "solely to enhance Cicero's reputation as an orator"; Frazel, "The Composition and Circulation of Cicero's *In Verrem*" argues they could have been composed quite rapidly from Cicero's notes, perhaps even by the end of 70; Vasaly, "Cicero, Domestic Politics, and the First Action of the Verrines" outlines the ways in which these orations might have served as political self-fashioning.

Verres chose to begin his public career while this Cinnan faction was still in power. He was assigned to serve as quaestor to one of the leaders of this faction, the consul Papirius Carbo, in 84 BCE. When Sulla landed in Italy, however, and it became clear that Sulla's army were going to be victorious, Verres deserted his cause and came over to the Sullans. Cicero recounts these events carefully, and always in such a way as to deny Verres any credit or consideration for choosing the side of the Senate and the nobility. Cicero works to block even the faintest whiff of such a hope:

Video quid egerim: erigit se, sperat sibi auram posse aliquam adflari in hoc crimine voluntatis adensionisque eorum quibus Cn. Carbonis mortui nomen odio sit, quibus illam relictionem prodicionemque consulis sui gratam sperat fore. Quasi vero id cupiditate defendendae nobilitatis aut studio partium fecerit, ac non apertissime consulem, exercitum, provinciamque compilarit et propter impudentissimum furtum aufugerit! (*In Verrem* 2.1.35)

I see what I have done. He is rousing himself, he hopes that some whiff of good will and favor might be blown his way in this trial, from those who still nurse a hatred of Gnaeus Carbo, though he is dead, from people he hopes will look favorably upon his desertion and betrayal of his consul. As if, indeed, he did this from a sincere desire to defend the cause of the nobility, or from his partisan zeal rather than from his desire to openly pillage his consul, his army, and his province and then, on account of his horrible theft, ran off!

Thus Cicero represents Verres as evincing sudden hope, that perhaps he might use the zealous feelings of his fellow Sullan partisans to his advantage. Cicero, however, acts to deny him this. Verres' desertion, he alleges, had nothing to do with his political beliefs, that is, his desire to defend the nobility or party loyalties, but instead was simply a clever stratagem to hide his embezzlement of military funds.¹²⁹ Verres appears to have done a signal service to the Sullan side, not only by deserting the consul Carbo, but also by

¹²⁹ *In Verrem* 2.1.37 "Ut hoc pacto rationem referre liceret, eo Sullanus repente factus est, non ut honos et dignitas nobilitati restitueretur." He suddenly became a Sullan partisan, not to restore the honor and position of the nobility, but so he could render his financial accounts in this way." (i.e. shoddily)

bringing the army's war chest as well. Cicero, however, imagines this incident not as a favor to the Sullans, but as a demonstration of Verres' immoral and disloyal nature. He does so by casting the events in a universally immoral light: desertion, betrayal, pillaging, and theft (*relictionem, prodicionem, compilarit, furtum*). Cicero carefully tears apart the bonds of partisan loyalty that might protect Verres from conviction, to destroy the party loyalty of the Sullan cause and instead promote the idea that other values like justice and honorable treatment must prevail in the Republic.

But, just as in the *Pro Roscio*, Cicero carefully avoids choosing sides in the dispute between the followers of Cinna and Sulla. He adopts a careful tone of non-partisanship, that is, of overarching loyalty to the republic as a whole rather than either side. This enables him to attack an opponent (Verres, Chrysogonus) who is affiliated with the victorious Sullans. Thus he reserves for himself the right to criticize even those on the winning side, should they act dishonorably. The critical issue for determining a person's worth to the *res publica*, as Cicero presents it, is not a Roman's political leanings, but rather, whether one acted honorably and faithfully given one's particular political beliefs. And Verres' actions, in his view, fail this test. In discussing Verres' earliest career, then, he emphasizes the fact that Verres betrayed the Consul Carbo for monetary gain rather than sincere belief.

Quodsi illinc inanis profugisses, tamen ista tua fuga nefaria proditio consulis tui conscelerata iudicaretur. "Malus civis, improbus consul, seditiosus homo Cn. Carbo fuit. " Fuerit aliis: tibi quando esse coepit? Posteaquam tibi pecuniam, rem frumentariam, rationes omnis suas exercitumque commisit. (*In Verrem* 2.1.37)

But even if you had fled empty-handed, your flight and nefarious betrayal of your consul would be considered criminal. "But Gnaeus Carbo was an evil citizen, a wicked consul, and a seditious person." Let's grant he was to other men: but

when did he become so to you? Only after he entrusted you with the money, the grain supply, the account books, and his army.

This betrayal, in the hands of Cicero's rhetoric, overwhelms all other, potentially mitigating, factors. The Republic, as Cicero would have it, can no longer accept the logic that the enemy of my enemy is my friend. The victors, instead, are urged to get into the business of policing themselves in order to maintain their legitimacy before the Roman people. And the crimes of Verres, even those that were committed in the service of the victorious Sullans, still deserve punishment. In service to this, he even adduces the opinion of the Dictator himself. For following this betrayal, Verres was rewarded by Sulla with rich estates and money, but even Sulla refused to trust him. A traitor, like Verres, cannot be tolerated. He is a person who destroys all the common bonds of friendship and trust:

Ipse Sulla, cui adventus istius gratissimus esse debuit, ab se hominem atque ab exercitu suo removit: [...] Ei postea praemia tamen liberaliter tribuit, bona quaedam proscriptorum in agro Beneventano diripienda concessit, habuit honorem ut proditori, non ut amico fidem. (2.1.38)

Sulla himself, who ought to have been most grateful for his arrival, removed this man from his own company and his army. [...] Later, he liberally bestowed gifts on him, and he allowed him to seize certain estates of the proscribed in the Ager Beneventanus, but he considered it the reward for a traitor, and not the trust given to a friend.

In this way, Cicero attempts to separate Verres from one of his greatest claims upon the support of the (presumably Sullan) Senators in the jury – his service to the Sullan cause and that of the nobility in the recent civil war. Cicero focuses not upon the ends of his treachery, and how Verres' actions presumably helped smooth the way for Sulla's

victory, but rather upon his chosen means, that is, his theft of campaign funds and willingness to betray his legal superiors and principles for personal gain.

The period of Sulla's return, as well as the executions and proscription of property, caused particular problems for the later regime. It proved difficult to legitimate a regime whose foundations appeared to lay in violence rather than the free choice of the Roman *populus*. Sulla, after all, had conquered the city at the battle of the Colline Gate, not by submitting himself peacefully for election. This was no doubt reinforced by the proscriptions which had followed. And Verres, for his part, had notoriously enriched himself in Sulla's proscriptions. Cicero suggests this fact, through a pointed *praeteritio*, but overall refuses to engage with Verres' gains from the proscriptions. Verres was clearly known to have received, as it were, a traitor's deserts from the spoils of victory. But Cicero pointedly declines to attack him for these acquisitions when he reaches the point of the proscriptions:

In quibus illud tempus Sullanarum proscriptionum ac rapinarum praetermittam; neque ego istum sibi ex communi calamitate defensionem ullam sinam sumere, suis eum certis propriisque criminibus accusabo. Quam ob rem hoc omni tempore Sullano ex accusatione circumscripto legationem eius praeclaram cognoscite. (*In Verrem* 2.1.43)

At this point I will pass over the time period of the Sullan proscriptions and plundering; for I will not permit that man to take any defense out of that universal calamity. I will confine myself to accusing him of his own particular crimes. So I have cut out that whole Sullan period from my accusation. Let us turn now to his famous diplomatic mission.

In passing this period over so pointedly, Cicero alludes once again to both the darkness of that time and the polarized atmosphere of Roman politics. He recognizes the period as one of proscriptions and also *rapinae* (plunder, rape, theft), but his portrayal seems to

acknowledge that the issue was too polarized for Cicero to handle with safety. The proscriptions might be, to some, a time of justified revenge, and to others a great injustice (and thus Cicero calls it a *calamitate communi* – “universal calamity”), but they were also surely a source of the wealth of many current (and powerful) senators. Cicero pointedly declines to even discuss the universal calamity for fear that Verres might gain some sympathy from those jurors more loyal to Sulla personally than to the *res publica*. Should Cicero attack the proscriptions directly, he telegraphs, Verres’ advocate Hortensius would make the trial (or at least a significant portion of it) into a kind of referendum on the Sullan settlement. And in that sort of atmosphere of Sullan vs. Cinnan, Verres might benefit from the partisan impulse to close ranks against an obvious foe. Cicero, even in this set of speeches which were never delivered, nevertheless portrays himself attempting to forestall and deflate this potential line of argument. This leaves an uncomfortable hole in his narrative of Verres’ early career, but denies Verres the ability to defend himself and his actions through partisan loyalty alone.

Verres as Urban Praetor: Who will Judge the Judges?

In his rhetorical attacks upon Verres and his crimes, Cicero attacks not just Verres’ criminal misdeeds, but illustrates the ‘crime’ of the Senatorial jury if it fails to convict. Thus acquitting Verres of betraying Carbo would convict the jury of Sullan partisanship, and make apparent their disregard for the Roman values of honor and loyalty. Similarly, excusing Verres for his misdeeds in the provinces as a legatus would only show the Senate’s apathy for justice in the empire, that is, that they officially condone Verres’ corruption and abuse. Cicero approaches Verres’ term as urban praetor

with a similar strategy in mind. He uses Verres' time as judge as a foil to his view of how the Roman courts of law ought to operate. Cicero imagines Verres' praetorship as the exact converse of the way a praetor ought to act in public, and uses the fictive trial as an opportunity to publicly define and promote his position on the Roman court system and the correct position of the praetor within it. He promotes, furthermore, a set of doctrines about the correct operation of the Roman legal system that, he argues, will shore up the legitimacy of both the Roman courts and the Senatorial Order, while also answering the demands of reformers for consistency, equity, and justice.

Cicero characterizes Verres' crimes while serving as urban praetor as both numerous and notorious. They are of such a character that they undermine the legitimacy of the Roman legal system as a whole. He begins his attack with an appeal to the crowd, and begs for their indulgence. But the indulgence he requests is that they allow Cicero to pass over some of Verres' misdeeds, particularly ones known to themselves, because there are simply too many for the orator to catalogue briefly:

Fatebor etiam illud invitus, me prorsus, cum iste punctum temporis nullum vacuum peccato praeterire passus sit, omnia quae ab isto commissa sint non potuisse cognoscere. Quapropter ita me de praeturae criminibus auditote ut ex utroque genere, et iuris dicendi et sartorum tectorum exigendorum, ea postuletis quae maxime digna sint eo reo cui parvum ac mediocre obici nihil oporteat. (*In Verrem* 2.1.104)

Since that man has allowed not one single second of time to pass free from crime, I will grudgingly confess that it has been impossible for me to discover all of his crimes. So listen now to me as I discuss the crimes of his praetorship under two headings. From each type – his legal decisions and his supervision of the public building contracts – I would have you expect only those items which are worthy of such a defendant as Verres; for it would not be right to object to small and medium offenses in such a case.

He appeals not just to his own evidence, but to the experiences and memories of the Senatorial jury and the imagined crowd itself, by requesting somewhat facetiously that they not blame him if he passes over some personal offense or minor injustice that Verres committed.¹³⁰ In this way, he appeals to the crowd itself to verify his claims, and subtly reminds the audience of the very public nature of the open air court system. Verres may have been elected by the Roman *populus*,¹³¹ and thus his actions have, or could have been argued to have, the sanction of the Roman people. But Cicero attempts in this section to thoroughly destroy his legitimacy as a judge by proving that many, and possibly all, of his decisions were so out of line with Roman legal tradition that they, and he, deserve to be publicly repudiated. Cicero builds up, in his criticism of Verres as urban praetor, a doctrine of the limits of the urban praetor's legal authority. In his argument, it is to be the law, not the person or whim of the judge, that must be the highest authority. Cicero accomplishes this specifically by outlining the legitimate limits of the praetor's powers, i.e. what he may not do, such as: *ex post facto* decisions, *privilegia*, decisions that contradict current statutes, accepted precedent or the praetor's own edict, and decisions that are inconsistent and arbitrary. All of which helps to create a doctrine of law (*ius*) that is clearly bounded in what it can and cannot do. This becomes a crucial marker of legitimacy within the speech, as well as a political cause that Cicero would take up himself before his consulship.

¹³⁰ See also *In Verrem* 2.1.103 *Multi enim ita dicent: "De illo nihil dixit in quo ego interfui; illam iniuriam non attigit quae mihi aut quae amico meo facta est, quibus ego in rebus interfui."* For many of you will say: "[Cicero] said nothing about the affair I was involved in. He never touched on the injury that was done to me or my friend, or in those affairs I participated in."

¹³¹ Or not, as Cicero alleges that he obtained the office by means of bribery (*In Verrem* 2.1.101).

He begins, naturally, with a description of Verres' edict and, at the same time, Verres' first wicked deed as praetor, his theft of the inheritance left by Publius Annius to his daughter Annia. The praetors of Rome were accustomed to issue a document, which was known as the praetorian edict, which helped to clarify how they were planning to rule in certain (potentially disputed) areas of Roman law.¹³² It seems to have arisen naturally from the deficiencies of the Roman statutory system (of *leges*- statutes). It is perhaps inaccurate to speak of this as a system, since it was never intended to be a comprehensive legal code, but was instead an ad hoc combination of all those statutes (*leges*) which had ever been proposed and passed by the legislative assemblies. It thus naturally possessed gaps, those places of law over which the Roman people had not yet decided to legislate. When legal issues arose that fell into those gaps, or, on the other hand, if the meaning of the statute in question was unclear or ambiguous, the Roman praetors, acting in their capacity as judges, would be forced to make a decision one way or the other. But every year brought a new praetor to office, and potentially a different decision. To preempt unending appeals or baseless cases, or simply to clarify certain areas of the law, the praetors issued a written document that stated, in advance, how litigants should proceed and how the praetor would rule in certain common situations. Over time, as many praetors occupied the office, a traditional document developed that, in large part, an incoming praetor was largely expected to re-issue as his own edict. He was, legally speaking, free to differ, by making some alterations. But should he do so, Cicero argues, the praetor would be altering traditional legal doctrines of proven

¹³² For its historical development the praetor's edict from the third century on, see Watson, "The Development of the Praetor's Edict," pgs. 106-110; For an overview of the powers of urban praetor in the first century BCE see Brennan, *The Praetorship in the Roman Republic*, pgs. 441-452.

usefulness. Thus, a praetor must be prepared to defend the reasoning behind his alterations, and to justify them in accordance with the customs and laws of the Roman legal system. This was particularly true, he asserts, if such alterations might have a large effect on the life and property of current and future litigants. Thus Cicero attacks Verres' additions and changes in issuing his own praetorian edict by alleging he did so on multiple occasions not just unreasonably and without cause, but solely to obtain a bribe from a litigant. It is in this way that he frames Verres' first case, involving the inheritance of Publius Annius Asellus.

As Cicero presents it, the case is straightforward. Publius Annius had died in 75 BCE, when Verres' predecessor Gaius Sacerdos still occupied the office of urban praetor, and Annius had appointed his daughter as heir in his will. By the *lex Voconia* of 169 BCE, it was illegal to appoint females as heirs unless the estate's assets were below a certain amount. Cicero asserts, however, that Annius' estate was well below the hundred thousand sesterces limitation – and so his decision to name Annia as heir was perfectly correct. Verres demanded a bribe from young Annia to enforce the usual (and equitable, according to Cicero) form of the edict. As Cicero says, “Everything was working for the orphan – the statutes, equity, the desire of her father, the edicts of the praetors, the customs of justice that existed at the time when Asellus died.”¹³³ But the estate's guardians refused to put down a bribe to obtain what was already theirs by right and Verres turned to the secondary heir, a certain Lucius Annius, and illustrated to him how Lucius might obtain the estate if Verres altered the praetorian edict for his term of office.

¹³³ *In Verrem* 2.1.103: *Faciebant omnia cum pupilla, leges, aequitas, voluntas patris, edicta praetorum, consuetudo iuris eius quod erat tum cum Asellus est mortuus.*

The man agreed and Verres altered the edict, and, accordingly, his official understanding of the *lex Voconia*. But Cicero attacks this decision not simply because it was the wrong decision, but because it violated an unwritten Roman legal norm – that barring retroactive statutes.

Cicero focuses his attack on a single word of Verres' edict (*fecit* – has made) as the sign of both his ignorance of Roman law and of his maliciousness in crafting his edict. He asks for a recitation of the relevant portion, ironically mocking the legal expertise of Verres' pronouncement:

Dic, quaeso, cetera; delectat enim me hominis gravitas, scientia iuris, praetoris auctoritas. Recita. Qui ab A. Postumio Q. Fulvio censoribus postve ea testamentum fecit fecerit. "Fecit fecerit"? quis umquam edixit isto modo? quis umquam eius rei fraudem aut periculum proposuit edicto, quae neque post edictum reprehendi neque ante edictum provideri potuit? (*In Verrem* 2.1.106-107)

Tell us, please, the rest. For I am delighted by this man's seriousness, by his knowledge of the law, by this praetor's authority. Recite: "Whoever from the year when Aulus Postumius and Quintus Fulvius were censors or after has made or shall have made a will. "has made or shall have made"? Who has ever written an edict in this manner? Who in all our history has proposed by edict a penalty or legal liability for an action which could not be avoided after the edict or foreseen before the edict was issued?

Cicero fastens upon this single word in Verres' edict (*fecit*) and attacks it as evidence of Verres' evil and unjust intent. It becomes a serious and intentional violation of long-standing Roman legal customs. He is concerned primarily to prove that Verres, in this first case, was already demonstrating his absolute contempt for Roman laws, its justice system, and his fellow citizens by parading his illegality so flagrantly. Cicero uses this *post facto* ruling as an opening to characterize Verres' entire tenure as praetor as one dominated by bribery, corruption, and injustice. He thus sets out to prove this accusation

in two steps: first by proving that retroactive legislation is either unthinkable or itself illegal (and verging on, we might say, unconstitutional), and, secondly, that Verres could have offered no legal or rational justification for this decision. There is, in Cicero's attack, no reason for Verres to alter his edict in this instance save one: to obtain a bribe from Lucius Annus. And finally, having proved this to his satisfaction, Cicero illustrates for the jury the clear risk to Roman society in letting such offenses pass: nothing less than the complete de-legitimization of the Senatorial Order.

Cicero proves this aspect of Verres' edict to be illegal/unconstitutional by reminding the jury of other famous legislation similar to the *lex Voconia* which dealt with the civil rights of citizens. On the one hand, he grants one possible exemption to such *ex post facto* laws, "that where the action is so nefarious and wicked of its own nature that, even if there were no specific statute, it was apparent it had to be avoided."¹³⁴ But outside of this exceptional violation of community standards, as it were, he points out from what would have been numerous well-known examples that establishing *ex post facto* laws is impossible in Roman law. The passage is lengthy but worth quoting in full:

Atque in his ipsis rebus multa videmus ita sancta esse legibus ut ante facta in iudicium non vocentur; Cornelia testamentaria, nummaria, ceterae complures, in quibus non ius aliquod novum populo constituitur, sed sancitur ut, quod semper malum facinus fuerit, eius quaestio ad populum pertineat ex certo tempore. De iure vero civili si quis novi quid instituit, is non omnia quae ante acta sunt rata esse patietur? Cedo mihi leges Atinias, Furias, Fusias, ipsam, ut dixi, Voconiam, omnis praeterea de iure civili: hoc reperies in omnibus statui ius quo post eam legem populus utatur. Qui plurimum tribuunt edicto, praetoris edictum legem annuam dicunt esse: tu edicto plus amplecteris quam lege. Si finem edicto praetoris adferunt Kalendae Ianuariae, cur non initium quoque edicti nascitur a Kalendis Ianuariis? an in eum annum progredi nemo poterit edicto quo praetor

¹³⁴ *In Verrem* 2.1.108: *nisi eius rei quae sua sponte tam scelerata et nefaria est ut, etiamsi lex non esset, magnopere vitanda fuerit.*

alius futurus est, in illum quo alius praetor fuit regredietur? Ac si hoc iuris, non unius hominis causa edixisses, cautius composuisses. (*In Verrem* 2.1.108-109)

And in these sorts of affairs we see that many things have been sanctified into laws such that anything done before passage cannot be questioned in court: the Cornelian law, the law on testaments, the monetary law, and many others prove that no new right is set up for the people unless this principle is affirmed: that a tribunal's jurisdiction starts at some time or other, even when the action has always been an outrage. In our civil law, if anyone has established some new principle of law, will he not nonetheless allow all things done before that date to remain valid? I think to myself of the Atinian laws, the Furian laws, the Fusian laws, and, as I said, the Voconian law and more so, every statute that deals with the civil law. You will find in all of these cases that rights are granted for the people to enjoy only after it is passed. Even those who grant the greatest authority to the praetor's edict say that the edict is an annual statute (*lex*). You, Verres, believe your edict is even more expansive than statute law. And if the first of January brings an end to the praetor's edict, why is it not also born on the first of January? Or is it true that no one can invade another praetor's term by edict, and yet this man will 'retreat' into his predecessor's term? And if you had composed this edict for the sake of law, rather than a single person, you would have composed it more carefully.

