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**Law, Rhetoric, and Science:
Historical Narratives in Roman Law.**



**University
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Doctor of Philosophy.**

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Abstract.

The consensus of scholarship has upheld the view that Roman law is an autonomous science. A legal system, which, due to its systematic, doctrinal principles, was able to maintain an inherent and isolated logic within the confines of its own disciplinary boundaries, excluding extra-legal influence. The establishment of legal science supposedly took place in the late second to early first century BC, when the famed Roman jurist, Quintus Mucius Scaevola *pontifex*, is supposed to have first treated law in a scientific way under the guidance of Greek categorical thought. As quickly as Roman lawyers came under the stimulating influence of Greek thought, they are said to have abandoned it, convinced by the initial injection of systematisation that their field required nought thereafter but the careful curation of a specialised and professional group of trained jurists.

This thesis argues that the above view results from the construction (conscious and unconscious) of historical narratives rooted in nineteenth century Germany, by the so-called Historical School. Seeking solutions to legal predicaments in their own time, German jurists ascribed modern conceptions such as scientific thought onto the Roman sources in order to validate their contemporary applicability. This narrative of science became dominant and restricted the understanding of Roman legal sources to a single methodological approach. At the same time, a narrative of continuity, which linked modern jurists to their ancient Roman forebears, enshrined the idea that ancient jurists approached the law by the same means as the modern professor. This idea, along with the narrative of science, led to Roman sources being read with little regard to the context of the Roman society in which they were written, and to the preclusion of extra-legal fields, particularly rhetoric, as a potential influence on the development of law.

This thesis offers a challenge to these narratives, arguing that rhetoric was central to legal development in the late Republican period, even at the time in which Quintus Mucius Scaevola *pontifex* was thought to have transformed the discipline into an autonomous science. This thesis challenges the origin of the narratives of science and continuity, concluding that, by reading Roman sources within the context of Roman science, Republican Roman jurists were not isolated from engagement with extra-legal fields, and indeed, to varying degrees, were knowledgeable of them, particularly rhetoric. Through the lens of the lawyer and orator, Cicero, this thesis then explores the extent to which the once excluded field of rhetoric had an influence on legal development, drawing rhetorical sources, particularly Cicero's *Topica*, into a discussion of praetorian law making, to reveal that, far from autonomous, Republican Roman law developed from rhetorical argument.

The key to unlocking this development is an understanding of Roman society, as socially understood Roman ideals, such as *pietas* and *aequitas*, form the basis of the rhetorical, topical

argumentation used before the praetor to form the locus for his *ratio decidendi* in changing the law. This thesis concludes that rhetoric is a key element in understanding the social development of law.

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Suffice it to say that any errors which persist in this thesis are entirely my own.

Author's Declaration.

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution".

Printed Name: _____

Signature: _____

Abbreviations.

All abbreviations regarding ancient texts are in keeping with the standard conventions of the *Oxford Classical Dictionary* (4th Edition).

A Note on Translations.

Translations for quoted ancient Greek and Latin are provided in the body of the text underneath the original, or, in fewer cases, especially with regards to smaller excerpts, in the footnotes alongside the original. Translators for these texts are attributed by relevant footnotes accompanying the translation. As a rule, no translation is provided for modern languages, however, where the original contains particularly technical language, or a specific turn of phrase that requires interpretation or scrutiny within the framing of the thesis as a whole, a translation to English may be provided. Translators for modern languages are attributed in the footnotes. Where a translation is given with no attribution to a translator, the translation is my own.

1. Introduction.

Ius est ars boni et aequi. (Dig. 1.1.pr.).

The bulk of scholarship treats Roman law as an internalised, autonomous, scientific system. This dogmatic view resulted from narratives that were constructed in the nineteenth century by the German Historical School, which ascribed the modern notion of science onto ancient legality, while, at the same time, viewing law as a teleological process of continuity in which they, as modern jurists, inherited the tradition of doctrinal, scientific jurisprudence from the past. An examination of the dubious origin of these narratives calls into question the conclusions which have been derived from the methodology which adheres to them, the dogmatic approach to law as a science. This stance largely excludes external, social consideration as a factor in legal development. In particular, the practice of rhetoric in late Republican Roman courts has been disregarded by much of legal scholarship, thought of as irrelevant to the development of law, as the institutional system of legal science had already become internalised and reliant upon its own autonomous logic.