The attack upon Verres' praetorship and decisions here operates in multiple ways. It is important to note that Cicero adduces the entire discussion as evidence that Verres promulgated this interpretation of the *lex Voconia* solely to please the male heir Lucius Annius and thus obtain the solicited bribe. But he is also proposing, in very brief terms, an idealized vision of the legal system as a whole (*ius*), which is envisioned not as an arbitrary collection of rules passed by the Roman Assemblies, but as a real system that operates according to certain definite and rational rules. He links this principle to a number of respected statutes such as the Cornelian and Voconian statutes to show that not a single one of these laws permitted or even contemplated *ex post facto* penalties.¹³⁵

¹³⁵ Cicero appears to have been consistent in this with his earlier career. For instance, the Cornelian law *de civitate* had deprived Volaterrans of their citizenship as a penalty for opposing Sulla so enthusiastically. Cicero believed, and argued in the *de muliere Arretina* of 80 BC, that this punishment was illegal, but rather more on the grounds that citizenship cannot be taken away, than that it constituted an *ex post facto*

Thus these laws become more than a collection of statutes, but instead a coherent whole illustrating Cicero's point – that it is impossible under Roman law for statutes to punish behavior retroactively.

But Verres' abuse of the legal system goes even further; for Cicero uses this constitutional type argument to depict Verres not only overriding praetorian law and the edict (the *ius honorarium*), but also overruling the power of genuine statutes (*leges*), and thereby the proper authority of the *populus Romanus*. Cicero here asserts that even those who believe in the most expansive and powerful version of the praetorian edict believe it to be an *annua lex* ('annual statute' i.e. a law that lasts for one year). But Cicero projects a world where even statute, a higher form of law than the yearly *ius honorarium*, is limited in certain crucial ways. Verres, however, is a threat to this world. In claiming the right to punish past behavior, Verres destroys all such reasonable bounds. In this way, Cicero expands his notion of limited *lex* to encompass also the praetorian *ius honorarium*. Rather than being separate sources of law with their own individual rules and scope, Cicero puts forward a rational and hierarchical arrangement where the same rules of limitation which affect statute law also necessarily apply to the praetor's edict. In the same way, Cicero looks at Verres' failure to consider other aspects of his praetorian innovation: "*Quid, si plus legarit quam ad heredem heredesve perveniat? quod per legem Voconiam ei qui census non sit licet; cur hoc, cum in eodem genere sit, non caves?*"¹³⁶

Verres failed to consider it, Cicero argues, because the bribe was his only true

penalty. The proscriptions and penalties of the Sullan era might also have been explained away as an emergency measure that was no longer in effect.

¹³⁶ *In Verrem* 2.1.110: "What if someone has bequeathed more in legacies than comes to the heir or heirs? This is permitted under the Voconian law to those who are not included in the census. Why do you not consider this, when it is the same type of situation?"

motivation. Thus his alteration to the edict is offered as a patent abuse of justice and law, and Cicero makes this into a repeated refrain throughout his attack. Verres' innovation was put there: not "for the sake of lawfulness, but for one man,"¹³⁷ "not for a type of person, but for a specific individual,"¹³⁸ "not for the people, but for the secondary heirs of Publius Annus."¹³⁹ Thus his innovation becomes, not just a change in praetorian procedure or an *ex post facto* law, but also a *privilegium* – a law directed at only one person rather than a type or class.

Though Cicero allows at least some space for praetorian innovation or for genuine differences in legal opinion, Verres' innovation is consistently cast as distinctly out of step with tradition. The abuse is seen as so manifestly unjust that, not only did no praetor follow his innovation, but none of Verres' successors even considered it even a possibility: "*iam hoc magnum iudicium hominum de istius singulari improbitate, quod C. Verres sua sponte instituisset, id neminem metuisse ne quis reperiretur qui istius institutum sequi vellet.*"¹⁴⁰ Thus Verres becomes not just a single praetor who happens to have violated the rules, but, in Cicero's handling, the only praetor that anyone can even imagine flouting this powerful norm of legal behavior. He becomes the sole tyrant so obsessed with his own advancement that he will neglect all law and precedent:

Eripias tu voluntatem mortuis, bona vivis, ius omnibus? Hoc populus Romanus non manu vindicasset, nisi te huic tempori atque huic iudicio reservasset? Posteaquam ius praetorium constitutum est, semper hoc iure usi sumus: si tabulae testamenti non proferrentur, tum ut, uti quemque potissimum heredem esse

¹³⁷ *In Verrem* 2.1.109: "hoc iuris, non unius hominis causa"

¹³⁸ *In Verrem* 2.1.110: "non generis, sed hominis causam"

¹³⁹ *In Verrem* 2.2.110: "non populo esse scriptum, sed P. Anni secundis heredibus"

¹⁴⁰ *In Verrem* 2.1.111: "Now this shows most clearly the judgment of men about that man's unique wickedness – that no one was even afraid that anyone else would want to reinstitute the rule which Verres had willingly set up."

oporteret, si is intestatus mortuus esset, ita secundum eum possessio daretur. Quare hoc sit aequissimum facile est dicere, sed in re tam usitata satis est ostendere omnis antea ius ita dixisse, et hoc vetus edictum translaticiumque esse. (*In Verrem* 2.1.114)

Will you then snatch away the preferences of the dead, the possessions of the living, and the rights of all men? And wouldn't the Roman people have avenged this injustice with violence, if it had not reserved you for this occasion and this court? Since the praetorian Law was instituted, we have always followed this principle: if a written will could not be produced, then possession should be granted to the person who has the best right to be heir, if the deceased passed away intestate. Why this is the most equitable way to proceed is obvious, but in so common an affair, it is enough to show that everyone has decreed this to be so, and that this is the ancient and customary edict.

Cicero thus appeals back to ancient precedent to justify his own legal position and to undermine Verres' position. This dispute over wills is no academic exercise of law, but such a foundational doctrine that Cicero imagines the Roman people avenging it, perhaps even violently (*manu*). In itself, then, this violation would have been enough to convict Verres and turn the Roman people against him. Such an alteration as Verres made is a threat to the living and dead alike. Indeed, the principle is so well-known that Cicero declines to defend the principles of intestate succession (which Verres is violating) on equitable grounds, although he claims it would be quite easy, but instead opts to defend them on the grounds of tradition and precedent alone. Indeed, he seems to suggest, when a principle is as well-known and widely accepted as this one, there is no need to defend it on rational or equitable grounds.

Having concluded his discussion of this exemplary case, Cicero turns to a second infamous example of Verres' tampering with the praetorian edict: the case of the Minucian *gens* (family). As he explains, a man named Minucius had died both intestate and without biological heirs. The typical, and, as Cicero emphasizes, long-established

Roman practice in such situations was for the estate to pass to the *gens Minucia* as a whole. Again Verres altered the traditional form of the edict, and once again Cicero alleges that it violates all precedent and fairness: “He composes his edict in such language that anyone can understand that it was written with a specific man in mind. He describes the entire case, but leaves out only the man’s name. In doing so, he disregards justice, customary law, fairness, and the edicts of all his predecessors.”¹⁴¹ But for proof of this charge Cicero turns to the edict itself, which has been rendered, so he argues, unintelligible (*ridiculum*) and manifestly unfair by Verres’ alteration. Cicero points out that Verres’ edict says that he will recognize wills so long as they are sealed in the customary manner and in accordance with all the relevant laws. But if no papers are produced, then the praetor will simply give possession to whoever claims to be heir.¹⁴² This, for Cicero, makes a mockery of the praetor’s edict. On the one hand, heirs that have a will must provide all manner of documentation and proof. Those that cannot provide a will, on the other hand, become possessors without question. But the most powerful proof that Verres did this not by any mistake, but for a bribe, is shown by the Provincial edict he put forth upon beginning his governorship of Sicily.

In fact, Verres own subsequent behavior becomes Cicero’s most powerful witness to the fact that all these praetorian innovations were both unjust and unnecessary. For when Verres moved from the office of urban praetor to the propraetorian governor of Sicily, he had to publish a provincial edict dealing with many of the very same topics.

¹⁴¹ *In Verrem* 2.1.116: *Componit edictum his verbis ut quivis intellegere possit unius hominis causa conscriptum esse, tantum quod hominem non nominat; causam quidem totam perscribit, ius, consuetudinem, aequitatem, edicta omnium neglegit.*”

¹⁴² *In Verrem* 2.1.117

The most damning evidence, for Cicero, is that when given the choice of renewing these innovations, Verres instead reverted back to the more traditional form of the edict:

Iterum enim iam quaero abs te, sicut modo in illo capite Anniano de mulierum hereditatibus, nunc in hoc de hereditatum possessionibus, cur ea capita in edictum provinciale transferre nolueris. Utrum digniores homines existimasti eos qui habitant in provincia quam nos qui aequo iure uteremur, an aliud Romae aequum est, aliud in Sicilia? Non enim hoc potest hoc loco dici, multa esse in provinciis aliter edicenda; non de hereditatum quidem possessionibus, non de mulierum hereditatibus. Nam in in utroque genere video non modo ceteros, sed te ipsum totidem verbis edixisse quot verbis edici Romae solet. Quae Romae magna cum infamia pretio accepto edixeras, ea sola te, ne gratis in provincia male audires, ex edicto Siciliensi sustulisse video. (*In Verrem* 2.1.118)

For I ask you again, just as in the case of the Annianus on the inheritances of women, and in this case on possession of inheritances, why you did not choose to transfer these clauses into your Provincial edict. Did you think that those who live in the province were more worthy than us Romans to enjoy just laws? Or that one thing is just for Rome, but another for Sicily? For you cannot say that these matters must be dealt with one way here, and another way in the provinces. Certainly not regarding the possession of inheritances, or the rights of women to inherit. For I realize that in each of these matters that other (praetors), including yourself, are accustomed to issue their Provincial edict in the exact same wording as at Rome. But I notice that you removed precisely these clauses from your Sicilian edict, which you had so infamously decreed at Rome for a bribe, so that you would not earn their anger without payment.

The real problem with Verres' mishandling of the edict is, then, not simply a litany of procedural problems or the fact that it differs from ancestral tradition. It is primarily that the edict Verres issued cannot even be argued to be just and appropriate according to Roman tradition. And though today we might be tempted view rules such as women's inheritances or the rights of a *gens* to inherit as, at their root, arbitrary or culturally determined, Cicero clearly views the matter as one of absolute justice. The sometimes arcane rules of Roman law become, ideally, methods of adjudicating justly (*aequo iure* – with equal law). And thus Verres' alterations to the edict in order to obtain bribes

undermine the foundation notional that Roman courts are just and fair. Under Verres, ‘justice’ becomes simply a matter of wealth, of buying and selling verdicts. And furthermore, by standing with Cicero, the Senatorial jury will be able to publicly demonstrate its abhorrence for Verres’ actions and its own commitment to upholding justice in the Roman *res publica*.

But Verres’ tampering with justice is not limited to altering the edict for pay. He was in fact notorious during his tenure for deciding cases contrary to the express wording of the edict, as Cicero alleges:

Et cum edictum totum eorum arbitrato, quam diu fuit designatus, componeret qui ab isto ius ad utilitatem suam nundinarentur, tum vero in magistratu contra illud ipsum edictum suum sine ulla religione decernebat. Itaque L. Piso multos codices implevit earum rerum in quibus ita intercessit, quod iste aliter atque ut edixerat decrevisset; quod vos oblitos esse non arbitror, quae multitudo, qui ordo ad Pisonis sellam isto praetore solitus sit convenire; quem iste conlegam nisi habuisset, lapidibus coopertus esset in foro. (*In Verrem* 2.1.119)

And just as, when he was praetor-Elect, he composed his whole edict for the benefit of those men who were willing to purchase justice from him wholesale, he also thought it right when he was in office to unscrupulously make decrees contrary to his own edict. And so Lucius Piso filled up numerous notebooks with the cases where he intervened, because Verres had decreed against his own edict; I do not think you have forgotten this fact – the vast crowd which used to gather about Piso’s judgment seat; and if [Verres] had not had such a colleague, he would have been stoned in the Forum.

Cicero does not bring to bear any concrete examples of this practice, but instead relies upon the memory of the jury and the notoriously public nature of these misdeeds to prove his allegation. He uses the dutiful example of Piso as a counter to the unjust figure of Verres. On account of Verres’ poor administration, the people begin turning to another

praetor to find justice.¹⁴³ In fact, Cicero represents Piso's tribunal as a kind of 'safety-valve' which protected Verres from deserved popular vengeance, much as Messala became the good aristocrat in contrast to the aristocrats who might support Sulla's freedman Chrysogonus in the *Pro Roscio*.

Roman courts and magistrates depended upon the notion that they dispensed impartial justice, rather than arbitrary decisions.¹⁴⁴ Verres' decisions, however, so flagrantly contradict that ideological underpinning that they had the very real possibility of inciting violent riots and lynching. Cicero returns frequently to the specter of popular violence to illustrate the threat that Verres represents to the Roman governing system. It should, of course, be recognized that the crowd that gathers in the Forum typically possessed, through sheer weight of numbers, the capacity to physically overpower the magistrates and their lictors. What restrains this potential violence from breaking out at any particular time, in Cicero's telling, is not really the coercive power of the magistrates, but their authority, the faith that the *populus* has that their decisions are wise, just, prudent, and right for the Roman people to obey. And indeed, throughout his career, Verres has served as a lightning rod, constantly attracting this looming popular violence. Cicero's most fervent narration comes, in his description of Verres' *legatio* at the Asian city of Lampsacus. There Verres, visiting as a *legatus*, had, along with his hanger-on Rubrius, attempted to rape the daughter of a leading man of the town named Philodamus.

¹⁴³ The precise legal justification for Piso's action here is debated. Mitchell, *Verrines II.1 with Translation and Commentary* believes Praetors had the legal authority to block each other's action. T. Brennan, *The Praetorship in the Roman Republic*, has recently supposed that Piso simply agreed to take the cases on appeal from Verres, and was particularly inclined to do so in cases in which Verres had violated his own Edict.

¹⁴⁴ Riggsby, "Did the Romans Believe in Their Verdicts?"

Philodamus resisted, and though successful in preserving his daughter's chastity was doused with boiling water and scalded. In response, the people of Lampsacus ran to their forum and debated a course of action, eventually coming to a unanimous decision. Verres is to be lynched:

inventus est nemo cuius non haec et sententia esset et oratio, non esse metuendum, si istius nefarium scelus Lampsaceniulti vi manuque essent, ne senatus populusque Romanus in eam civitatem animadvertendum putaret; quodsi hoc iure legati populi Romani in socios nationesque exteras uterentur, ut pudicitiam liberorum servare ab eorum libidine tutam non liceret, quidvis esse perpeti satius quam in tanta vi atque acerbitate versari. (*In Verrem* 2.1.68)

Not one man was found who did not agree with this sentiment, that they should not be afraid of Roman vengeance, if the Lampsacenes avenged the wicked deed with physical force; but that if the *legati* of the Roman people adopted the precedent that their allies and foreign nations should not be permitted to protect the chastity of their children from Roman predation, then it was better to endure any extreme rather than put up with with such bitter violence.

The Lampsacenes, just like the Roman people, seem to decide that, in the face of such an outrageous crime, they would rather kill the legate and face possible armed retribution than allow this egregious incident to pass unpunished. Cicero says these people, normally great friends to Rome, pick up weapons, rocks, and lay siege to the home where Verres is staying. They even gather up wood and torches with the intent of burning him out. He is only saved by the intervention of the Roman traders in Lampsacus who rush to the spot and beg the Lampsacenes to “think more of the office of lieutenant than the injury this lieutenant had inflicted.”¹⁴⁵ Verres was saved by this timely intervention. But note, that even his defenders decline to justify his actions, but appeal more broadly to the legitimacy of the office and of the Roman Empire in general. Furthermore, in discussing Verres' time as urban praetor, Cicero makes certain to remind his audience of another

¹⁴⁵ 2.1.68: orant Lampsacenos ut gravius apud eos nomen legationis quam iniuria legati putaretur;

near-miss as well: the Roman people's brewing hatred against Verres. Verres' injustices provoke retributive violence both at home and abroad, threatening the ideological stability of the *res publica* in Rome and its *imperium* abroad.¹⁴⁶ Indeed, the incident at Lampsacus becomes an object lesson in what could, and perhaps even *ought*, to have happened to Verres. It is only the prospect of a public trial, and of a just guilty verdict, that Cicero says has saved Verres from the hands of the Roman people: "Hoc populus Romanus non manu vindicasset, nisi te huic tempori atque huic iudicio reservasset."¹⁴⁷

All of this violence is provoked not just by Verres' threats, thefts, violence, and cruelty, but also by his inconsistency in offering judgments as urban praetor. Cicero appeals to the memory of the jury themselves again to make the point:

Nam, quaeso, redite in memoriam, iudices, quae libido istius in iure dicundo fuerit, quae varietas decretorum, quae nundinatio, quam inanes domus eorum omnium qui de iure civili consuli solent, quam plena ac referta Chelidonis; a qua muliere cum erat ad eum ventum et in aurem eius insusurratum, alias revocabat eos inter quos iam decreverat, decretumque mutabat, alias inter aliquos contrarium sine ulla religione decernebat ac proxumis paulo ante decreverat. (*In Verrem* 2.1.120)

Please bring back to your minds, o jury, what caprice he showed in making his judgments, how varied his decrees were, what a market-place his tribunal was, how empty he left the homes of the lawyers and consultants, and how jam-packed the house of [his mistress] Chelidon always was; and how, when even a whisper on the wind came to him from that woman, sometimes he recalled those whose dispute he had just judged, and changed his decree, and at other times he unscrupulously contradicted the decree he had issued just a short time ago.

¹⁴⁶ *In Verrem* 2.1.113: *Miramur ad arma contra istum hominem Lampsacenos isse, miramur istum de provincia decedentem clam Syracusis profugisse? Nos si alienam vicem pro nostra iniuria doleremus, vestigium istius in foro nullum esset relictum.*

"Are we surprised that the people of Lampsacus flew to arms against this man, are we surprised that he fled from his province in Syracuse in secret? For if we truly grieved for the plight of others as for ourselves, there would not even be a trace of that man left in the Forum."

¹⁴⁷ *In Verrem* 2.1.114: "And wouldn't the Roman People have avenged this injustice with violence, if it had not reserved you for this occasion and this court?"

So Cicero alleges that Verres would, when presented with enough opportunity, re-write his edict in order to subvert justice. But when there was not enough time available, he was also accustomed to flagrantly contradict his standing edict. We can see, from the use of Verres as a foil, several characteristics that Cicero asserts are essential for the law. First, unlike his characterization of Verres' term of office, Cicero advocates a professionalized and specialized discipline of knowledge. Though the judges, being praetors, might be, and very often were, legal amateurs, but certain Romans had acquired, by long practice and experience, the knowledge of a special class, the jurists (*iuris consulti* – those experienced in the law). Under Verres' praetorship, however, their knowledge is ignored, and their homes empty. Instead it is the home of Verres' mistress, Chelidon, which was become the center of legal concern. Verres' idea of justice was so flimsy and flexible, Cicero argues, that he was notorious for changing his verdict at but a hint from Chelidon.

Cicero presents as self-evident the idea that justice and law should be consistent and unchanging. It ought to have, as he says, a *religio* to it, a binding force or, we might say, an almost sacred consistency. Thus while legal decisions might be complicated or depend upon technicalities, they could not afford to be seen by the people as, in the final analysis, simply arbitrary, capricious, or, worst of all, purchased. This is the *libido* – the lust or license – of boorish justice.¹⁴⁸ But even Cicero feels that this tack is out of line and not suitable for such a trial, except for one fact. The very popularity of the proverb

¹⁴⁸ I refer to Cicero's famous pun on Verres' name. Verrine justice (*ius Verrinum*) could also mean "pork gravy," which was not regarded as a desirable food.

allows Cicero to show that Verres' miscarriages of justice threatened the people's faith in their justice system:

“Quae ego non commemorarem — neque enim perfacite dicta neque porro hac severitate digna sunt -, nisi vos illud vellem recordari, istius nequitiam et iniquitatem tum in ore vulgi atque in communibus proverbiiis esse versatam” (*In Verrem* 2.1.121).

I would hardly remind you of these trifles – for they are not particularly well said or worthy of the dignity of this court – except that I want to remind you that this man's worthlessness and injustice were the talk of the town, and became proverbial.

Cicero focuses again and again upon the danger represented by not punishing Verres, but for one simple reason – his escape will be a proof that the Senate cannot, as he said in his exordium, convict a wealthy man. So even his misdeeds as praetor are seen as undermining the whole ideological foundations of the Roman court system, and thereby also the Senatorial Order's current place in Roman society.

Conclusion

The legitimacy of the 'Sullan Senate' of 70 BCE is thus a central issue of Cicero's prosecution of Verres, especially in First Action and the *De Praetura Urbana*. It is also foundational to his rhetorical strategy to persuade the Senate that Gaius Verres must face justice. Much attention in the past has been given to the ways in which Cicero's profound success in the Verrines catapulted his career as politician and as advocate. It is often said that his marshalling of the vast evidence against Verres and his presentation of it was the key to this success and helped him gain both fame among the Roman people and the gratitude of the much abused Sicilians. It is not my intent to deny that this is true, as it obviously is, but there is rather more to Cicero's rhetorical strategy than simply

‘wrong-footing’ Hortensius by front-loading the evidence. For Cicero is concerned here not just with winning his case, (though that remains a very major concern) but also with building a reputation as a politician and promoting himself as a political ‘brand,’ even more stridently than he could in his earlier private defenses such as the *Pro Roscio Amerino*. His rhetorical attack on the Sullan Senate allowed him to accomplish both his persuasive and political goals at the same time. He is at once able to castigate Verres as an obviously guilty man, while also portraying himself as a loyal Senator whose primary concern is with restoring the Senate’s legitimacy with the Roman populace. This allows him to build a reputation as an opponent of corruption and the abuses which were rampant in the Roman system at this time, while also articulating to an audience of listeners and readers his own political stance and desired solutions.

That Cicero intended to reach a broad audience with these speeches is demonstrated by the great effort that was taken to compose and write the five speeches of the Second Action. The fact that he went to such an effort shows that he believed he had something to gain from presenting the full evidence in a readable, if fictionalized form. Quite simply, he believed he would have an audience willing and interested to read both the evidence against Verres and, especially, Cicero’s handling of the delicate political and forensic situation surrounding the trial. It is nevertheless apparent that he did not publish these speeches as a form of direct political action. Although he deals extensively with the political situation, and most extensively with the issue of jury composition represented by the Aurelian Law, he did not publish these speeches as a kind of pamphlet for or against any specific political proposals. It is also not the complete truth, however, to suppose

that his publication of these speeches was therefore apolitical, as Brunt, for instance, suggests.¹⁴⁹ Direct advocacy for or against legislative proposals is certainly not the limit of the political. Cicero, especially as a *novus homo*, a new man in Roman politics, is especially concerned to fashion himself as a known quantity, politically speaking. We must then ask ourselves, as readers, how Cicero presents himself politically in the *Verrines*, for his rhetorical strategy, as we have demonstrated, is far from apolitical. Cicero's presentation of his views is clear and consistent: he supports the idea of the juries remaining in the hands of the Senate, but if and only if they show themselves able to convict Verres and thus demonstrate their fitness as the ruling body of the *res publica*. This is an intensely political strategy of self-fashioning.

Within the *De Praetura Urbana* especially, Cicero articulates his own political loyalties to the Sullan Senate, but this is nevertheless tempered in certain crucial ways. Firstly, although he anticipates a polarized reaction to Verres' early career and his betrayal of the Cinnans for Sulla, Cicero works on his audience to overlook their previous partisan sympathies. He refuses the binary of Sulla vs. Cinna, as well as the natural extension that the enemy of my enemy is my friend. Thus he refuses Verres any credit for his timely switch to the Sullan side, by emphasizing his alleged motivations: his theft of public funds from his superior, the Consul Carbo. Instead, Cicero advocates that we look at the action itself which Verres took, treason and betrayal, rather than which side gained from it. In doing so, he demonstrates his conception of loyalty, much as he had done in the *Pro Roscio Amerino*. The proper role of loyalty in the *res publica* is not

¹⁴⁹ Brunt, "Patronage and Politics in the *Verrines*" pg. 287 "Publication cannot have had any such practical purpose; it must have been designed solely to enhance Cicero's reputation as an orator."

loyalty to a person, like Sulla or his opponent Carbo, or even a faction but rather to a higher notion of a legitimate *res publica*. Verres' action in betraying his general may have helped Sulla and his cause, but he did not commit them, Cicero argues, out of conviction or principle. So while Verres may have been, at least temporarily, loyal to Sulla, Cicero demonstrates that he was not at all loyal to the legitimate *res publica* that the Sullans aimed to establish. A higher loyalty calls those, like Cicero, who do not fall into the trap of petty tribal loyalties and overzealous partisanship.

A similar lack of loyalty to this higher republic is demonstrated by Verres' actions as urban praetor. Verres' abuses as praetor are in fact portrayed as worse for the *res publica* as a whole because they undermine the legitimacy of the Sullan constitution itself. The reforms of the courts, in particular, were an important achievement of the Sullan regime. So it should not be surprising that the Roman people, of all classes, would be watching the performance of these courts closely as a method of evaluating the truth of Sulla's claims to have restored a *res publica* on behalf of the *causa nobilitatis*. Verres' abuses of these legal processes, however, undermined both the Sullan reforms of the courts and the binding force of Roman law itself. But it would be an even worse blow to the *res publica*, in Cicero's argument, if the Senatorial jury failed to correct these abuses through the new legal process. It would be a public proof that the august Senate was in fact more concerned with protecting members like Verres or even with taking bribes than with its duties to protect Roman citizens and serve as the protectors of justice in the *res publica*.

These speeches, taken together, thus perform a double function. Firstly, they serve as a very public warning to the Senatorial jury in the case of the First Action, and to contemporary readers, in the case of the *de Praetura Urbana*, that the Roman Senate was facing a legitimacy crisis in 70 BCE. They are also intended, however, to shape the public's perception of Cicero. At the same time as he is offering these criticisms of the Senate, he is also fashioning himself as the kind of orator who is brave enough to make these criticisms. In creating a rhetoric of legitimacy in the Verrine orations, he is implicitly making himself an example of a legitimate politician and potential officeholder for the future. If Verres hopes to use the Senate's partisanship and loyalty to avoid justice, Cicero shows himself above such divisive rhetoric. If Verres abuses the legal process and makes a mockery of the duties of the praetorship, Cicero makes himself the champion of law and justice at Rome. If Verres, then, is the criminal whose wealth undermines all just verdicts, Cicero is the bold advocate who persists, even in the face of great obstacles, to give the Senators a chance to show their true colors. Only in this way can the two of them, together, Cicero and the Senate dispel that *opinio perniciose rei publicae, vobisque periculosa* which now threatens to overwhelm the republic.

CHAPTER FOUR

Sulla's Illegal Law:

Ius, Lex, and Legitimacy in Cicero's Pro Caecina

Cicero's political presentation and the creation of his own unique political 'brand' was by no means limited to celebrated causes like the prosecution of Verres or his defense of Roscius of Ameria. In those cases, Cicero defined himself as an idealistic orator standing up to the Sullan regime's lawlessness and as a young politician urging the Senate to restore its legitimacy by convicting. In his speech for Aulus Caecina, by contrast, Cicero uses his test of legitimacy no longer on individual actions or actors, like those of Chrysogonus or Verres, but on statute law itself. Within this understudied and complex defense of Caecina's inheritance, Cicero offers his most vigorous definition of legitimate law (*ius*) and its proper role in the Roman courts. He uses the speech to define himself vis-à-vis the law (*ius*) in ways designed both to make him a more appealing candidate and to promote his understanding of the *ius civile* as a higher form of law. The *ius civile* becomes, in his treatment, a code of laws sufficiently authoritative that they can be said to define the *res publica*. This body of law, passed haphazardly by the Roman people and their magistrates, becomes instead a consistent and rational code at the center of the republic. In fact, he even goes so far as to argue that individual statutes (*lex*, pl. *leges*) cannot conflict with the civil law. Instead, Cicero actually subjects one such law, Sulla's law on citizenship, to a kind of proto-judicial review. He advances a seemingly novel doctrine that any law (*lex*) found to be in conflict with the *ius civile* is not just a bad law, but actually invalid or unconstitutional. Furthermore, he uses the published version

of the speech to promote this novel treatment of the law, as well as to promote himself as the kind of advocate who supports this sweeping understanding of the *ius civile*.

The Roman advocate, if he hoped to pursue a political career, was always engaged in a delicate game, balanced between two concerns: winning the case at hand while also forging a political reputation. In winning a case, an advocate looked to gain gratitude from his client, as well as fame for his rhetorical skill. But an advocate was also conscious of the need to form a consistent political identity if he hoped for success at the polls. Indeed, due to the competitive nature of Roman politics, virtually every facet of an aspiring politician's life was being closely monitored by his opponents for signs of weakness, down to his gestures and even offhand jokes.¹⁵⁰ Thus while, theoretically, an advocate might advance virtually any defense of his client that had a reasonable chance of success, the Roman advocate was aware that in practice he was to some extent limited to those claims which were consistent with his own public character.¹⁵¹ A reputation for inconsistency or opportunism could easily doom an aspiring Roman politician. And in the competitive political atmosphere of the Roman Republic, there were many political opponents waiting in the wings to make such charges.

It seems clear that a Roman advocate, then, could only drift so far away from his 'true' political sentiments (that is, from the identity he had formed and promoted) before his judgment began to seem either arbitrary or self-interested in the extreme. Against this notion, one passage of Cicero's *Pro Cluentio* is often cited to say that, within the context

¹⁵⁰ A careless gesture could easily lead to charges of effeminacy, on which see Corbeill, *Controlling Laughter*, pgs. 147-173.

¹⁵¹ This was true across Cicero's speeches. Thus May, *Trials of Character*, pgs. 21-48, has emphasized Cicero's search for an authoritative persona in his pre-consular speeches.

of a forensic case, Roman advocates might say anything at all if they deemed it necessary to secure their desired verdict.¹⁵²

Sed errat vehementer si quis in orationibus nostris, quas in iudiciis habuimus, auctoritates nostras consignatas se habere arbitratur; omnes enim illae causarum ac temporum sunt, non hominum ipsorum aut patronorum [...] Nam si causae ipsae pro se loqui possent, nemo adhiberet oratorem: nunc adhibemur ut ea dicamus, non quae nostra auctoritate constituentur, sed quae ex re ipsa causaque ducantur. Hominem ingeniosum, M. Antonium, aiunt solitum esse dicere idcirco se nullam umquam orationem scripsisse ut, si quid aliquando non opus esset ab se esse dictum, posset negare dixisse; proinde quasi si quid a nobis dictum aut actum sit, id nisi litteris mandarimus, hominum memoria non comprehendatur. (Pro Cluentio 139-140)¹⁵³

But any person who believes that he has our true judgments put on the record in the speeches which we give in the courts is sadly mistaken; for they [the opinions expressed there] come from the cases and the situation, not from the men themselves or their advocates [...] For if cases could speak for themselves, no one would have need of an orator; as it is now, we are made to say things, not because they are a sign of our true opinion, but because they are demanded by the facts of the case itself. They say that the talented Marcus Antonius was always saying this was why he never wrote any oration down so that if a past statement of his could prove inconvenient, he could deny that he had said it; just as if anything we have said or pleaded would not be remembered if we failed to write it down.

The passage is, however, not nearly as clear-cut a defense of inconsistency as it may at first appear. For Cicero said this as a way of answering the charge that he, in a previous case, had rather embarrassingly stated that his current-client, Cluentius, had bribed a jury in the trial of his step-father Oppianicus in 74 BCE. Having taken up Cluentius' case in 66, his opinion on the matter obviously changed. But Cicero's defense against this charge of inconsistency is multi-pronged. Firstly, he claims never to have said it at all.¹⁵⁴

Second, that *if* he had said something like that, it was not on his own authority, he was

¹⁵² For this view, see especially the Introduction in Powell and Paterson, *Cicero the Advocate*; Burnand, "The Advocate as a Professional: The Role of the Patronus in Cicero's Pro Cluentio"; Craig, "Cicero as Orator" pg. 273-74; For a view more closely paralleling my own, see Vasaly, "Cicero, Domestic Politics, and the First Action of the Verrines," pg. 116-118 and n. 50.

¹⁵³ The text cited is that of Clark, *M. Tulli Ciceronis Orationes*.

¹⁵⁴ *Pro Cluentio* 138: *Recitavit ex oratione nescio qua Accius, quam meam esse dicebat.* "Accius read out from some oration or other, which he claimed was mine."

simply using a rumor advantageous to his case at the time.¹⁵⁵ In fact, the defense here, that any fool knows that advocates do not always give their true feelings, is his third (self-contradictory) defense against the charge on inconsistency.

In concluding his defense, Cicero cites a famous story of his mentor Lucius Crassus, who had once been confronted with his past statements in court and responded by publicly shaming the opponent who had dared to read out these contradictions. Pointing out his inconsistencies had cut Crassus to the quick, Cicero says, and he bore it especially badly because he had been caught out in his inconsistencies *de re publica*. Cicero uses this episode to illustrate the contrast with his own behavior.

Moleste enim fortasse tulerat se in eis orationibus reprehensum, quas de re publica habuisset, in quibus forsitan magis requiratur constantia. Ego autem illa recitata esse non moleste fero; neque enim ab illo tempore quod tum erat, neque ab ea causa quae tum agebatur aliena fuerunt; neque mihi quicquam oneris suscepi, cum ista dixi, quo minus honeste hanc causam et libere possem defendere. Quod si velim confiteri me causam A. Cluenti nunc cognosse, antea fuisse in illa populari opinione, quis tandem id possit reprehendere? (*Pro Cluentio* 141-42)

For [Crassus] had taken it badly perhaps that he had been caught out in the speeches which he had given *de re publica*, in which possibly more consistency is required. I, however, am not taking his recitations badly at all; for these statements were not inappropriate to the situation at that time, or to the cause that was being pleaded; nor did I take on any burden, when I said those things, which could prevent me from defending this case frankly and honestly. But if I should confess that I just now learned the true facts of Cluentius' case, while I earlier had

¹⁵⁵ *Pro Cluentio* 139: *Ego vero, si quid eius modi dixi, neque cognitum commemoravi neque pro testimonio dixi, et illa oratio potius temporis mei quam iudicii et auctoritatis fuit. Cum enim accusarem, et mihi initio proposuissem ut animos et populi Romani et iudicum commoverem, cumque omnes offensiones iudiciorum non ex mea opinione sed ex hominum rumore proferrem, istam rem, quae tam populariter esset agitata, praeterire non potui.* “But if I said anything of this sort, I did not claim to know it personally nor did I offer it as my own testimony, and that speech was the result of the situation of the trial; I was not speaking from my own authoritative opinion. For since I was acting as accuser, and I had set myself the task from the beginning of rousing the spirits of the Roman people and the judges, and since I was offering a list of all the corruptions of the courts not from my judgment but from what was commonly being said, I could not afford to pass over that instance which had been the source of so much popular agitation.”

been too influenced by public opinion, well, who in the world could find fault with that?

This episode, far from illustrating that Roman advocates were free to say anything needed to serve their clients' interest, actually illustrates the opposite. It shows that inconsistency was a convenient charge for an opponent in a future case or dispute. It also illustrates that Cicero can go to great lengths to 'prove' that he was not inconsistent, even if it meant resorting to virtually self-contradictory defenses.¹⁵⁶ Advocates are, in fact, so concerned with the appearance of inconsistency that they can be expected to refuse to publish their words (Antonius) or publicly abuse their opponents (Crassus) rather than admit to a contradiction. Consistency of presentation (*constantia*) was also especially valued when one is speaking *de re publica* (on public affairs), since this justifies Crassus' overbearing behavior. The opinions of an important politician and advocate were considered to be worth remembering, and even the reticent Antonius could not escape entirely, for Cicero concludes that section by emphasizing the futility of hiding one's public opinions: "just as if anything we have said or pleaded would not be remembered if we failed to write it down."¹⁵⁷

¹⁵⁶ One is reminded in this instance of the 'natural proliferation of stories' engendered by adversarial advocacy, as told by R.A. Ferguson (cited in Fotheringham, "Repetition and Unity in a Civil Law Speech: The Pro Caecina," pg. 254): "The defendant says that he never borrowed any pot; and that he used it carefully; also, that the pot was broken and useless when he borrowed it; also that he borrowed the pot of somebody not the plaintiff; also, that the pot in question was the defendant's own pot; also, that the plaintiff never owned any pot, iron or other; also, that the defendant never had any pot whatsoever."

¹⁵⁷ Cf. *Pro Roscio Amerino* 2, where Cicero justifies his own role as advocate by emphasizing the danger a more established advocate might have faced in that case: *Quia, si qui istorum dixisset, quos videtis adesse, in quibus summa auctoritas est atque amplitudo, si verbum de re publica fecisset, id, quod in hac causa fieri necesse est, multo plura dixisse, quam dixisset, putaretur.* "Since, if any of these men had spoken, the men whom you see here and who have the greatest influence and dignity, if they had said one word about politics (*de re publica*), something which he would have to do in this case, then he would have been thought to have said more than he really did."

Cicero's resounding defense of the *ius civile*, the Roman legal system, and the rights of citizenship in the oration for Aulus Caecina are not merely arguments of convenience, but rather important parts of his political self-presentation. Not only did he expect his statements on these subjects to be remembered in the future, but he consciously aided the process by devoting the effort to publish this speech in its extant form so as to associate himself with these opinions. The speech is thus not merely a recitation of how one might defend the *ius civile* in a convenient civil case, but also a genuine political statement of *why* a good Roman should do so. One cannot simply dismiss all rhetorical statements as empty utilitarian rhetoric. Even if such statements, like Cicero's creation of a 'higher law,' do not always reflect the true beliefs of a politician, they certainly reflect the beliefs the politician wants others to believe they hold.¹⁵⁸

The case is fairly unique in that it is one of only four surviving private law orations of Cicero (the others being the *Pro Quinctio*, *Pro Roscio Comoedo*, and the *Pro Tullio*). By contrast, the majority of Cicero's cases are defenses against criminal charges or political orations. The *Pro Caecina* is also the latest of the private orations in date and the only one which survives intact.¹⁵⁹ The speech is therefore one of our fullest windows into the very complicated world of Roman private law. The speech deals with the complex legal issues surrounding the inheritance of a certain farm near the Italian town of

¹⁵⁸ For a similar argument in a different context, whether Cicero's rhetoric is valuable for locating his political thought, see Stem, "Cicero as Orator and Philosopher: The Value of the *Pro Murena* for Ciceronian Political Thought," esp. pgs. 229-230: "Just because an orator will bend the truth in the service of his client and his art, however, does not mean that he always necessarily does so."

¹⁵⁹ Or at least mostly so. A few scholars have supposed a lacuna of unknown length at section 95, most recently Stroh, *Taxis und Taktik* pg. 99 n. 59; For a larger listing, see Frier, *The Rise of the Roman Jurists* pg. 97. n. 7.

Tarquinius. The issue is further complicated in that the speech that survives purports to be the third hearing of the case (*Pro Caecina* 3), so that many of the legal arguments and witness testimony we might expect in full are frustratingly compressed or nearly absent from this speech entirely.¹⁶⁰ The very complication of the case and its concern with legal niceties¹⁶¹ invites the question of why Cicero chose to publish this particular private oration. This is especially so since Cicero himself later characterized the speech as an example of the “restrained” (*tenuis*) style in his *Orator*:

Tota mihi causa pro Caecina de verbis interdicti fuit: res involutas definiendo explicavimus, ius civile laudavimus, verba ambigua distinximus. (*Orator* 102)¹⁶²

My entire case *Pro Caecina* was concerned with the wording of the interdict: I explained complicated matters by defining terms, I praised the *ius civile*, I took care to distinguish ambiguous phrases.

As Fotheringham has pointed out, this summary cannot be taken as a neutral evaluation of either the speech’s style or its argumentation. As she points out, this later evaluation by Cicero is both brief and polemical. From this alone, we might assume Cicero based his arguments on the letter of the law, rather than the spirit as shall be shown below.¹⁶³ But this summary also does a disservice to the speech in that, out of context, it may incline the reader to believe the *Pro Caecina* relatively unimportant within Cicero’s corpus. Perhaps instead, however, we should see the speech as the best (or most

¹⁶⁰ For a generally accepted reconstruction of the three phases of the trial, see Frier, *The Rise of the Roman Jurists*, pg. 104-115.

¹⁶¹ The tradition that this speech is involved only with legalistic quibbles is an old one. In the *Dialogus*, Tacitus imagines one of his characters opining: *Quis de exceptione et formula perpetietur illa immensa volumina, quae pro M. Tullio aut Aulo Caecina legimus?* “Who [these days] will bother with those great volumes on the defense plea and the legal formula, which we read in [Cicero’s] *pro Tullio* and *Pro Caecina*?” The text is that of Winterbottom and Ogilvie, *Cornelii Taciti opera minora* .

¹⁶² Wilkins, *M. Tulli Ciceronis Rhetorica*, vol. II.

¹⁶³ Fotheringham, “Repetition and Unity in a Civil Law Speech: The Pro Caecina,” pg 255-57.

appropriate) example of the restrained speaking style.¹⁶⁴ As we shall see, this speech deserves an important place in Cicero's writings, not just as a singular example of judicial oratory, but also as an example of the intentional crafting of his political identity within a private law speech.

The Threat of Violence (*vis*) and the Project of Law (*ius*)

The case presented in Cicero's *Pro Caecina*, which he delivered in 69 BCE¹⁶⁵, is a complicated one, both factually and legally. The *narratio* of the speech (sections 10-23), although it does lay out the basics of the case, is compressed, perhaps because, as mentioned above, the extant speech represents the third hearing of the case before the board of *recuperatores*. The board hesitated to make a decision on the case and decided to re-hear the case rather than issue a decision after the initial hearings, a fact Cicero laments in the *exordium*. A wealthy widow from Tarquinii, named Caesennia, had been left a half usufruct, or life-interest, in a farm owned by her first husband, Fulcinus. For this reason, it will be referred to as the Fulcinian farm. After the death of her husband, she became friends with Sextus Aebutius, who agreed to act as the agent for her in a number of unspecified legal matters. During this time, Cicero asserts, she contracted Aebutius to purchase the Fulcinian farm for her, and he did so. She later remarried, taking as her husband Cicero's later client, Aulus Caecina. When she passed away, she left the vast majority of her estate to Caecina, but also a small portion (1/72nd) to

¹⁶⁴ Frier, *The Rise of the Roman Jurists*, pg. 126, points out that the speech was cited by Quintilian in his *Institutio Oratoria* some fourteen times, more than all his other private law speeches combined. Clearly some ancient readers took the speech very seriously as an example of both style and substance in legal rhetoric.

¹⁶⁵ The date of the *Pro Caecina* is not definitively known. Stroh, *Taxis und Taktik* pg. 80-81 inclines towards 72 BCE; I am persuaded by the arguments of Frier, "Urban Praetors and Rural Violence" pgs. 225-227, that the case was argued under the praetor P. Cornelius Dolabella in 69 BCE.

Aebutius. Aebutius, according to Cicero, became dissatisfied with his share of the estate and attempted to extort a larger share of the estate from Caecina by publicly asserting that Caecina could not legally inherit under a Roman will, because, by a law of the Dictator Sulla, the residents of Volaterrae had been deprived of their citizenship.¹⁶⁶ This strategy failed to frighten Caecina, who now determined to stand firm in his rights. So Aebutius turned to a new strategy. He asserted that he had purchased the Fulcinian Farm as his own, rather than as Cicero contends as Caesennia's agent. This, then, is the major dispute of the surviving text of the *Pro Caecina*. Aebutius claims he purchased the Fulcinian for himself and with his own funds, while Caecina/Cicero argues that Aebutius really purchased the plot as an agent of his late wife Caesennia.

Cicero spends only a short portion of the surviving speech, however, on what might appear the main crux of the argument, the issue of ownership.¹⁶⁷ A far greater portion of the speech is devoted to the incidents surrounding the legal positioning between Aebutius and Caecina which nearly resulted in blood. When Aebutius registered a claim that the farm belonged to him, the two parties met to agree upon a formal expulsion, an act of symbolic violence that Cicero terms a *deductio moribus* wherein the

¹⁶⁶ Volaterrans were, according to this theory, *deteriore iure* "of a lesser standing" (*Pro Caecina* 20). Cicero responded that Sulla's law was itself illegal and invalid, as shall be discussed later. Caesennia's will divided the inheritance between three heirs, Aulus Caecina her current husband (23/24th), Marcus Fulcinus, a freedman of her first husband (1/36th), and Sextus Aebutius, her friend (1/72nd). If Caecina had been barred from inheriting, as Aebutius hoped, the estate would have been divided *pro rata* between Marcus Fulcinus and Sextus Aebutius, raising Aebutius' share from 1/72nd of the estate to 1/3rd.

¹⁶⁷ As Frier, *The Rise of the Roman Jurists*, has pointed out, Cicero's surviving speech merely alludes to the issue of ownership briefly (*Pro Caecina* 104). He argues this is due to the fact that it was the primary issue of the first hearing, but that had receded by this, the third hearing. It may also, however, be due to the fact that Cicero had no way to undeniably refute it and decided to argue more resolvable points. For if Aebutius purchased the property at auction as Caesennia's agent, he would still be the purchaser of note. See *Pro Caecina* 16: *Quasi vero aut nos ei negemus addictum aut tum quisquam fuerit qui dubitaret quin emeretur Caesenniae* "as if either we would deny that it was marked down to him or there was anyone who doubted that it was being bought for Caesennia."

two agreed that Caecina, as the current possessor, would be escorted off the property.¹⁶⁸

Aebutius, however, reneged of this act of symbolic violence. He brought together a band of armed men and slaves, and informed Caecina that he would be killed if he attempted to set foot on the disputed property. Caecina, believing this was mere bluster and acting, as Cicero admits, “rashly” (*temere* – *Pro Caecina* 21), nevertheless decided to make the attempt to enter the boundaries of the farm. At this point Aebutius loudly ordered a slave of his named Antiochus to kill Caecina if he went past the row of olive trees which marked the boundary (*Pro Caecina* 22). Even so, Caecina persisted, and was only deterred by the onrush of Aebutius’ armed men and a volley of darts (*Pro Caecina* 22). Caecina fled the area, unharmed, and sought restitution through the interdict *de vi armata* (“for the use of armed force”) from the praetor Dolabella. It is this incident of armed violence, rather than the precipitating dispute over ownership, which forms the lynchpin of Cicero’s defense of Caecina.

Cicero accordingly builds from the very outset of the speech a favorable portrait of his client as a restrained and lawful man and of himself as an advocate of principle and one deeply concerned with what we might term the project of law (*ius*). He is especially concerned to build a portrait of the Roman legal system as perhaps *the* civilizing influence in the world, the bulwark against a world of anarchy and oppression. At the same time, Cicero is enabled to portray himself, of course, as the champion of both *ius* and the *ius civile* specifically. Thus the speech begins with the contrast of his lawful and orderly client, Aulus Caecina, to his lawless and violent opponent, Sextus Aebutius:

¹⁶⁸ Ibid, pgs. 78-92 reviews the arguments over what precise form this *deductio moribus* took in Cicero’s time. There is relatively little evidence for it outside of Cicero’s speech, as the practice appears to have died out during the early Imperial period.

Si, quantum in agro locisque desertis audacia potest, tantum in foro atque in iudiciis impudentia valeret, non minus nunc in causa cederet A. Caecina Sex. Aebutii impudentiae, quam tum in vi facienda cessit audaciae. Verum et illud considerati hominis esse putavit, qua de re iure disceptari oporteret, armis non contendere, et hoc constantis, quicum vi et armis certare nolisset, eum iure iudicioque superare. (*Pro Caecina* 1)¹⁶⁹

If impudence could accomplish as much in our forum and our courts as audacity does in the country and unpopulated places, then Aulus Caecina would be yielding as much now to the impudence of Sextus Aebutius as he once yielded to his violent audacity. But Caecina supposed it was the duty of a thoughtful man to refuse to contend with arms in a matter which ought to be decided by law, and the part of a resolute man to defeat in a court of law the opponent that he had declined to contest with armed violence.

Cicero's rhetoric operates by creating a powerful contrast between the impudence (*impudentia*) and audacity (*audacia*) of Aebutius with the thoughtful (*considerati*) and consistently resolute (*constantis*) nature of Caecina. The contrast between violence (*vis*) and law (*ius*) forms a central theme in the speech.¹⁷⁰ In Cicero's hands the contrast between the two becomes a struggle between civilization and chaos. Audacity and violence holds sway "in the country and unpopulated places." The indicative *potest* implies that this is not a remote possibility, but actually a fact, for *audacia* (audacity) does indeed have power outside the cities and Aebutius' successful attack on Caecina stands as witness to that. By contrast, Aebutius' impudence, in bringing this before a court of law, is not yet successful, for it depends upon the jury's verdict. The counterfactual subjunctive *valeret* indicates that *ius*, law, and thoughtful and determined men might yet prevail against this apparent threat to civilization.

Aebutius' impudence, in Cicero's treatment, does not rest in the action he took barring Caecina's entrance at the Fulcinian Farm, but rather in the legal defense he offers

¹⁶⁹ The Latin text used for the *Pro Caecina* is that of Clark, *Orationes Vol. IV*.

¹⁷⁰ Frier, *The Rise of the Roman Jurists*, pg. 118-120.

before the court. Rather than deny the acts he committed, which would be, Cicero avows, wicked (*improbe*), Aebutius openly confesses them and attempts to defend his actions as legal (*Pro Caecina* 2). Thus Cicero claims to be basing the speech for the third hearing of the case, no longer upon his own witnesses, but actually upon Aebutius' witnesses, who for the most part, like Aebutius, readily acknowledged the presence of weapons at the Fulcinian Farm.¹⁷¹ The defense offered by Aebutius' counsel, L. Calpurnius Piso, is said by Cicero to rely on the specific wording of the praetorian interdict which Caecina had employed to initiate the case, the *de vi armata* ("on the use of armed force"). The praetorian interdicts (*interdicta*) were a series of largely traditional formulae which were a part of the praetor's edict. They provided the express grounds under which a litigant might bring suit against another party. Thus the party bringing suit came before the praetor, explained formally the actions leading to their request for remedy, and requested him to issue the interdict in question. In the case of the Fulcinian Farm, the interdict obtained (*de vi armata*) was a formal order to Aebutius to restore the disputed property to Caecina. The wording of the interdict, however, was crucial to the case, for if Piso could prove to the satisfaction of the *recuperatores* that the interdict was uncalled for, Aebutius would win the case.

¹⁷¹ Cicero runs through the witness testimony at 24-30. The only witness not in general agreement is the senator Fidiculanus Falcula, whom Cicero eviscerates for his alleged inconsistencies and corrupt reputation. He announces this strategy early on in the speech. *Pro Caecina* 3: *Tum enim nostrae causae spes erat posita in defensione mea, nunc in confessione adversarii, tum in nostris, nunc vero in illorum testibus*. "For at first [in the first speech] our hope was placed in my defense, but now in our opponent's confession, then our hope rested in our witnesses, but now in their testimony."

Cicero presents Piso's argument tendentiously centering on a single word of the interdict, *deiecisti* ("You have ejected"). This interdict appears to have run as follows in 69 BCE:

Unde tu aut familia aut procurator tuus illum vi hominibus coactis armatisve deiecisti, eo restituas.

From wherever you, your family, or procurator have ejected him either through force or with men collected and armed, you must restore him to it.¹⁷²

Piso, in Cicero's representation, had relied on this one word to dismiss Caecina's lawsuit. For, Piso supposedly argued, Caecina could not, either logically or legally, have been "ejected" from the property if he entered it.¹⁷³ Under this theory, Caecina would be unable to claim the protection of this interdict. Cicero presents this defense as patently absurd, and attacks it at length as a perversion of justice and the whole intention of the interdict.

An vero illa defensio vobis praeclara visa est: 'Non deieci, sed obstiti; non enim sum passus in fundum ingredi, sed armatos homines opposui, ut intellegeres, si in fundo pedem posuisses, statim tibi esse pereundum?' Quid ais? is qui armis proterritus, fugatus, pulsus est, non videtur esse deiectus. (*Pro Caecina* 31).

Or did his defense seem appropriate to you all: "I did not eject him, I opposed him: for I did not allow you to enter the farm, but put armed men in your way to show you that you would be killed the very moment you set foot on the property." What do you say? That a person who was completely terrified, forced to flee, and repelled by force of arms, does not appear to have been 'ejected.'

Thus Cicero employs Piso's defense to make his case not about the possession or ownership of the Fulcinian Farm, but rather about the necessity for a system of law (*ius*)

¹⁷² Although the whole of the interdict *De Vi Armata* is not quoted by Cicero, it has been restored from several passages in the speech (Caecina 41-48, 55, 60-61, 88). Frier, "Urban Praetors and Rural Violence," pgs. 236-37.

¹⁷³ This is not, it should be acknowledged, the most charitable interpretation of Piso's defense. For it later relied upon the broader grounds that Caecina was not the possessor of the property at the time of his repulse from the property. Frier, *The Rise of the Roman Jurists*, explains Piso's "fallback position" based on possession rather than expulsion pgs. 112-13, 175-78.

in Roman society to combat the evils of violence and aggression. What is, from Cicero's point of view, so especially impudent about Aebutius' actions and Piso's defense together is that they attempt to use the law to defend an acknowledged act of lawless violence. This cannot be allowed to stand.

By exploiting this cultural antithesis between law and violence,¹⁷⁴ Cicero is enabled to present Aebutius as just that strong-man who hopes to rule by force alone, while turning himself metaphorically into that primordial wise orator who had founded all human society. And the crime of Aebutius is even greater, because he purports to make his defense of violence rest upon the majesty of the civil law itself.¹⁷⁵ What should have been a straightforward case concerned with the factual grounds of the incident at the Fulcinian Farm has become in Cicero's hands a case about the proper place of the civil law in Roman society:

Quaero sitne aliqua huius rei actio an nulla. Convocari homines propter possessionis controversiam non oportet, armari multitudinem iuris retinendi causa non convenit; nec iuri quicquam tam inimicum quam vis nec aequitati quicquam tam infestum est quam convocati homines et armati. (*Pro Caecina* 33)¹⁷⁶

I am asking then whether any legal proceeding exists for this crime or not. It is not right to call together men in a dispute over possession, it is not our way to arm a crowd in order to reclaim our right (*iuris*); there is nothing as hostile to the law

¹⁷⁴ As also in the *De Inventione*, for my previous discussion see pgs. 29-31.

¹⁷⁵ *Pro Caecina* 4: *Simul illud quod indignissimum est futurum arbitrati sunt, ut in hac causa non de improbitate Sex. Aebuti, sed de iure civili iudicium fieri videretur.* "At the same time they [Aebutius and Piso] judged that this, the worst of all things, would result, that they could make your judgment in this case depend not on the criminality of Sextus Aebutius, but on the civil law."

¹⁷⁶ See also the exordium, where Cicero sets up this antithesis clearly through his abstract praise of the law. *Pro Caecina* 5: *Sed cum de eo mihi iure dicendum sit, quod pertineat ad omnis, quodque constitutum sit a maioribus, conservatum usque ad hoc tempus, quo sublato non solum pars aliqua iuris deminuta, sed etiam vis ea quae iuri maxime est adversaria iudicio confirmata esse videatur.* "But since I am compelled to speak about that law [the civil law], which pertains to us all, which was set up by our ancestors and preserved intact to the present day. If it were abolished, not only would some part of the law be weakened, but that violence which is the chief adversary to the law would appear to have been strengthened by your judgment."

(*iuri*) as force (*vis*); nor anything as dangerous to fairness as men called together and armed.

Piso's defense, then, is made into an absurdity that depends upon a quibbling definition of one word of the interdict (*deiecisti*) and a trifling concern, whether or not Caecina physically entered the property. Against this Cicero appeals to a sort of higher understanding of both law in general and the Roman civil law in particular; for Piso's case, he asserts, would leave those wronged in such cases without legal recourse. There is an intention behind it to bring the law that aims to settle disputes through discussion and debate, rather than through violent conflict. Cicero gives voice to Aebutius' legal position as a mocking taunt, not just of Caecina, but the law, the office of praetor, and the board of *recuperatores* who were hearing the case:

'Feci equidem quae dicis omnia, et ea sunt et turbulenta et temeraria et periculosa. Quid ergo est? impune feci; nam quid agas mecum ex iure civili ac praetorio non habes.' Itane vero? recuperatores, hoc vos audietis et apud vos dici patiemini saepius? (*Pro Caecina* 34)

'Of course I did all those things you say, and I agree they are turbulent and rash and dangerous too. But so what? I get away without punishment; for you have no way to proceed against me in the civil or praetorian law.' Is that so? *Recuperatores*, will you listen to this and permit it to become a common defense before you?

What is especially dangerous about Aebutius' position is that, should his argument succeed, it might establish his interpretation of the interdict as an established principle of Roman law. Thus Cicero turns Aebutius' 'confession' that force was employed, and turns it into a confession to a far greater crime. For he exaggerates Aebutius' acknowledgment of what happened at the Fulcinian Farm into an admission that Aebutius

stands for the absence of all (true) law and the unchecked rule of force in the Roman world.

The Force of Precedent: Twisting Words and the Intent of the Interdict

Cicero portrays the case at hand as especially threatening for its potential influence on the future administration of justice in the Roman Republic. The decision of the court is magnified into a decisive engagement between two ways of interpreting the law, the followers of the ‘letter’ and the followers of the ‘spirit’ of the law. Thus Cicero’s simplifying characterization of Aebutius’ defense (*impune feci*), is only, in a sense, the tip of the iceberg in a movement which has the potential to overturn, Cicero asserts, all of the ideological foundations of Roman law. This defense allows Cicero to make his stand, and at the same time make a name for himself, as a defender of the law and a champion of the campaign to end the violence unleashed by the Sullan victory. All this while simultaneously casting his opponent, the notoriously pro-Sullan senator Calpurnius Piso, as a supporter not just of overly literal interpretation, but of violence itself and, as we shall see later, a doctrine of unlimited governmental power. All of this hinges on Cicero’s ability to expand the potential threat represented by this single verdict. Accordingly, it becomes a threat not just to the inheritance of Aulus Caecina, but, by undermining the authority of the praetor’s interdict, also to the security and property of every Roman.

Etenim cui non perspicuum est ad incertum revocari bona, fortunas, possessiones omnium, si ulla ex parte sententia huius interdicti deminuta aut infirmata sit, si auctoritate virorum talium vis armatorum hominum iudicio approbata videatur, in quo iudicio non de armis dubitatum sed de verbis quaesitum esse dicatur? (*Pro Caecina* 38)

For is it not completely obvious that all of us will again be made insecure in our possessions, wealth, and property, if the authority of this interdict is curtailed or made weaker in any way, if the violence of armed gangs appears to be approved by the authority of such men (as yourselves) in a court of law, and further, that it start to be said that, in your judgment, while you did not even doubt his use of weapons, you instead inquired into the wording of the interdict?

Thus Cicero portrays Piso's appeal to the exact wording of the interdict as an attempt to repeal it in fact, if not in name.¹⁷⁷ The result of allowing such a verdict would be to cast all property into confusion (*ad incertum revocari*), in a way even more threatening, perhaps, than the still-recent proscriptions firstly because it would not be temporary, and secondly because this new violence would be backed up by the authority of the jury and their court (*auctoritate virorum talium... iudicio*). What is perhaps the worst part of this verdict, however, is the appearance it would create of illegality and illegitimacy in the minds of the Roman people. Cicero emphasizes the corrosive effects of the 'appearance' of sanction (*approbata videatur*) and of the way this judgment would be 'talked about' (*esse dicatur*). The real trouble in this case lies not in the verdict itself, but rather in the appearance in the minds of the Roman people that it indicates a pre-occupying concern for wording and legal niceties (*de verbo*). This is all the worse because it comes, Cicero implies, at the expense of law's obvious purpose, quelling violence (*de armis*).

¹⁷⁷ So also his portrayal of the praetor's role in maintaining society. Cicero uses the analogy of a band of robbers taking over Piso's house while he is absent and using his own argument to legally repel him from the premises. *Pro Caecina* 36: *Praetor interea, Piso, tanta de re tacebit? quem ad modum te restituat in aedis tuas non habebit? Qui dies totos aut vim fieri vetat aut restitui factam iubet, qui de fossis, de cloacis, de minimis aquarum itinerumque controversiis interdicit, is repente obmutescet, in atrocissima re quid faciat non habebit?* "Meanwhile, Piso, is the praetor supposed to remain silent in so vital a matter? Will there be no legal way for him to restore you in your home? Do you think this official who spends whole days forbidding violence or ordering restitution, who issues interdicts about ditches, sewers, and the very smallest controversies over waterways and right-of-ways will suddenly fall silent, that he will have nothing he can do in so outrageous an affair?"

A ruling against Caecina in this case and on these grounds, Cicero further argues, undermines the entire rational project of Roman law. The Roman civil law is portrayed as a rational construct. It becomes a consistent and complete body of law. As such, it cannot possibly allow a ‘loophole’ like Piso’s defense which hangs on the difference of but a single letter: “*Non deieci, sed reieci.*”¹⁷⁸

Huiusce generis una est actio per hoc interdictum quo nos usi sumus constituta; ea si nihil valet aut si ad hanc rem non pertinet, quid neglegentius aut quid stultius maioribus nostris dici potest, qui aut tantae rei praetermiserint actionem aut eam constituerint quae nequaquam satis verbis causam et rationem iuris amplecteretur? Hoc est periculosum, dissolvi hoc interdictum, est captiosum omnibus rem ullam constitui eius modi quae, cum armis gesta sit, rescindi iure non possit. (*Pro Caecina* 40)

There is a single action of this kind set up by this interdict which we have employed. If this has no force or if it does not pertain to this case, what could be called stupider or more careless than our ancestors? After all they either left out an action of such clear importance or established one which failed to provide for this case and the principle of law at stake with their wording. It is dangerous for this interdict to be overturned, it is harmful for us all that any precedent become established of this type: that once something has been done by force of arms, it cannot be set right by law.

Cicero returns once again to the notion that this is not really a dispute between two potential heirs, but rather between force (*armis*) and law (*iure*). The true travesty is to allow the precedent to be established that there is no hope of just recourse under Roman law. Piso’s defense threatens not just the single interdict, but even the faith of the Roman people in their lawgivers. Caecina’s case, which was obviously troublesome enough to require three hearings by the *recuperatores*, is portrayed as a case that was obviously foreseeable and easily provided for by the interdict. To say otherwise is made into a challenge to the wisdom and foresight of the “ancestors” (*nostris maioribus*) who

¹⁷⁸ “I did not expel him, I repelled him.” *Pro Caecina* 84, but similar statements at 24, 31,38, and 64.

promulgated this interdict. This is an especially odd thing to say about the interdict *de vi armata*, which appears to have been added to the praetor's edict only two years previous, in 71 BCE.¹⁷⁹ Cicero, it must be noted, is discussing a very recent innovation in the praetor's edict. This innovation is attributable to a single known person, the praetor L. Caecilius Metellus, but Cicero talks about it as if it were an ancient and tested principle of Roman law approved of by a long line of Roman "ancestors."

Cicero returns with vigor to the theme of violence when he picks up another defense against the interdict supposedly offered by Piso on behalf of Aebutius, namely, that as no one was physically injured in the altercation at the Fulcinian Farm, no violence was done to Caecina. Cicero replies with something very much like the modern doctrine of assault, that the charge of *vis* in Roman law is not limited to bodily harm. It applies just as much to someone who terrifies or merely threatens physical harm against another, which is exactly what was done to Caecina.¹⁸⁰ He even asserts that the fear of harm constitutes greater use of *vis* than even bodily injury because wounded men sometimes stay in their positions of defense, while the uninjured are often driven to flee. Of much greater importance, however, is the precedent that Cicero fears such a ruling on violence would set:

Quod si aliter statuetis, videte ne hoc vos statuatis, qui vivus discesserit, ei vim non esse factam, ne hoc omnibus in possessionum controversiis praescribatis, ut confligendum sibi et armis decertandum putent, ne, quem ad modum in bello poena ignavis ab imperatoribus constituitur, sic in iudiciis deterior causa sit eorum qui fugerint quam qui ad extremum usque contenderint. (*Pro Caecina* 46)

But if you decide against us, be sure that you do not set up this doctrine: that no violence was committed against a person who leaves the field alive. Beware

¹⁷⁹ Frier, "Urban Praetors and Rural Violence," pg. 235

¹⁸⁰ See *Pro Caecina* 40-44.

setting this as the standard in all disputes over possession, so that men think they have to fight it out hand to hand or struggle with arms. Or enshrining the principle that, just as on campaign our military commanders appoint a penalty for cowards, so too in our courts of law we always rule against those who escaped a scene of violence and in favor of those who fought it out to the very last.

This interpretation by Piso of the charge of violence (*vis*) is also made to strike at the foundations of the Roman legal system. The victor at law will be like the victor at war, he whose side is in possession of the field at the end. The courts too would become a nullity and hardly worth the name, for they would simply become a rubber stamp declaring the winner of these bloody brawls. A system can hardly, in Cicero's opinion, be legitimately called law (*ius*) which demands that one show the seriousness of a claim to property with injuries and murders. For it is not strength and bravery which should prevail at law, but the truth and rightness of the case.

This leads Cicero into the broader dispute over the correct method of interpreting law, whether one should rely upon 'spirit' (*voluntas scriptoris*) or upon the 'letter' (*scriptum*) of the interdict.¹⁸¹ He adduces the notorious example of the *Causa Curiana*, which was argued circa 92 BCE and pitted two great Roman advocates, Lucius Licinius Crassus and Quintus Mucius Scaevola Pontifex against each other. The case is frequently mentioned by Cicero, and has generated a great deal of scholarly comment.¹⁸² In this instance, Cicero reduces this complicated case, wherein both sides with reason claimed the law to be on their side,¹⁸³ to an exemplary case of the letter versus the spirit. In this

¹⁸¹ The argument of the spirit versus the letter of the law was a common concern in Roman courts. Cicero actually provides advice in the *De Inventione* on how to argue either side of such an argument. See *De Inventione* 2.137-143.

¹⁸² For a full reconstruction of the factual situation of the case see Vaughn, "Law and Rhetoric in the *Causa Curiana*." For a history of scholarship on the matter, see his pg. 208-210 and especially n. 1.

¹⁸³ See Harries, "The Law in Cicero's Writings," pg. 109 who sees this less a battle of the letter versus the spirit of the law as a battle between orators. "[I]n fact, both advocates advanced an interpretation of written

case, a Roman man by the name of Coponius left a disputable will. Looking forward to the birth of a son, he made his son heir and, in the case that son died before coming of age, appointed one Manius Curius the reversionary heir. No son, however, was ever born. The dispute settled on the question of whether Curius could inherit, given that the son, not having been born, never died. In this case, Cicero says, Crassus defended the spirit or intention of Coponius, while Scaevola argued for the letter, i.e. that Curius could not inherit because there was no son. In this case, Crassus prevailed, and Cicero adduces it as precedent that sometimes laws must depend not on the wording, but rather upon the intention of the drafter:

Quid? verbis hoc satis erat cautum? Minime. Quae res igitur valuit? Voluntas, quae si tacitis nobis intellegi posset, verbis omnino non uteremur; quia non potest, verba reperta sunt, non quae impedirent sed quae indicarent voluntatem. (*Pro Caecina* 53)

So? Was this provision specified in the text? Not at all. So what principle prevailed? The intention. For if our intentions could be understood from silence, we would not use words at all; but since that is impossible, words are employed, not so they can impede our intention, but to make our intention clear.

Thus even if the *recuperatores* decide that the actual text of the interdict does favor Aebutius' cause, they are advised to consider instead the intention of the interdict *de vi armata*. Words are imagined as but imperfect vessels for conveying human thought, and some allowance must be granted if they fail to cover every possible situation. Cicero continues and declares that any legal writing, be it *senatus consulta* or a private will, can be easily reduced to absurdity or nonsense by applying this overly literal method of

text and intention, as inferred from the text, and both used authorities, precedents, and forms of wills in support of their case. Crassus prevailed because he was more attuned to audience reaction than Scaevola, not because his understanding of 'the law' was superior."

interpretation.¹⁸⁴ He adduces a number of pointed but silly examples, obviously designed both to mock Aebutius' case and to raise a little levity from the jurors, including the famously blind Censor Appius Claudius unable to have his case heard because the traditional formula was "since I see you in this courtroom" and a herdsman driving his oxen with impunity over an estate in Tusculum because the road is out in far-off Bruttium, simply because the relevant law says "if the road is unpaved, it bids a man drive his oxen wherever he wants."¹⁸⁵ Through these jokes, he reinforces the point that the law depends on far more than its written word alone, but also clearly on the intention of the author.

The debate over the letter vs. the spirit of the law was a commonplace of a Roman legal education, as we have seen from its inclusion in both the rhetorical handbooks of the period, the *De Inventione* and the *Rhetorica ad Herennium*.¹⁸⁶ Thus Cicero was obviously just as aware of how an advocate should best argue for the "letter" of the law, as well as its spirit as he does in the *Pro Caecina*. This does not mean, however, that a Roman advocate would be advised to argue stubbornly for the letter of the law against all notion of legislative intention, justice, or sense. One struggled, for the most part, not to argue for the "letter" alone, but to make one's opponents argument for the "spirit" appear inconsistent, self-interested, or ludicrous.¹⁸⁷ What is most interesting, and perhaps most powerful, about Cicero's treatment of the letter versus the spirit commonplace is how

¹⁸⁴ *Pro Caecina* 51.

¹⁸⁵ *Pro Caecina* 54: "quandoque te in iure conspicio." "Si via sit immunita, iubet qua velit agere iumentum."

¹⁸⁶ As Frier, *The Rise of the Roman Jurists*, comments, pg. 128: "Despite the undeniable brilliance of Cicero's argument in favor of the 'spirit' of the law, there is not one of his arguments that would not have been instantly recognizable to his rhetorically educated audience, nor one for which the rhetorical handbooks did not provide a ready counter."

¹⁸⁷ *De Inventione* 131-137; *Rhetorica ad Herennium* 2.14.

closely he weds himself and his case to the cause of the spirit. At a later point, he ‘recalls’ an encounter with the unknown jurist (*ignotus*)¹⁸⁸ supposedly behind Piso’s argument on the interdict *de vi armata*. This jurist offered, Cicero claims, an important concession:

rem et sententiam interdicti mecum facere fatebatur, verbo me excludi dicebat, a verbo autem posse recedi non arbitrabatur (*Pro Caecina* 79)

[*Ignotus*] confessed that the force and spirit of the interdict was on my side, but nevertheless held that I was excluded by the wording and he judged moreover that one could not depart from the wording.

Thus the unknown jurist continues to insist that the only appropriate way to interpret the interdict is to do so literally, and that Caecina, having been “repelled” is not able to claim the interdict on this ground. He goes on, however, to offer Cicero a rather novel solution to this problem:

consolatus est me et ostendit in hac ipsa causa nihil esse quod laborarem; nam verba ipsa sponsionis facere mecum, si vellem diligenter attendere. 'Quonam,' inquam, 'modo?' 'Quia certe,' inquit, 'deiectus est Caecina vi hominibus armatis aliquo ex loco; si non ex eo loco quem in locum venire voluit, at ex eo certe unde fugit.' (*Pro Caecina* 80)

He consoled me and showed me that there was no reason for me to be troubled by this case: for the words of the *sponsio* were on my side, if I only examined them closely enough. “How is that?” I say. “Since of course,” he replied, “Caecina was ‘expelled’ by force and armed men from some place or other. Even if not from the place he wanted to go to [i.e. the Fulcinian Farm], at the least from the location he fled from.

¹⁸⁸ Platschek, “Der Auctor Defensionis in Ciceros Rede Für A. Caecina,” has recently theorized that this jurist might be **[insert when you can track this article down]**. Frier, *The Rise of the Roman Jurists*, pg. 152-54, although offering no definitive answer, inclines toward Servius Sulpicius Rufus.

Cicero uses this supposed interchange to further emphasize the failings of this overly literal school of interpretation, as several scholars have noted.¹⁸⁹ It also divorces literal interpretation virtually completely from any notion of justice or truth, casting the law, so important to Cicero, as a complicated and quibbling game. Under this jurist's wild interpretation, Caecina's case falls because he was 'repelled' from the farm, but then succeeds because he was 'expelled' from the neighboring property.

Cicero has, then, a convenient handle on which both to attack Piso: that Caecina was expelled from 'some' place rather than specifically the Fulcinian Farm. But even in offering this sophistic and literal argument as rebuttal, Cicero makes sure the reader knows his true sympathies. He stands clearly on the side of the "spirit:"

Tu me ad verbum vocas; non ante veniam quam recusaro. Nego oportere, nego obtineri posse, nego ullam rem esse quae aut comprehendi satis aut caveri aut excipi possit, si aut praeterito aliquo verbo aut ambigue posito re et sententia cognita non id quod intellegitur, sed id quod dicitur valebit. (*Pro Caecina* 81)

You force me to argue on the "letter;" I will not descend to this without registering my objections. I object that it is not correct, I object that it cannot be sustained, I object that there is no matter so simple that it can be described well enough, or made secure enough, or provided with enough legal exceptions, if we will allow some overlooked or ambiguously placed word to prevail and base our judgment not upon what is understood, but upon what is literally said, even when the intention on the matter is clear.

He then imagines Piso objecting that certainly the interdict was meant to apply only to the specific property, and of course not to any property wherever located. While Cicero grants that this would obviously be true, he uses the opportunity to cast Piso as

¹⁸⁹ Stroh, *Taxis und Taktik*, pg. 88 n. 29, comments on the portrayal: "Der mann is der Karikatur eines juristen"; Frier, *The Rise of the Roman Jurists* pgs. 150-152, supposes that this "patently bogus" argument more closely resembles "a joke spun out in a conversation between friends".

unintentionally hypocritical. If Piso were to offer this argument, he would be acknowledging Cicero's larger point:

id quaerendum esse dicis neque aequitatem rei verbi laqueo capi putas oportere, in meis castris praesidiisque versaris; mea, mea est ista defensio, ego hoc vociferor, ego omnis homines deosque testor, cum maiores vim armatam nulla iuris defensione texerint, non vestigium eius qui deiectus sit, sed factum illius qui deiecerit, in iudicium venire; (*Pro Caecina* 83)

[If you offer this argument]... you are saying that this would be a legitimate cause for complaint, and you think that it is not fair or right that you be caught in a verbal trap, then you are fighting alongside my troops and in my camp as it were. It's mine; that defense is mine, I cry this out loud, I testify by all the gods and men that, as our ancestors provided no defense at law for armed violence, it is not legally relevant where an ejected man put his last footstep when compared to the crime of the man who expelled him.

In this passionate near outburst, Cicero wraps himself in the banner, as it were, of the law. He identifies himself so closely with the cause of the law that it becomes a metaphorical 'war' (*in meis castris praesidiis*). Piso is said to be 'changing sides' in this dispute over the nature of law and justice, and Cicero cries out to prove his claim to this argument. He declares it to be virtually a possession, and himself the sole owner (*mea, mea est ista defensio*). All this said, however, he suddenly and abruptly returns to his true position: that Piso's interpretation renders the interdict, practically speaking, worthless. Cicero appeals to the wisdom of the Roman *maiores*, who obviously never intended to protect violence, especially armed violence, with a defense at law (*vim armatam nulla iuris defensione texerint*).

Within the defense of Caecina, Cicero uses the rhetoric of the law (*ius*) and weaves a powerful web of legitimacy about himself and his client. He widens the scope of this case, a private law case over a disputed inheritance, into a kind of quasi-

constitutional test case. He recasts the case, no longer a simple matter of ownership or a finding of the facts, into a precedent. A wrong verdict means much more than depriving Caecina of his inheritance; for Cicero expands it into an almost existential threat to the Roman legal order. He demonizes Piso's overly-literal defense (*'reieci, non deieci'*) as the overthrow of the entire Roman legal system (*ius*) with the unrestrained rule of *vis*. His argument is further strengthened by his references to legal language and, especially, to the well-known series of argument for and against the 'letter' of the law. Cicero uses the written text of the *Pro Caecina* not only to promote his own vision of law, as a rational and coherent law code, but also to cast himself in the role of its champion and defender. Even when he feels compelled himself to lower himself a literal style of argumentation, he mocks it and carefully puts this argument into the mouth of an unnamed jurist. The rhetoric of law that he creates legitimizes his own position, while simultaneously de-legitimizing his opponent Piso for trying to hide his client's crimes behind the technicalities of the civil law.

Ius Civile Laudavimus: The Praise of the Civil Law as Political Positioning

As Frier's invaluable work, *The Rise of the Roman Jurists*, has pointed out, the status of law in the Roman Republic cannot be taken for granted. It in no way possessed the settled nature that moderns often (somewhat casually) attribute to Roman Law. What we so often think of as this overarching system of 'Classical Roman Law' is in fact the eventual product of centuries of constant and robust debate that was codified, in a sense, only in the age of the Byzantine Emperor Justinian. What Frier's work so valuably illustrates is the fundamental anachronism of evaluating Cicero's legal arguments by the

lights of this much later, far more evolved, system. The juristic project was by no means completed in 69 BCE when Cicero delivered the *Pro Caecina*.¹⁹⁰ The speeches of Cicero, although providing invaluable insight into the evolution of that system, come almost from a different world. In Cicero's world, furthermore, the status and nature of the evolving civil law were very much a subject of debate. In the praise of the civil law, Cicero is not muttering empty, popular platitudes, but actually taking sides in this struggle to define the nature and limits of the law itself.

Cicero closely links the spirit (*voluntas*) of the law (*ius*) in general with Rome's specific code of law, the *ius civile* (body of citizen law). It appears that Piso had attempted to overcome Cicero's reliance on the expertise of the jurists (especially C. Aquilius Gallus¹⁹¹) by advising the jury that there was no need to listen to legal experts in making their decision. Cicero seizes on this unfortunate turn of phrase to castigate Piso for the alleged contradiction of arguing against the jurists but for the letter:

Atque illud in tota defensione tua mihi maxime mirum videbatur, te dicere iuris consultorum auctoritati obtemperari non oportere. Quod ego tametsi non nunc primum neque in hac causa solum audio, tamen admodum mirabar abs te quam ob rem diceretur. Nam ceteri tum ad istam orationem decurrunt cum se in causa putant habere aequum et bonum quod defendant; si contra verbis et litteris et, ut dici solet, summo iure contenditur, solent eius modi iniquitati aequi et boni nomen dignitatemque opponere. (*Pro Caecina* 65)

And in your whole defense this seemed to me the most outrageous, when you said that it was not right to comply with the advice of the jurists (lawyers). Although this case is not the first or the only time that I have heard this, I still was confused why you would make this argument. For other advocates run to this argument when they think that they have some notion of equity and fairness to defend. But if a legal contest centers on the exact wording and, as they say, the strictest

¹⁹⁰ See especially Frier, *The Rise of the Roman Jurists*, pgs. 184-196, 252-287.

¹⁹¹ Gallus may actually have been present on the day at the Fulcinian Farm, see *Pro Caecina* 95. On his intellectual heritage and interpretation of the interdict *de vi armata*, see Frier, *The Rise of the Roman Jurists*, pg. 140-155.

interpretation (*ius*), most advocates generally use an argument for equity against the tyranny of the letter.

Cicero here picks up on a common stereotype of Roman law, that the jurists were, at least generally, associated with technicalities and sophisticated legal arguments.¹⁹² Despite the fact that both sides were employing juristic *responsa* (Cicero was using Gallus', while Piso relied on the *Ignotus*) to bolster their arguments, Cicero claims Piso's statement here is unsuitable to his argument. For, he asserts, those who argue against the lawyers, so to speak, typically do so by defending some higher concern for equity or justice (*aequum et bonum*). If one is going to urge a kind of jury nullification, he asserts, it should be for justice and fair play, not for a tortured literal understanding of the interdict, or, as Cicero calls it, the tyranny of the letter (*eius modi iniquitati*). This is further connected to the broader cultural dispute over the proper nature of law itself, and of the civil law in particular.

Cicero seizes the opportunity, in fact, not just to counter Piso alone, but a definite group of Roman advocates. In doing so, he elevates the civil law. It is not simply an arbitrary code, or a chance assemblage of components, but becomes a normative code. It is portrayed as virtually the ultimate expression of legitimacy in Roman society:

Cum id miror, te hoc in hac re alieno tempore et contra quam ista causa postulasset defendisse, tum illud volgo in iudiciis et non numquam ab ingeniosis hominibus defendi mihi mirum videri solet, nec iuris consultis concedi nec ius civile in causis semper valere oportere (*Pro Caecina* 67)

It is a puzzle to me why you defended this point in this case, since it was an inappropriate moment and the exact opposite of what your case demanded. And I further wonder why this is so frequently defended in our courts and sometimes

¹⁹² This is a theme he famously return to in his arguments against the jurist Ser. Sulpicius Rufus in his *Pro Murena* of 62 BCE. *Pro Murena* 25-27.

even by quite intelligent people, the position that it is not always right to concede to legal experts or for the civil law to prevail in every case.

Piso's argument, that one need not obey the jurists, is again countered as inopportune (*alieno tempore*) and in fact the exact opposite of what his case required (*contra quam ista causa postulasset*), but Cicero connects it to a larger seemingly dangerous mode of thought within Roman society. Thus he is dumbstruck not just at Piso, but even more so at those unspecified advocates who say even the civil law need not prevail (*ius civile in causis semper valere oportere*). This is a vulgar notion (*vulgo*), perhaps, but it appears particularly threatening as it has gained some currency among the elite (*non numquam ab ingeniosis hominibus*). Piso becomes subsumed in this class, for Cicero claims that in attacking 'the lawyers' he is actually attacking the civil law itself and undermining its authority in Roman society.

Piso himself may even be one of these 'intelligent men' (*ab ingeniosis hominibus*) who has inadvertently attacked the civil law, but this attack cannot be allowed to stand.

For Cicero imagines the civil law not just as a law code, but as the glue that holds together Roman society.

Nam qui ius civile contemnendum putat, is vincula revellit non modo iudiciorum sed etiam utilitatis vitaeque communis; qui autem interpretes iuris vituperat, si imperitos iuris esse dicit, de hominibus, non de iure civili detrahit; si peritis non putat esse obtemperandum, non homines laedit, sed leges ac iura labefactat; quod vobis venire in mentem profecto necesse est, nihil esse in civitate tam diligenter quam ius civile retinendum. Etenim hoc sublato nihil est qua re exploratum cuiquam possit esse quid suum aut quid alienum sit, nihil est quod aequabile inter omnis atque unum omnibus esse possit. (*Pro Caecina* 70)

For a man who thinks the civil law is contemptible is tearing apart the bonds not only of our courts, but also of our shared life and the good of the community. A man who rails against the interpreters of the law and argues they are not actually experts, for instance, is harming the men, but does not touch the civil law. But if

he thinks that you should not take the advice of expert lawyers, however, he is not harming the lawyers, but is shaking the very foundations of our legal rights (*leges ac iura*); it is essential for this thought to be in your mind: that there is nothing in our state we must protect as carefully as the *ius civile*. For if this is removed, there is nothing else which can determine what is one person's property and what is another's, there is nothing else which can be both fair to all people and consistent in all matters.

Cicero asserts here a very important distinction for the civil law. One can attack a particular lawyer (e.g., as Cicero attacked the *Ignotus*) by saying that he is wrong or ignorant on a point (*si imperitos iuris esse dicit*). This has no effect on the civil law. But in attacking the entire profession of the jurists, as Piso has done, is actually to strike a blow at the foundations of civil society (*leges ac iura labefactat*).¹⁹³ But, surprisingly, Piso as opposing advocate nearly vanishes from this portion of the speech. It is as if Cicero is no longer addressing the legal case itself, but begins to almost grandstand in promoting the civil law. He turns dramatically to the *recuperatores* (and thus also to his reading audience) to assert the importance of his point, that the civil law is the most important inheritance of the Roman state, and greatly to be treasured (*nihil esse in civitate tam diligenter quam ius civile retinendum*). It is the only method (*qua re*) for resolving disputes fairly, and actually the embodiment of fairness and consistency, at once fair to all and consistent for each (*quod aequabile inter omnis atque unum omnibus esse possit*).

¹⁹³ Indeed, he uses almost the same terminology here (*communis utilitatis*) that his character Scipio would later use to so famously define the *res publica* in his philosophy: *Est igitur... res publica res populi. Populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.* (*De Re Publica* 1.39) “A ‘Republic’ is, accordingly, the common business of a *populus*. Not every gathering of people, however, gathered together in any which way, constitutes a *populus*, but a *populus* is the gathering of a multitude joined together by their **consent to law and shared purpose.**”

The civil law is even beyond the reach of criticism; for it exists as a kind of ideal notion outside of reality. Although bad judgments occur, Cicero asserts, they are not the fault of the civil law, but rather of corrupt judges, forged documents, or misled juries.

The civil law itself is always and forever untouched by the baseness around it:

non numquam honesto ac probabili nomine bono viro iudici error obici, improbo facultas dari ut, cum sciens perperam iudicavit, testem tamen aut tabulas secutus esse videatur; in iure nihil est eius modi, recuperatores, non tabulae falsae, non testis improbus, denique nimia ista quae dominatur in civitate potentia in hoc solo genere quiescit. (*Pro Caecina* 71)

Sometimes a noble judge may appear to fall into error with an honest and understandable excuse, or an unscrupulous judge may be given the chance to say he is convinced by the documents and witnesses, when in fact he knowingly issues a false judgment. But in questions of pure law, this cannot happen, *recuperatores*. There are no forged documents, no perjured testimony in questions of law, even the voice of the powerful, who are dominant in our state, falls silent in questions of this type, and this type alone.

In Cicero's conception, the law itself is never in error. It is, in fact, the one bastion which is untouched by power politics, human error, or deceit. Even the powerful, who he says hold sway in other aspects of Roman government have none over the wise and just rules of the civil law (*nimia ista quae dominatur in civitate potentia... quiescit*). Indeed, in questions of pure law, even bribery cannot avail. He defines such questions as inviolable or almost, as we might say, constitutional in character, for the civil law appears, at least in its broad outlines, both sacred and immutable.

Non est aditus ad huiusce modi res neque potentiae cuiusquam neque gratiae; denique, quo maius hoc sanctiusque videatur, ne pretio quidem corrumpi iudex in eius modi causa potest. (*Pro Caecina* 72)

The powerful and well-connected have no undue influence in matters of this kind; Finally, what makes it all the greater and more venerable, it is not even possible to corrupt a judge through bribery in a case of this kind.

This is certainly a strange statement, if it is meant to be taken factually. For only a year before, Cicero had been arguing that wicked praetors like Verres had, in fact, been flouting the *ius civile* by altering its text to suit their own ends. But he speaks here not of the reality of Roman law, but of an ideal. In the types of pure law cases he mentions, such as that a posthumous son invalidates a will, or that a woman may not bestow property without the sanction of a trustee, the rules are so powerfully stable that no judge would dare to change them. Or perhaps, if one did, like Verres, their illegal actions would be readily seen for the corrupt decisions they were. While the praetor might be corrupt, or the jury misled, the civil law itself would continue on as a beacon of justice at the foundation of Roman society.

But this praise of the civil law is at once a description and a kind of political manifesto. By describing this law as an ideal to be aspired to, he criticizes those who would abuse it and situates himself as its bold champion. He stands for the civil law precisely because the civil law too stands for perfect justice in opposition to the powerful, the influential, and the wealthy.

O rem praeclaram vobisque ob hoc retinendam, recuperatores! Quod enim est ius civile? Quod neque inflecti gratia neque perfringi potentia neque adulterari pecunia possit; quod si non modo oppressum sed etiam desertum aut neglegentius adservatum erit, nihil est quod quisquam sese habere certum aut a patre accepturum aut relicturum liberis arbitretur. (*Pro Caecina* 73)

O how magnificent and for this reason worth holding onto, *recuperatores*! For what is the *ius civile*? It is that which cannot be bent by the influential or broken down by the powerful or corrupted by the wealthy. And if you allow it, not just to be attacked, but even to be deserted and left carelessly unprotected, there is nothing a person can securely possess, whether it be a legacy from his father or an inheritance left to his children.

He connects this immutability powerfully to a defense of property rights.¹⁹⁴ Any threat to the civil law is presented as an actual threat to the security of all property holders.

Instead, the civil law is appealed to as the lone neutral and fair institution which has any hope of restraining the powerful and wealthy. If it is worn down, by unjust precedents, or destroyed altogether, Cicero appears to warn his audience, there will be nothing preventing the capricious rule of the powerful. The civil law becomes the greatest inheritance of the Roman people.¹⁹⁵

In summing up his praise of the civil law, Cicero skillfully weaves together all his themes into an overwhelming totality: the power of precedent, the threat of violence, misinterpretation of the interdict, and the commanding and legitimate authority of the civil law. All these seemingly disparate topics are combined under the moniker of the “voice of law” (*vox iuris*), while Piso’s side of the argument becomes the “voice of lust” (*vox libidinis*):

populi Romani causa, civitatis ius, bona, fortunae possessionesque omnium in dubium incertumque revocantur. [...] Iuris si haec vox est, esse vim non in caede solum sed etiam in animo, libidinis, nisi cruor appareat, vim non esse factam; iuris, deiectum esse qui prohibitus sit, libidinis, nisi ex eo loco ubi vestigium impresserit deici neminem posse; iuris, rem et sententiam et aequitatem plurimum valere oportere, libidinis, verbo ac littera ius omne intorqueri: vos statuete,

¹⁹⁴ Harries, “The Law in Cicero’s Writings,” pg. 108-09.

¹⁹⁵ See also *Pro Caecina* 74: *quid, inquam, prodest fundum habere, si, quae diligentissime descripta a maioribus iura finium, possessionum, aquarum itinerumque sunt, haec perturbari aliqua ratione commutarique possunt? Mihi credite, maior hereditas uni cuique nostrum venit in isdem bonis a iure et a legibus quam ab eis a quibus illa ipsa nobis relicta sunt. Nam ut perveniat ad me fundus testamento alicuius fieri potest; ut retineam quod meum factum sit sine iure civili fieri non potest.*

“What advantage is it, I say, to have a farm, if those laws of boundaries, properties, water-rights, and roads, which were so diligently set down by our ancestors, can be disturbed or upended for any reason. Believe me, each and every one of us receives a greater inheritance of property from the law and the statutes than from those who left these properties to us. For it is possible for a farm to be left to me in someone’s will; but it is not possible for me to hold onto what has become mine without the civil law.”

recuperatores, utrae voces vobis honestiores et utiliores esse videantur. (*Pro Caecina* 76-77)

The cause of the Roman people, the law of the state, the possessions, fortunes and properties of all men are being made doubtful and insecure again. [...] If it is the voice of law that declares that illegal violence consists not just in killing but also in intent to kill, while the voice of lust urges us to think that no violence has been done, unless the blood runs. If it is the voice of law that a man who is prevented from entering is ‘ejected,’ but of lust that no one can be ‘ejected’ unless he sets foot on a property. If it is the voice of law that the fact and spirit and fairness of the law ought to prevail, but of lust that all law be perverted by its literal wording. You decide, *recuperatores*, which of these two voices seems to you the more honest and useful one.

Piso’s legal arguments, genuine as they might well have been, are magnified into an existential threat to the *res publica*. He is not only in conflict with Caecina or Cicero any longer, but with the “cause of the Roman people” (*causa populi Romani*), the “law of the state” (*civitatis ius*), and even threatens the holdings of all Roman citizens.¹⁹⁶ Two vivid worlds are held before the eyes of the *recuperatores*, the first being a world of law, fairness, and security, while the second a world of violence, anarchy, and capricious oppression. Cicero concludes by asking the *recuperatores* which of these two worlds, law’s or libido’s, they would rather live in. The choice the jurors face, he argues, is no small decision; it is a decision of paramount importance.

Overriding Positive Legislation: Promoting Constitutionality

Within the speech for Caecina, Cicero offers an expansive and seemingly unique set of ideas concerning the law, legality, and legitimacy. The arguments offered so far in the speech, those dealing with precedent, the use of violence, the spirit of the law, and,

¹⁹⁶ There is also, it seems to me, a reference to the period of Sulla’s dictatorship and possibly earlier, since the security of tenure of all property is being “called back into uncertainty” (*in dubium incertumque revocantur*). Where the civil law does not prevail, Cicero suggests, the force of the influential and powerful will.

though perhaps to a lesser extent, the praise of the civil law appear to have a direct bearing on the dispute between Aulus Caecina and Sextus Aebutius. They center primarily on the legal dispute concerning the interpreting the interdict *de vi armata* and characterizing the incident that occurred at the Fulcinian Farm. The general strategy of these arguments is to offer a definition of law (*ius*) that, in general, seeks to prove that the ‘spirit’ of the law, if understood correctly, is obviously reconcilable with its ‘letter.’ Cicero professes to offer these correct (in his view) understandings of these legal arguments and casts Piso’s argument as bringing the spirit and the letter into a conflict as unnecessary as it is illogical (i.e. ‘*reieci, non deieci, vis Caecinae facta non est*’). This strategy is executed skillfully and allowed Cicero to present his client as lawful and himself as a champion of the law to his political advantage. It is also in accord with Roman rhetorical doctrine, as offered in Cicero’s *De Inventione* and the anonymous *Rhetorica ad Herennium*.¹⁹⁷ When Cicero somewhat surprisingly (and, legally speaking, unnecessarily) returns to the argument on Caecina’s citizenship and Sulla’s law on citizenship, however, he is extending his arguments on *ius* one critical step further: that *ius* can even, in fact, override and invalidate positive legislation (*leges*). This is no longer a case of reconciling the text and the meaning of the statute, but of asserting a new legal doctrine, that some statutes are themselves illegal and unconstitutional under Roman law.

Cicero turns suddenly and virtually without warning to discussing the unconstitutionality of one of Sulla’s many laws: the *lex Cornelia de civitate Volaterranorum adimenda*. This is particularly surprising, as the issue of Caecina’s citizenship had receded almost completely into the background in the central portion of

¹⁹⁷ *De Inventione* 2.138-143, *Rhetorica ad Herennium* 2.13-14

Cicero's *Pro Caecina*. The topic is mentioned very briefly at section 18, but seemingly only as an example of Aebutius' litigiousness.¹⁹⁸ There Cicero mentions that Aebutius had begun saying that Caecina, as a native of the Etruscan town of Volaterrae, had been deprived of his citizenship by the law of the Dictator Sulla. Further, if Caecina were proved to be without Roman citizenship, Aebutius' theory went, he would be barred from inheriting under a Roman will. Cicero rather jarringly turns from a discussion of the legal possession of the farm to take up again the issue of Caecina's citizenship.¹⁹⁹

At enim Sulla legem tulit. Ut nihil de illo tempore, nihil de calamitate rei publicae querar, hoc tibi respondeo, ascripsisse eundem Sullam in eadem lege: 'si quid ius non esset rogari, eius ea lege nihilum rogatum.' (*Pro Caecina* 95)

Ah! But Sulla passed a *lex* (statute). Since I do not wish to complain about that terrible time, or about the disaster that then struck our republic, I will confine myself to this argument: namely, that even Sulla had this clause placed in his law: "if anything 'not *ius*' (lawful) is proposed in this bill, then that provision is null and void."

This law in question was politically important, both at the time of its passage and the period of the *Pro Caecina*. It targeted the people of Volaterrae, an Etruscan town which had stubbornly resisted Sulla's forces. As punishment, the people of Volaterrae were deprived of their Roman citizenship. They were thus legally reduced to a *deteriore iure*, some sort of 'lesser civil status' by means of this legislation.²⁰⁰ But this law, in

¹⁹⁸ *Pro Caecina* 18: Iam principio ausus est dicere non posse heredem esse Caesenniae Caecinam, quod is deteriore iure esset quam ceteri cives propter incommodum Volaterranorum calamitatemque civilem. "At first (Aebutius) dared to argue that Caecina could not inherit from Caesennia, because he had a 'lesser right' than other citizens on account of the harm and civic calamity inflicted on the Volaterrans."

¹⁹⁹ Frier, *The Rise of the Roman Jurists*, pgs. 97-104. He points out that the transition into this section is so abrupt, in fact, that it has caused several commentators to theorize a lacuna in the preceding section. See especially pg. 97 n. 7.

²⁰⁰ Cicero reports this as one attack of Caecina's foe Aebutius at *Pro Caecina* 20. Nevertheless, Cicero tells us, the people of Volaterrae retained the rights of the "twelve colonies." The precise details of this status are not clear, but appear from Cicero's argument to have included inheritance and intermarriage with Roman citizens.

particular, appears to have stirred up a great deal of resentment against Sulla and his partisans. The first open opponent to the new Sullan regime, the rebel consul Aemilius Lepidus in 78, appears to have opposed this law in order, at least in part, to solicit support against the regime in Etruria.²⁰¹ The provision became a live wire once again during the census of 70/69, when the censors were forced to decide whether to enroll these former citizens or not.²⁰² So for a decade, this portion of the Sullan settlement remained an open (and apparently divisive) legal and political question. By challenging Sulla's law on the Volaterrans, Cicero is voluntarily and, at this stage in the trial unnecessarily, taking a very public stand on an especially contentious issue between die-hard Sullans and the opponents of the regime. Cicero's method of approaching such an overtly political issue bears further examination. For his discussion of the law, although brief, allows Cicero to accomplish several goals at the same time.

It is thus certainly of note that Cicero assumes that the audience will know immediately which statute he is referring to in this argument. This is expecting quite a bit from the *recuperatores* or his readers, as this law had only been mentioned once prior to this point. Even that mention is enigmatic, speaking only of the "civic calamity" of the

²⁰¹ A fragment of Sallust's Histories depict the consul Philippus complaining to the Senate about Lepidus (1.77.14): *An Lepidi mandata animos movere? Qui placere ait sua cuique reddi et aliena tenet, belli iura rescindi, cum ipse armis cogat, civitatem confirmari, quibus ademptam negat, concordiae gratis tribuniciam potestatem restitui, ex qua omnes discordiae accensae.* "Or are Lepidus' demands persuasive? He says that he wants each man's property restored, but yet holds the property of others, that he would repeal the laws of war, when he uses armed force himself, that he wants to recognize the citizenship (i.e. of the Volaterrans) of those who, he claims, never lost it and that the power of the tribunes be restored 'in the interest of peace' when it was the source of all our civil discord." It is interesting to note how many of these demands (restoring the tribunes, opposition to proscriptions, and restoration of citizenship) were later upheld by Cicero.

²⁰² Whether they were enrolled at this time is not absolutely clear, although Cicero's statements on the issue seem to suggest they were enrolled in 70/69. Harris, *Rome in Etruria and Umbria*, pgs. 276-84. Cicero may even be attempting to claim credit for the censors' decision to enroll them by citing his own earlier arguments defending the Woman from Arretium.

Volaterrans without mentioning Sulla or the specific law at all. Because the issue of Caecina's citizenship has not been dealt with in the earlier part of the speech, some scholars have hypothesized a lacuna in the text that could have included a more detailed transition to the topic of Sulla's law.²⁰³ But whether any text is missing or not, the extant speech shows that the issue of Volaterran citizenship was a topic of some importance at the time of publication. For Cicero clearly expected his readers to understand, from this scanty preparation, exactly which of Sulla's many laws he was discussing.²⁰⁴ This suggests two possibilities. First, it might suggest that the issue had already been dealt with extensively in the earlier hearings of the case and he expected the *recuperatores* or his readers to be fully familiar with the argument.²⁰⁵ Secondly, however, it might suggest that in such a context, a trial between a Roman and a Volaterran, Sulla's law was a natural topic to come up and that his ancient readers might even have been expecting it to return at some point without much preparation.

Cicero roots the law on Volaterran citizenship in the period of the violence and proscriptions following Sulla's victory at the Colline Gate. He quickly brings up the specter of Sulla's dictatorship in the minds of his reading or listening audience, but only to pointedly *pass over* any extended treatment of that time period. The implication, of course, is that he very well could discuss this period and its violence in order to attack

²⁰³ Stroh, *Taxis und Taktik*, pg. 99. Frier, *The Rise of the Roman Jurists*, pg. 97-98, believes a lacuna is unlikely as Cicero did not mention this topic in his *partitio*. He instead theorizes it is an insertion in this, the published version of the third hearing, of material which had bearing on the first hearing.

²⁰⁴ Sulla's dictatorship was a time of intense legislation, see Callie Williamson, *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic*, pg. 17.

²⁰⁵ Frier, *The Rise of the Roman Jurists*, pg 104: "At this time [the first hearing] Cicero doubtless delivered an argument drawn loosely from his speech for the Arretine woman. However, by the trials' third hearing the issue, and indeed the entire question of Caecina's ownership, had obviously receded into the background [...] Nonetheless, Cicero's insertion of the argument into the published version of the speech suggests the orator's deep feelings on the issue and also how important it had been in shaping the trial."

this law, but that he forebears doing so. Thus, without making any substantial accusations of violence or irregularity, he brings to our mind the battles, death, and bloody proscriptions that came along with the Sullan regime. He suggests he could challenge the law either as one passed by violence or lacking the real sanction of the Roman people. Instead, however, he challenges it on purely legal rather than procedural grounds: that it is an *unconstitutional* law, so out of concert with Roman legal tradition that it must be declared invalid. Where Cicero might have expanded on a number of weaknesses in the law, he instead zeroes in specifically on the constitutional argument (*hoc tibi respondeo*).

Moderns are quite familiar with the concept of an unconstitutional law, by which I mean a law which is argued to be invalid because it conflicts with an established higher law. This is most often a set of pre-existing rules expressed in a written constitution, although the British case is the most obvious example of a modern unwritten constitution. In Cicero's day, however, this style of argumentation was rarely if ever advanced. It is thus not, for instance, recommended (or indeed contemplated) in the rhetorical handbooks of Republican Rome. In arguing against the 'letter' of the law, the advice of the handbooks, after all, is to cast one's opponent's argument as an illogical, self-interested, or torturous misinterpretation of the law. To accept the meaning of a law (as Cicero does with the *lex Cornelia*) and yet argue that it is not binding, or unconstitutional, is a very different sort of argument. Rather than argue that the text is being misinterpreted, one advances the argument that it is, legally and perhaps also morally or philosophically, beyond the pale of legitimate legal discourse. Cicero's

argument shows too that he expects his readers or listeners to be unfamiliar with such an argument, for he argues first that some such legal limitation, the idea of the *unconstitutional*, exists at all.

Cicero finds support from a traditional ‘savings clause’ which had been attached to the Sullan law as it was attached, Cicero says, to “all our laws:” *si quid ius non esset rogarier, eius ea lege nihilum rogatum*. (“if anything ‘not *ius*’ is proposed in this bill, then that provision is null and void”). This exact phrase (*si quid ius non esset rogarier...*) is found in its entirety only in Cicero’s writings, in the *Pro Caecina* and the *De Domo Sua*. The version in the *De Domo Sua*, in reference to Clodius’ law exiling Cicero, is of a slightly different form, but both still point towards the same tradition.²⁰⁶ Neither of these examples are direct citations of the text of the law, because both are compressed and given to us in indirect, rather than direct, speech. Nevertheless, it is possible to restore the likely ending of this savings clause (Latin *exceptio*), since it appears to be a version of the common abbreviation E.H.L.N.R: *eius hac lege nihilum rogarur*.²⁰⁷ Even though this tag was found in “all our laws,” as Cicero says, its precise meaning was likely a matter of debate even among jurists and legislators.²⁰⁸ Two

²⁰⁶ *De Domo Sua* 106: *non exceperas ut, si quid ius non esset rogari, ne esset rogatum* “Had you not added the exception clause that if something *non ius* was proposed in this bill, it would be invalid?”

²⁰⁷ There are many citations of this clause in the epigraphic remains of Roman legislation, but for an historical overview of the interpretation of the clause Badian, “E.H.L.N.R.” The phrase can be translated “Nothing of this sort is proposed in this law.”

²⁰⁸ *Ibid*, pg. 205-208, shows that this clause is written in a number of different ways throughout this period. Thus *eius ea lege nihilum rogatum* in the manuscripts of Cicero, *eius hac lege nihilum rogato* in the manuscripts of Frontinus, *eius hac lege nihilum rogarur* in the *Lex Antonia de Termessibus* (CIL 589), and the very frequent mistake *ex hac lege nihilum rogarur*. Badian describes the use of *ex hac lege* “in accordance with this law” as a clearly mistaken expansion of the phrase which makes very little sense in the contexts in which we find this abbreviation. Nevertheless, when the abbreviation is expanded in inscriptions, *ex* is found 6 times, *eius* 2, and the clearly mistaken *eum* once. There was, he has shown, clear confusion even about the correct wording of the abbreviation as early as 100 BC. Its meaning, then, must have been equally disputed.

thousand years later, it is impossible to recover an unassailably correct view of its intended legal force. What can certainly be said, however, is that Sulla (or his legal drafters) clearly believed that the removal of citizenship, as accomplished by the *lex Cornelia de civitate Volaterranorum adminenda*, was indeed *ius*, a legitimate goal of legislation, or else they would never have added such a self-defeating savings clause.

But what about the other half of the phrase (*si quid ius non esset rogari*)? This particular wording of the phrase is not attested anywhere outside of Cicero.

Nevertheless, the first century CE grammarian Probus explains a very similar phrase. In his *De Notis Antiquis*, he lists the abbreviation S.Q.S.S.E.Q.N.I.S.R.E.H.L.N.R., which he expands to *Si quid sacri sancti est, quod non iure sit rogatum, eius hac lege nihil rogatur*.²⁰⁹ And this abbreviation has been found or plausibly restored in several surviving Roman legal inscription, such as the *Lex Calpurnia Gabinia* of 58 BCE and the *repetundae* law found at Tarentum.²¹⁰ Probus' version of the savings clause is concerned with the religious and legal category of sacrosanctity. Sacrosanctity, as a legal doctrine, is most famously associated with the office of the tribune of the plebs. Unlike the higher magistrates of the state (consuls, praetors, etc) who possessed the legal power to command known as *imperium*, tribunes possessed *sacrosancta potestas*, sacrosanct power. In addition, the office itself was surrounded by religious/legal taboos. Most famous, perhaps, is their personal inviolability. A tribune could not be rightly interfered

²⁰⁹ Translation: "This law does not intend to alter anything sacred and sanctified which has been unrightfully affected by this law."

²¹⁰ On the *Lex Calpurnia Gabinia*, see Dumont, *Insula Sacra*, pg. 149-150. On the law from Tarentum, *Epigraphica* 9 (1947) p. 3ff. It should be noted that these laws appear to have a slight variant of Probus' phrase: S.S.S.E.Q. instead of S.Q.S.S.E.Q, which presumably expands to *si sacrum sanctum est quod...* See Badian, "E.H.L.N.R.," pg. 209.

with or prevented from performing his duties in any way, both because of his religious sanction and because he was thought to represent the will of the people directly. This authority allowed them, for instance, to oppose the will of other magistrates and even, in several famous cases, physically haul consuls off to jail. To obstruct a tribune incurred a religious as well as a legal punishment. One deemed to have done so was punished by *sacratio*, a ritual in which the guilty person was pronounced *sacer*, taboo. And under Roman practice this declaration amounted to a decree of banishment. Cicero's treatment of the phrase, to all appearances, removes this religious component from the clause. Thus while it might have been legally impossible or even 'unconstitutional' to interfere with the tribunes of the plebs before, Cicero greatly expands the scope of the clause to include other legal doctrines such as citizenship and freedom..

When Cicero employs the clause, he must actually argue for the existence of a Roman constitution, in the sense that there are limits on the legitimate use of legislation. He continues with a rhetorical question:

Quid est quod ius non sit, quod populus iubere aut vetare non possit? Ut ne longius abeam, declarat ista ascriptio esse aliquid; nam, nisi esset, hoc in omnibus legibus non ascriberetur. (*Pro Caecina* 95)

But what is there that is 'not *ius*,' and which the people can neither order nor forbid? So as not to go too far from the matter at hand, this clause declares that there is such a thing: for if this was not so, this clause would not be appended to all our laws.

Thus Cicero explicitly connects this to an idea of a constitutional limitation. While he professes himself content not to explain it at great length (*ut ne longius abeam*), he declares that some category of actions or laws exists which "the *populus* can neither order nor forbid" (*quod populus iubere aut vetare non possit*). The very idea is strange or

novel enough that Cicero must go about proposing it in distinct steps. And the first step is to prove the existence of a legal category we might call the unconstitutional, those things which are absolutely and irrevocably forbidden by Roman law (*ius*).

The idea of a constitutional *res publica* which Cicero proposes here is not taken for granted in his argumentation. This is unlike our modern context, where virtually all sides of the political spectrum recognize that there are some government actions which should be considered illegitimate or unconstitutional. Cicero, by contrast, imagines himself wringing only a reluctant confession from his opponent Piso:

Sed quaero abs te, putesne, si populus iusserit me tuum aut te meum servum esse, id iussum ratum atque firmum futurum? Perspicis hoc nihil esse et fateris; qua in re primum illud concedis, non quicquid populus iusserit, ratum esse oportere; deinde nihil rationis adfers quam ob rem, si libertas adimi nullo modo possit, civitas possit. Nam et eodem modo de utraque re traditum nobis est, et, si semel civitas adimi potest, retineri libertas non potest. Qui enim potest iure Quiritium liber esse is qui in numero Quiritium non est? (Caec. 96)

But I ask you, if the people ordered me to be your slave or you to be mine, do you think that that command would be binding and valid? You see that this action would be invalid and you admit it; and in this matter you concede that principle – that not everything that the people have ordered ought to be considered valid. For we have one tradition which governs both *civitas* (citizenship) and *libertas* (freedom). If even one time our citizenship can be stripped away, our freedom could be taken from us as well. For how can anyone be guaranteed freedom ‘by citizen right’ (*iure Quiritium*) who is not also counted as a citizen?

Cicero proceeds in a rational two step process. First, by clever deployment of the savings clause, he proves that some things (actions, laws, etc) are legally impossible in Roman law. He first asks Piso if the Roman Assembly (the *populus*) has the power, for instance, to reduce Piso to being Cicero’s slave through legislation. Cicero has chosen this as perhaps the ultimate and most obvious example of legislative tyranny, to force a free man into slavery by statute (*lex*). In response, he imagines even Calpurnius Piso, one of the

most notorious Sullan diehards,²¹¹ being forced to answer that this would not be a valid order (*ratum atque firmum*). Thus Cicero imagines Piso, and thereby his Roman audience, accepting the principle of unconstitutionality. Second, he attempts to prove that removing citizenship is one of these indisputably unconstitutional actions. He does so by linking the two legal doctrines of *civitas* (citizenship) and *libertas* (freedom). Cicero asserts that Piso can bring forward no rational reason (*nihil rationis*) to treat the two statuses, free and citizen, in a different manner. In fact, Cicero says that citizenship is the guarantor of freedom.²¹² This right is declared to be so important that if citizenship is allowed to be stripped even one time (*semel*), it would fully establish the evil precedent of slavery by legislation. The truth of this legal analysis may perhaps be questioned. But more importantly, stripped of citizenship, a Roman would be legally unable to appeal for redress. Non-citizens were barred the legal procedure of *vindicatio in libertatem*, by which they claimed to be free, importantly, by citizen right (*iure Quiritium*).

Cicero bases this assertion, that *civitas* and *libertas* must be treated in the same fashion, as not just self-evident, but actually based on precedent. He adduces as evidence a case in which he argued as a younger man, the case of the Woman of Arretium (80 BCE):

Cum Arretinae mulieris libertatem defenderem et Cotta xviris religionem iniecisset, non posse nostrum sacramentum iustum iudicari, quod Arretinis adempta civitas esset, et ego vehementius contendissem civitatem adimi non posse, xviri prima actione non iudicaverunt; postea re quaesita et deliberata

²¹¹ Gruen, *The Last Generation of the Roman Republic*, pg. 28: "one of the most conservative figures in the Roman Senate."

²¹² This assertion is presumably based upon the Roman citizen right to appeal to the praetor for redress through the appropriate interdict. See Levy, "Civitas Und Libertas"; Valentina Arena, *Libertas and the Practice of Politics in the Late Roman Republic*, pgs. 26-30 .

sacramentum nostrum iustum iudicaverunt. Atque hoc et contra dicente Cotta et Sulla vivo iudicatum est. (Caec. 97)

When I was defending the freedom of the woman of Arretium and Cotta (the opposing advocate) had appealed to the religious sense of the Decemviri, that our *sacramentum* (legal oath) could not be judged *iustum* because citizenship had been taken away from the people of Arretium and I quite forcefully countered that citizenship cannot be taken away, the decemviri did not offer a judgment at the first hearing; but later, once they had considered and deliberated on the question, they deemed our oath *iustum*. And this case was decided although Cotta spoke against me, and Sulla was yet alive.

In that case, a woman from the town of Arretium was being held in slavery. Nevertheless, she

found someone to assert (an *adsertor*) that she was actually a free woman and was therefore being held in bondage wrongfully. The hearing to decide her status was conducted before the court of the *Decemviri Stitibus Iudicandis*. According to the somewhat archaic procedure of the *legis actio sacramenti*, both sides began the trial by making an oath (*sacramentum*) that they were telling the truth. The losing side was deemed to have made a *sacramentum* that was *iniustum* (unjust). Cicero represents the case as turning, not on any factual grounds, but rather on the technical legal language of that oath. His recounting of the case is quite compressed and complex, which suggests that he assumes his audience will remember the notorious case even ten years later.

From this, the relevant details of the case can be fairly clearly reconstructed.²¹³

The woman of Arretium was being held in slavery, consequently Cicero is defending her *libertas*, her freedom, rather than directly defending her *civitas*, citizenship. Cicero's unknown client swore an oath that this woman was free "by citizen right" (*iure Quiritium*). At this point, Gaius Cotta, the opposing advocate, advanced a legal

²¹³ This citation is actually the only evidence we have for the speech for the Woman of Arretium. Crawford, *M. Tullius Cicero, the Lost and Unpublished Orations*.

technicality. For Cotta argues that the *sacramentum* Cicero's client has no validity, because citizenship rights had been taken away from the people of Volaterra and Arretium by Sulla's law. He appears to have thereby conceded that this woman might be free (*libera*), but without citizenship she could not be free 'by citizen right.' Thus his opponent's *sacramentum* would have to be deemed invalid (*iniustum*). Cicero, on the other hand, argued against this technicality. He might, in fact, have focused on the fact that it was a technicality, but instead argued "quite forcefully" (*vehementius*) that citizenship could not be taken away. Thus he presents himself arguing against the written statute (the *lex Cornelia*) and in favor of an abstract principle of Roman law – that it is impossible to remove citizenship by means of statute. Thus, he would have had to argue, Sulla's law on the Volaterrans was not just bad legislation, but also invalid as law.

As it turned out, the case was not an easy one for the judges to decide, as Cicero explicitly mentions – *xviri prima actione non iudicaverunt* – the Decemviri did not offer a judgment after the first hearing. Instead, they decided to look into the matter in greater depth (*re quaesita et deliberata*). Only on the second hearing did they issue a decision in Cicero's favor. So, Cicero claims, the court of the Decemviri established in this case a clear precedent upholding the legal principle that citizenship cannot be taken away (*civitatem adimi non posse*) even through the passage of a statute in a legitimate assembly. This achievement of the early Cicero is then magnified as all the greater because it was achieved against an eloquent advocate like Cotta (*contra dicente Cotta*), but even more importantly, while Sulla was still living (*Sulla vivo*). The constitutional principle he advocates in the *Pro Caecina* is not depicted as new, but rather as a long-

established principle. Whatever this limiting ‘constitution’ is that Cicero promotes, it existed, it appears, even before Sulla’s death. In fact, this belief in a kind of Roman constitution was strong enough that even as young and unimportant an advocate as Cicero was in 80 BCE (at the very same period he was arguing the *Pro Roscio Amerino*) might dare to assert it and win. Even Sulla, the man who had forever altered the Roman constitution in so many ways, who had held virtually unlimited legal power over the Roman world, appears to have accepted the decision of the *decemviri* in this case and allowed it to stand. This is proven, Cicero says, by the fact that at the time of the *Pro Caecina* the Volaterrans, among others, were again enjoying their full citizen rights in full view without the least hesitation by anyone.²¹⁴

Cicero goes on to illustrate this point further by briefly discussing exile as a penalty in Roman law. He claims to be aware of some legal confusion on the point, although he represents it as the sort of quibbling that he, as an experienced advocate, has heard of, but does not expect his readers to be aware of.²¹⁵ He covers a well-known instances in Roman law where a person could lose either his citizenship or his freedom as a penalty: fetial dedication, a citizen father selling a child, the enslavement of those avoiding military service, voluntary departure to the Latin Colonies, and fleeing trial. In each case, however, he tries to show that the citizen was not deprived of his citizenship as

²¹⁴ *Pro Caecina* 97: *Iam vero in ceteris rebus ut omnes qui in eadem causa sunt et lege agant et suum ius persequantur, et omni iure civili sine cuiusquam aut magistratus aut iudicis aut periti hominis aut imperiti dubitatione utantur, quid ego commemorem? Dubium esse nemini vestrum certo <scio>. “But now why should I bother to recite to you how in other matters all these people who are in the same circumstances plead their case by statute and pursue their rights and enjoy the full civil law without anyone giving it a moment’s hesitation, whether magistrate or judge, experienced or ignorant? <I know> that not one of you doubts this.”*

²¹⁵ *Pro Caecina* 98: *Quaeri hoc solere me non praeterit—ut ex me ea quae tibi in mentem non veniunt audias. “It does not escape me that this is a frequent question – and thus you will hear from me even those objections which do not occur to you.”*

a penalty, but rather voluntarily chose to abandon it.²¹⁶ He further emphasizes that this list of *apparent* exceptions is itself long-settled law, and not open to further alteration.²¹⁷ Even banishment (*exilium*) is re-interpreted not as a punishment, but rather as a consciously chosen opportunity to flee from punishment. Thus the citizen in question is seen to have chosen exile, rather than face the punishments of execution or infamy. Had they chosen to face execution, he argues, they would only lose their citizenship when they lost their lives.²¹⁸

The argument concerning Caecina's citizenship is not an insignificant portion of Cicero's *Pro Caecina*. In all, it amounts to approximately ten per cent of the surviving speech. It is also placed last of the major sections in the extant oration, suggesting that Cicero wanted it to be at the forefront of his readers' minds. But it is crucial to note that the speech might have argued on much narrower grounds and still achieved its goal of gaining the inheritance for Caecina. For, he tells us, even those who were supposedly deprived of their citizenship were statutorily allowed to inherit under Roman wills. And the right of inheritance was, in fact, restored to them by a separate law of Sulla.²¹⁹ In addition, Cicero apologizes for the length of this argument in the address, since the topic

²¹⁶ Valentina Arena, *Libertas and the Practice of Politics in the Late Roman Republic*, pg. 26, shows his insistence on "personal consent." A clear exception to this emphasis, not mentioned by Arena, is the sale of a citizen child. Here Cicero simply says: *Si pater vendidit eum quem in suam potestatem susceperat, ex potestate dimittit*. "If a father sells someone (usu. a child) whom he had had under his authority (*potestas*), he dismisses him from his authority." This emphasizes not consent, but the father's absolute legal power over his family.

²¹⁷ *Pro Caecina* 99: *si per has rationes maiores adimi posse voluerunt, alio modo noluisse?* "If our ancestors willed that they [citizenship or freedom] could be taken away for these reasons, did they not also will that they be taken away in no other way?"

²¹⁸ *Pro Caecina* 100: *Qui si in civitate legis vim subire vellent, non prius civitatem quam vitam amitterent*. "If these men were willing to undergo the force of the law in the citizen body, they would not lose their place in it until they lost their life."

²¹⁹ *Pro Caecina* 102

is treated at greater length than appropriate (*longius... quam ratio vestri iudici postularit*).

So we are faced with the question: Why did he include the argument in his speech at all?

It is, of course, quite possible that Cicero simply believes that citizenship cannot be taken away by statute. And furthermore, that to allow this to happen would be unprecedented, illegal, or even immoral. It is, however, notoriously difficult to judge the hidden or real intentions of a speaker, and especially an aspiring politician, from his public positions and platform. A politician, after all, need not be absolutely convinced himself to be convincing in public. Nevertheless, it remains a very real possibility and we can surely attribute some of his motivation to his “deep feelings”²²⁰ on the issue. But a public position on a controversial topic like Sulla’s law was also unavoidably a part of Cicero’s public and political self-fashioning. It is a position he embraces wholeheartedly:

Verum id feci, non quo vos hanc in hac causa defensionem desiderare arbitrarer, sed ut omnes intellegent nec ademptam cuiquam civitatem esse neque adimi posse. Hoc cum eos scire volui quibus Sulla voluit iniuriam facere, tum omnis ceteros novos veteresque civis. Neque enim ratio adferri potest cur, si cuiquam novo civi potuerit adimi civitas, non omnibus patriciis, omnibus antiquissimis civibus possit (*Pro Caecina* 101)

But I presented this argument not because I thought that you were expecting such a defense in this case, but so that everyone would understand that no one has lost their citizenship, nor could they. I wanted this principle demonstrated to those whom Sulla wanted to injure, yes, but also to all citizens, old or new alike. For no reason can be advanced why, if citizenship can be taken away from any new citizen, it cannot also be taken from all the patricians, all our citizens of longest standing.

This is not just a purely legal question, however deeply felt. In the context of 69 BCE, it was also necessarily a position on public policy. Even in a matter of private law dealing with an inheritance in Tarquinii, Cicero goes out of his way to present a very public and

²²⁰ Frier 104

political argument on the constitutional status of Sulla's law on citizenship. He has intentionally made this portion of the case for Aulus Caecina into a test case in order to demonstrate it "to those whom Sulla wanted to injure, yes, but also to all citizens, old or new alike." Then, having won his case after three speeches before the *recuperatores*, Cicero afterwards, decided to write up an official version of the speech for publication and dissemination. It seems clear that he wanted his position on this issue both to be as widely and accurately known as possible.

Conclusion: Legitimate *Ius* in the *Pro Caecina*

As we have seen, within his private law speech for Caecina, Cicero constructs a powerful duality between lawful, legitimate, and constitutional behavior which he contrasts with the illegality and violence of Aebutius and his advocate Piso. But at the same time as he is engaged in arguing for his client Caecina, he is also engaged in a public argument about the nature and especially the limitations of the law (*ius*). Thus he uses the totality of his arguments to build a consistent picture of both himself and his rhetorical opponent, Piso, as champions of their respective arguments. Piso becomes, on the one hand, an enabler of violence, the champion of the letter of the law, and, in the conclusion, an unwitting advocate of an unconstitutional republic. Cicero fashions himself in a way that is both rhetorically and politically favorable to himself, and thus becomes an advocate for resolving disputes at law, a master at interpreting its spirit, and a vociferous advocate of constitutional and legitimate limits on government power. This is equally true whether that power rests in the hands of a dictator like Sulla, or in the hands of the sovereign *populus* itself. Thus he uses the opportunity to show himself to be a

politician of principle, who believes that the *res publica* must follow certain rules if it wishes to be considered legitimate.

This strategy has the added benefit of allowing Cicero to thread the needle, so to speak, of Late Republican politics. He is able to challenge the most outrageous errors of the Sullan dispensation (the law taking away the citizenship of the Volaterrans), but without falling into demagogic or unprincipled opposition. By making the constitutional argument he does, Cicero pointedly avoids making any argument about the violent or chaotic nature of that time. He refuses to advocate for the wholesale repeal or abrogation of all of Sulla's legislation, which was likely as impractical as it was unwise, even following the restoration of the tribunes in 70. He avoids antagonizing either the allies or opponents of the Sullan regime, and instead portrays himself as an unbiased protector of *all citizens*, both new and old alike. By concentrating his criticism on the seemingly neutral ground of *ius* and the inalienable rights of Roman citizenship, Cicero is able to present himself once again as a principled politician. He holds himself out as a critic of the regime, to those who want reform, and also a supporter of the *status quo*, by basing his appeal on Roman legal tradition.

CHAPTER FIVE

Conclusion:

Recovering Cicero's Constitutional Vision

The influence of the political vision which Cicero puts forward in his early speeches of a just, legitimate, and constitutional *res publica* would be difficult to overstate. It played a powerful role in his own political career in that Cicero used it to define himself as a candidate and differentiate himself from other Roman politicians and office-holders, whether regularly elected office holders such as Verres, Hortensius, and Piso or even the powerful dictator Sulla. It should go without saying that the expressed political views of a candidate are a key, if not *the* key, part of his appeal to voters. The early law court speeches of Cicero, just as much as those of his later career or his philosophical works, are not just attempts to promote himself or serve as educational materials for the Roman nobility.²²¹ Even when they appear so very apolitical, the preserved speeches remain, as Habinek notes, attempts to intervene actively in the distribution of power in the Roman system.²²² As I have attempted to show, this is an especially marked effect in the speeches he delivered before his consulship when he was attempting to establish himself as a political figure worth following. This study, then, has not focused on whether the speeches seek to intervene – they quite openly do - but

²²¹ A commonly expressed view. See, for instance, Craig, "Cicero as Orator"; Morstein-Marx, *Mass Oratory and Political Power in the Late Roman Republic*. The latter's examination of the Roman *contio* somewhat surprisingly concludes that, despite the public and popular character of contional demonstrations, virtually all power remained in the hands of the magistrates and nobility. Rhetoric was not designed to sway minds, but simply to rally support in pre-approved ways.

²²² Habinek, *The Politics of Latin Literature*, pg. 11: "it is precisely the transparency of Cicero's devices that makes him useful for a study of this sort; for he accomplishes openly and in an easily analyzable way what all other writers in the Roman tradition tacitly aspire to; namely, to intervene in the distribution of power in their social context. Indeed, much of the resistance to serious study of Cicero seems to derive from precisely this uncomfortable recognition on the part of contemporary scholars."

instead upon the more profound question of *how* these speeches were shaped as interventions in the complex, contested, and dynamic political situation of the Roman Republic.

The public opportunities afforded by Cicero's early law court speeches were of course used in a variety of ways. They allowed him to demonstrate his competence and skill as an advocate, to repay or elicit favors from the established nobility, or simply to win his desired verdict. But at the same time, Cicero used them as carefully staged events to create a public image and to present his own political thoughts and inclinations in the most favorable light possible. The speeches are *political* not just in protecting members of one party or attacking members of another; for Cicero intersperses the speeches with discussion of the nature of the *res publica* and in particular what it means for the Roman Republic to be a *legitimate* state. And each of the three speeches I have examined reveals this concern in related ways, though with different emphases to match their different contexts. The *Pro Roscio* weighs in on the poisonous atmosphere created by the partisanship and fear in the wake of Sulla's victory and the notorious proscriptions of his political enemies. The *In Verrem* and particularly the *De Praetura Urbana* deal with the twin issues of judicial and provincial corruption by proposing ways to limit the reach of Roman magistrates. Finally, the defense of a disputed inheritance in the *Pro Caecina*, seemingly the least political of all these speeches, extensively lays out Cicero's position on the nature (and legitimate boundaries) of statute and legislation, especially when it concerns citizenship. Yet, even with these differing emphases, they share a common vision of what constitutes a legitimate *res publica*. The speeches avow a

consistent concern that Rome's institutions protect an abstract notion of justice, rather than the interests of one party or another. In the interests of serving justice, Cicero argues consistently that certain principles and political processes of the *res publica* are inalterable. The principles he highlights are essential to the *res publica*'s legitimacy; a threat to any of them is a threat to the very existence of the *res publica*. In his rhetoric, they are placed out of the reach of the normal political game, and made by Cicero's successful arguments into truly constitutional principles. From this comes the interlocked argument of this study, that Cicero discovered and defined this Roman constitution in his rhetoric, while at the same time this constitution defined him as a candidate and political actor. His pre-consular speeches were essential, too, in making his reputation as the defender of 'the' (that is, Cicero's) Roman constitution. His actions once in power, and particularly the execution of the Catilinarian conspirators and subsequent exile, would prove that it was much harder to defend one's own actions from other constitutional attacks. Thus his consulship marks a transition in emphasis in his rhetoric from his earlier habit of criticizing those in power to defending his own controversial actions as consul of the Roman Republic.

This study has attempted to rectify two errors common in the study of Cicero and of the political history of the Roman Republic. The first of these is the common assumption that Cicero was simply an orthodox and unoriginal advocate for a relatively stable and unified Roman political tradition.²²³ This view has thankfully begun to change

²²³ E.g. Thomas N. Mitchell, *Cicero, the Ascending Years*, pg. 197, is reflective of this argument, that Cicero's ideas "may also safely be regarded as representative of the conservative *nobilitas* as a whole." He devotes a surprising amount of space to the argument that Cicero was essentially a "conservative" rather than a radical on the Roman political scene.

in recent years and the trend is particularly noticeable with regard to Cicero's philosophical works. Scholars have begun to put down the old *quellenforschung* approach to Cicero, the notion that all his ideas have clear antecedents in the Greek or Stoic philosophical traditions.²²⁴ Though his expressions often have some political or philosophical antecedents, the final expression of them in public acts of political rhetoric leaves them with a distinct Ciceronian touch. He himself on several occasions portrays his ideas as idiosyncratic or even potentially surprising to his contemporaries.²²⁵ On this point, we should be inclined to take him seriously. In approaching Cicero as a creative and original political practitioner, one responding to and intervening in his political circumstances, we begin to reveal how his political ideas contrast, coincide, or interact with those offered by his contemporaries.

A second and related error is that Cicero's political ideas can be seen as purely *optimas* or *popularis*, that he is either conservative or radical in his outlook, with no room for gradation or nuance. Thus scholars have been tempted to classify him as a conservative or Sullan in political temperament. His so-called 'departures' into *popularis* causes or rhetoric become either aberrations or bald hypocritical attempts to win popular support.²²⁶ What has become clear, however, from this examination of his

²²⁴ This shift is particularly noticeable in collections like Powell, *Cicero the Philosopher*, and more recent works like Connolly, *The State of Speech* and Gildenhard, *Creative Eloquence*.

²²⁵ In two of the cases I have examined, he pointedly distinguishes his own views on politics from other Roman politicians (Cicero vs. Hortensius in the *In Verrem*, or Cicero vs. Piso in the *Pro Caecina*) or even, at times, from the views of his own clients, see *Pro Roscio* 149 (discussed at pg. 79) or *Pro Caecina* 101 (discussed at pg. 186-87)

²²⁶ So, for instance, Seager, "Cicero and the Word *Popularis*" who is perhaps overly influenced by the famous definition of *populares* and *optimates* in the *Pro Sestio* and appears to classify Cicero as wholly and always an optimate. As Tracy, "The People's Consul," has pointed out, these terms themselves were subject to change and Cicero had a pronounced penchant to use a supposedly insulting word like *popularis* positively, especially in reference to himself.

early political speeches is that Cicero never chose to present himself as a doctrinaire politician, whether conservative or radical. He pointedly and repeatedly contrasts himself on the one hand with both the elite entrenched nobility who behave as if the *res publica* exists to serve their interests and on the other hand, with the supposed radicals and demagogues, who would seek to overthrow the Senatorial order and all the privileges of the nobility. Instead, Cicero charts an idiosyncratic middle course which can appeal to both sides of this optimate-popularis divide by appealing to a supposedly ancient, neutral, and binding constitution. Consequently, what is potentially radical or subversive (to a doctrinaire Sullan) in Cicero's political program, that is, ideas like holding Praetors to their Edicts or invalidating Sulla's law on citizenship, are phrased not as revolutionary alterations but as ancient and constitutional limitations in a legitimate *res publica*. This is the paradox of constitutionalism; it often argues for what is new under the guise that it is, in fact, a fundamental and long-settled legal doctrine.²²⁷ Perhaps, too, this very paradox explains why this powerful influence on western political thought, the idea of limited, legitimate, and constitutional governments, so often goes unnoticed in the histories of legal and political thought.

The preserved versions of Cicero's speeches are incredibly conscious of the impression that the orator is leaving in the minds of his audience. At no instance does he lose sight of the fact that he is performing before an audience and that that audience is apt to recall his words in the future. This is especially true when an orator like Cicero has

²²⁷ Cicero hits upon virtually this very paradox in a metatextual comment in the *De Re Publica* (2.22) when his character Laelius responds to Scipio's presentation with measured praise: *es enim ita ingressus, ut quae ipse reperias, tribuere aliis malis quam, ut facit apud Platonem Socrates, ipse fingere*. "For you have started with this in mind, to attribute what you yourself have discovered to others, rather than, as Plato's Socrates did, to make it up on your own authority."

gone to the trouble of preparing and disseminating a written version of the speech, an authoritative version whose words cannot be misremembered and explained away.²²⁸ In such a context, an orator naturally has to be careful about his or her political utterances; for they can create enemies or enliven one's political supporters. This helps to explain Cicero's bold and provocative insertion of himself as advocate into the defense of Roscius of Ameria. He utilizes an extended exordium describing the unique situation of the trial, the first sitting of the Sullan murder court, in order to summon an atmosphere of fear and paranoia. The Sullan world he creates is reeling from the terrifying specter of the proscriptions, of judges who dare not acknowledge the truth, of the noble and equestrian orders virtually paralyzed by the fear of appearing disloyal to the new regime. In this it is by no means a positive portrayal of Sulla and the foundation of his regime. It is, after all, a world where one is right to be afraid even of the imputation of saying something political. The other brave nobles gathered around Cicero, who only dare to support him in silence, stand in abject fear of even "saying one word about the *res publica*."²²⁹

Yet in the midst of this dark and repressive vision, Cicero makes himself and his case into a ray of light. Even Sulla, it seems, can be redeemed, if they live up to their ideological goals: the true *causa nobilitatis*. Cicero casts himself opportunistically as the brave and upright advocate, one who is emboldened to speak the truth simply too insignificant to attract the ire of the regime. He emphasizes his own credentials as a loyal supporter of the new regime, and yet emphasizes his rights, as a supporter, to criticize and

²²⁸ Cicero recalled, for instance, that Antonius the orator never published his speeches so that he could deny any unfortunate statement or phrasing, *Pro Cluentio* 140, discussed at pg. 140-141.

²²⁹ *Pro Roscio Amerino* 2

reform that system. The Sullan regime is tentatively granted legitimacy, but it is carefully conditional. They will be legitimate both in Cicero's eyes and the eyes of the Roman *populus* if and only if they prove themselves true nobles. And further, in Cicero's argumentation, the regime is not legitimated by unquestioning obedience; the system can only be legitimated when the jurors demonstrate their loyalty to justice rather than Sulla, to the truth of the case rather than the demands of partisanship, to the *res publica* rather than the whim and diktat of individuals in power. Should the jury decide against Roscius, they choose to make the horrific state of exception, Sulla's devastating proscriptions, into a permanent state of affairs. The *res publica*, rather than a legitimate state, would become simply the rule of the strong, dominated by violence and, above all, cruelty on all sides.²³⁰ Cicero becomes the champion of a way out of this prophesied cycle of violence and asks the jury to join him in upholding the middle ground offered by a new legitimate republic. Cicero's very first foray into public advocacy makes him out to be neither a Sullan partisan nor a die-hard opponent. What matters most to the young advocate of the *Pro Roscio Amerino* is not fear or partisanship, but serving justice and establishing the legitimacy of the Sullan republic.

In his prosecution of Verres Cicero's aim is more restricted. Rather than focus upon the entirety of Sulla's regime, he reframes the trial as a crucial test for the Roman Senate. Due to the flagrant nature of his crimes, Verres' guilt is not so much argued as assumed. Thus the prosecution centers not on Verres, but rather on whether the Senate can dare to convict a wealthy and influential member of its own order. The real danger, as Cicero presents it, is not that a guilty man such as Verres will go free. Instead, he

²³⁰ Cf. *Pro Roscio Amerino* 154, pg. 83-84 of chapter 1.

notes how an acquittal will demonstrate to the Roman people and all foreign nations that the Senatorial order is, at heart, corrupted by its greed and blinded by self-interest. Instead that *opinio perniciose rei publicae, vobisque periculosa* (“sentiment that is pernicious to the republic, and dangerous for you”),²³¹ that is, that the Senate as it was then constituted was incapable of convicting a wealthy person, would be publicly confirmed. He cleverly exploits the current political climate and especially the proposal of the Aurelian law on jury composition to link the trial of Verres to the successful agitation against the Sullan Senate. At the very time when centerpieces of the Sulla regime such as jury composition and the restriction of tribunes were toppling down, Cicero offers the Senate the trial of Verres as a golden opportunity to repair the damage. In one stroke, by convicting Verres, the Senate can show its intent to deal seriously with all the threats to its legitimacy, including the issues of magisterial abuse, praetorian injustice, and systemic extortion in Rome’s provinces. But this powerful criticism of the Senate’s rule is carefully framed as the words of a senator and fellow-traveler rather than a revolutionary and foe. Cicero returns to his argument of conditional legitimacy, that the Senate deserves the loyalty and obedience of the Roman people only if it proves itself up to the task of establishing and enforcing justice in the Roman Empire at home and abroad.

In many ways, the second *actio* of the Verrines is even more telling as an example of Cicero’s desire to shape his legacy and make his own political commitments clear to the Roman electorate. Since Verres decided to go into exile after the first *actio*, the second is a fictitious prosecution. Unlike the vast majority of Cicero’s speeches

²³¹ *In Verrem* 1.1

which purport to relay a copy of the actual words delivered, the second action of the Verrines were never delivered in an actual court of law. And the fact that Cicero went to the great effort of writing down and disseminating these fictitious prosecution speeches shows that he expected to gain something from their publication. I have argued that while he did aim to capitalize upon the case and to create a *monumentum* to his skill as an orator and prosecutor, Cicero was also using the publication of the *De Praetura Urbana* as a way to discuss his vision of the proper role of justice and law in the Roman Republic. He gives a privileged place, and extensive space, to his discussion of Verres' notorious abuse of the office of Urban Praetor. Cicero's attack on Verres' career, and particularly of his Praetorian Edict, serves to reinforce Cicero's political brand as an orator concerned not with some personal vendetta, but with the neutral and objective enforcement of justice. But Verres' abuses of the system are based on a technical legality, that the Praetor's judgment *is* the law. In contrast, Cicero appeals to an uncodified Roman tradition of customary law and rightful limits on the Praetor's behavior. When he rails against Verres for altering his Edict in order to subvert justice, for applying his Edict wrongfully to elicit bribes, and even for issuing rulings that expressly contradict his own Edict, Cicero is putting forward a notion of autonomous law. The Praetorian Edict, once a flexible and mutable document, becomes in Cicero's argument an expression of a rational and coherent code of law. It can be changed, he acknowledges, but only with the right intentions: to make it a better expression of his Roman constitution. This becomes the clearest and most easily provable example of Verres' malfeasance because, unlike his offenses abroad, they can be demonstrated

without a need to rely on witnesses. Thus does Verres' trial for extortion abroad become a trial for the very soul of the Senate as well as the future course of Praetorian law. The central question of the prosecution is what kind of *res publica* the Senate represents. Was it to be a *res publica* ruled by the corrupt and wealthy, or a *res publica* of rational law and a legitimate and limited ruling order?

The *Pro Caecina* in contrast to the *Verrines* or the *Pro Roscio Amerino* did not directly deal with matters of great political concern. It focused neither on governmental actions like the controversial Sullan proscriptions or any great legislative proposal. Yet here in this private law speech, one of the most legalistic and difficult of the Ciceronian corpus, Cicero deals most explicitly with the nature of *the* law and the Roman civil law in particular. He outlines a vision of the law free from the interference of influence, injustice, and violence. Cicero makes this somewhat obscure and politically inconsequential inheritance case into a contest over the role of law in civil society. Cicero's opponents in that case, Aebutius and Piso, are seen as proponents of a harsh world wherein the magnificent law is reduced to the simple savagery of gang violence. Aebutius' decision to change his mind and deny Caecina the chance to enter the disputed farm is depicted as the complete subversion of the entirety of Roman civil law, as it would replace the civil law with the unchecked rule of violence. Adding insult to injury is Piso's attempt to ground his defense on the exact language of the Praetor's Interdict *de vi*, which Cicero repeatedly attacks as a disingenuous technicality. Cicero's strategy in the *Pro Caecina*, just as in the *Pro Roscio Amerino* and *In Verrem*, is to magnify and exaggerate the importance of this case by making it into an unprecedented decision. The

wrong decision in this case will be far more than the a singular injustice to one Aulus Caecina, it will be a precedent establishing armed violence as the preferred method of settling disputes, the erosion of all rights to property and inheritance, and indeed the complete and utter abolition of the civil law.

Cicero utilizes his opponent's reliance on a so-called technicality to further his own image as the champion of Roman law and justice, a notion which now becomes strong enough that it can even invalidate clearly stated statute law. He makes a complex and legalistic argument based upon the precise wording of two Praetorian interdicts: the interdict *de vi* and the interdict *de vi armata*. But throughout this argument, which descends to the individual clauses of the interdicts, Cicero takes great care to portray himself as the champion of the spirit of the law, rather than the letter. His opponents may rely on the wording of the law, but Cicero focuses with determination upon the intention of the lawgiver and the nature of law itself; for in his view the interpretation of Piso and Aebutius would leave the Roman civil law impotent and incapable of addressing even a minor property dispute. Against Piso's conception of the interdicts as meaning only what they say, Cicero argues that they must be understood as attempting to address societal problems in a rational and coherent way. This notion of an overriding logic and rationality in the Roman civil law finds its most powerful expression in Cicero's discussion of Sulla's statute *De civitate Volaterranorum Adimenda*. Cicero forcefully asserts that this law which purported to strip the people of Volaterrae of the Roman citizenship was, in the modern sense, an *unconstitutional* law. Cicero asserts that this law attempts to subvert the long-established and deeply held constitutional provision that no

Roman's citizenship can be taken away without his consent. There is no mistaking his argumentation; he asks the jurors to ignore this law because it is substantively unconstitutional. There are, he wants everyone to know,²³² certain foundational matters of law, such as citizenship, which are placed outside the reach even of the theoretically sovereign *populus Romanus* in its legislative assemblies. Cicero proposes a method of approaching the law very reminiscent of the modern practice of judicial review, that courts should be prepared not just to interpret the law, but even to decide whether a particular law is itself allowable, that is, whether it is a legitimate and constitutional exercise of legislative authority.

Taken together, these three speeches of Cicero's early career advance a remarkable and inventive legal doctrine: the doctrine of constitutionality. This doctrine reflects the dual needs of the advocate and politician. On the one hand, the advocate wishes to win his case, while the politician, on the other, wishes to create a favorable image in the minds of the voters. While these two goals could be in considerable tension, Cicero's constitutional doctrine allows him to thread this needle. Thus his vision of a constitutionally limited and legitimate *res publica* appears to have accomplished both goals at one time, by appealing to the deeply held legal traditions of the *res publica* and casting himself, Cicero, as the champion and advocate of the Roman constitution. What we find in an examination of his early career speeches is that he is remarkably consistent in his deployment of these Roman constitutional principles, even in very different circumstances and trials. If the advocate might have been tempted to waver, advocating one set of principles in the *Pro Roscio* and another in the *Pro Caecina*, the needs of the

²³² *Pro Caecina* 101, see pg. 185-87.

politician to fashion a coherent and consistent public brand seems to have been the overriding concern. While we cannot with total accuracy recover Cicero's *real* political thoughts from these public statements, we can at least recover many of the important details of his early presentation of himself and his political program.

Firstly and most importantly, Cicero asserts that legitimacy in the Roman *res publica* descends ultimately from the *populus Romanus*. Legitimate power is a willing and un-coerced grant of authority from the *populus* to perform certain actions necessary for the maintenance of the *res publica*. Though the actual assembly's input may be indirect on certain occasions, Cicero holds consistently that the willing deference of the *populus*, their belief that the dictator, Senate, or the Roman courts serve their true interests, is a foundational assumption of his public political presentation. He phrases this in both practical and theoretical terms. Thus in the *Pro Roscio* he asserts that the nobility must live up to their professed principles and become a legitimate ruling class, because there are others 'waiting in the wings' to take that task over if they fail. In the *Verrines*, he grounds his entire case on the argument that a guilty verdict is required to put an end to the dangerous rumor that the Senate rules for itself alone and has put aside any concern with justice or right, and even hints at the possibilities of lynchings and revolution if Verres is acquitted. Similarly, in the *Pro Caecina*, he defends the idea that even the dictator and the assemblies of the Roman *populus*, who were theoretically the sovereign legislative body of the republic, must recognize that there are limits to their legal authority. Citizenship and its conferral is the special privilege of the Roman

populus, but once granted, however, it can never be taken away. Even the sovereign body of the state, it would seem, has limits that it dare not transgress.

A second major component of this constitutional doctrine is Cicero's argument that it fundamentally limits the power and authority of Roman magistrates and even the Roman *populus*. A legitimate state, in his conception, is one where a general agreement exists about what actions are, legally speaking, beyond the pale of government authority. These principles are found through a rational examination of natural law to a limited extent, but most importantly from an understanding of Rome's customary law and long-standing legal traditions. Unlike the creative impulse behind statutory law which are passed by fleeting majorities to suit their specific time and place, certain general principles of customary law are imagined by Cicero to have gone through an evolutionary process that has made them efficient, narrowly-tailored, and universally accepted expressions of justice and the will of the Roman people. Included among these are such bedrock principles as the notion that no citizen may be punished without a trial, that fair and open courts of law and not individual men must decide one's guilt or innocence, that laws cannot be made to apply retroactively (*ex post facto*) or to one person or situation (*privilegia*), and that a person's citizenship cannot be taken away without that person's consent. When Roman leaders and magistrates violate these constitutional provisions, they may get away with the action, but they damage their own standing before the Roman people. Far worse, however, is the damage that such crimes do to the institutions these men represent; for every violation of Cicero's Roman constitution carries the penalty of eroding the legitimacy of the nobility, the Senate, or the Roman court system. Only by

obeying the dictates of this Roman constitution, he argues, can institutions like the Roman Senate serve justice, remove the sting of resentment and hatred from the lower classes, and maintain their legitimacy in the eyes of the *populus Romanus*. The institutions and arrangements of power must demonstrate continually that they exist to serve the interests of the Roman people, rather than their own.

The constitutional vision that Cicero puts forward of a legitimate *res publica* in his pre-consular speeches was fashioned for a specific contemporary purpose: gaining the attention and favor of the Roman electorate. For this reason, he uses this political program in a war of ideas to set himself apart and differentiate himself from other Roman politicians. That these ideas were, in fact, an important component of his public presentation is shown by the effort he takes to present them within his pre-consular speeches, even on a few occasions when they are irrelevant or unnecessary to the defense of his client. In most instances, however, Cicero is able to use his Roman constitution to his own rhetorical, legal, and political advantage by characterizing it as a set of longstanding legal doctrines that cannot be violated without seriously compromising the legitimacy and authority of the Roman *res publica* in the eyes of the *populus Romanus*. Cicero's notable electoral successes, achieving the praetorship and consulship *suo anno* despite being a *homo nobis*, would seem to show that this concept of a legitimate *res publica* was appealing to the Roman electorate. But by taking his stand on principles of neutral and objective legality, Cicero was able to brand himself as a loyalist, a senator, and yet at the same time criticize the Sullan regime or the Senate when it veered from the 'correct' course. The rhetoric of legitimacy allows Cicero to appeal to both sides,

portraying himself as a candidate of principle rather than a zealous partisan or unthinking apparatchik of the Sullan Senate.

These doctrines appear, then, to have been developed in order to contrast the political positioning of the up and coming politician Cicero with that offered by his more established and entrenched political competitors. At the same time, however, Cicero's speeches have also served an important purpose in preserving an important legacy of his political thought about Roman Republic: his concern with the legitimacy of the state and the constitutional behavior of its legislators, magistrates, and assemblies. Even if these speeches were preserved and passed down as examples of the rhetorical art, they carried with them like a Trojan horse the essentials of Cicero's public political ideology. In Cicero's writings, this critical advance in the discussion and articulation of political legitimacy and constitutional limitations in the western tradition, one of the great legacies of the sometimes turbulent last century of the Roman Republic, was preserved to be rediscovered and reimagined by successive generations of rulers, philosophers, and politicians.

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