This thesis presents a challenge to that view and questions whether rhetoric, as a vehicle for arguments resulting from the everyday practice of Roman society, was truly excluded from law, or whether the exclusion of rhetoric is simply the result of its failure ‘to fit’ later narrative constructions.

The thesis sets out to scrutinise the weaknesses in the narratives of continuity and legal science, contributing to a recent and on-going challenge to the dogmatic view. It then presents the Roman jurists in a new light, revealing that they did not exist in professionalised isolation from the culture and society in which they found themselves, but rather were integrally part of that society, sensitive and responsive to its needs.

This recontextualisation of the interaction of Roman lawyers with their society allows the thesis to examine two questions which in the dogmatic understanding of Roman law were redundant, but which, in this new understanding are pertinent to our understanding of the very bases upon which law operated:

1. To what extent did rhetoric have a direct impact upon Republican legal development?
2. Did socially understood social concepts inform the arguments presented rhetorically toward that legal development?

The thesis concludes in the affirmative to both.

It argues that rhetorical argumentation was a demonstrable influence on legal development in the late Republic, focussing on *bonorum possessio* and the *querela inofficiosi testamenti* as concrete examples of when rhetoric was pivotal in new law during the period.

From there, this thesis examines the topical arguments used in *bonorum possessio* and the *querela inofficiosi testamenti*, identifying the *loci* which form the postulates on which the rhetorical arguments were rooted. This thesis argues that these *loci*, *aequitas* and *pietas*, can only be presented as argumentative postulates because they form socially understood concepts within Roman society, existing as deeply held concepts that form the basic manners of social interaction. Rhetoric became a means by which these social concepts were intellectualised and presented as legal arguments. The law, as shown in *bonorum possessio* and the *querela inofficiosi testamenti*, then demonstrably changed as a result of appeals to these social values.

This thesis aims to show that at the very time when Roman law was supposed to have become an internalised and impenetrable scientific system, external factors, in the form of socially understood concepts, argued through the intellectual method of rhetoric, nevertheless informed legal creation and development, despite the narrative of their exclusion.

1.1. An Outline of the Argument by Chapter.

The first substantive chapter of this thesis, Chapter Two, entitled *The Challenge to Dogmatism: New Methods in Roman Law*, begins by presenting trends in the scholarship of Roman law over the course of its vast history. The Chapter traces the development of ideas in Roman law with an emphasis on its reception in the West. The Chapter begins with a brief sketch of the intellectual history of Roman law and the various methods by which it was examined since its rediscovery in Italy in the Middle Ages, leading to the in-depth analysis afforded to Roman law in early modern Germany. The importance of German scholarship to the study of Roman law is attested by the volume and reputation of German writing in the field, which persists to the present day. With this in mind, the Chapter tracks the context in which the most noteworthy ideas in the field of Roman law occurred in nineteenth century Germany, examining the social, cultural and intellectual environment in which German scholarship on Roman law took place. From there, it discusses the Historical School, the leading German legal school of the nineteenth century, and places their conceptualisation of Roman law within the context of their own arguments. Drawing upon this contextualisation, the Chapter discusses how the German Historical School, building upon earlier ideas, constructed, with varying amounts of complicity and obliviousness, a narrative around the operation of Roman law that more represented the intellectual environment of Wilhelmine Germany than ancient Rome. The Historical School, in its contemporary quest for legal solutions to issues in their own age, developed an understanding of Roman law that imposed modern values anachronistically onto the ancient past. Two narratives became prominent. First, a narrative of continuity emerged, in which the professorial jurists of German universities came to view themselves as part of a continuous intellectual tradition beginning with the Roman jurists and ending with

themselves. This idea of a continuous profession of Roman law had two outcomes: first, it caused Romanist lawyers to fetishise their position in the academy through allusions to a mythical, idealised and venerated Roman past; secondly, it transported ideas from modernity back in time to the Romans, as professors, thinking themselves the same as Roman jurists, and therefore operating with the same methodologies, ascribed their own views of the law back to ancient Rome, without careful consideration of the effects of time and context on the shape of ideas. The second narrative, that of legal science, is strongly linked to the first. The context in which the Historical School emerged led them to embrace the idea of legal “science” as of paramount importance to a sophisticated legal system.¹ The importance of science to jurists in modernity led to them imposing science onto Roman legal material, asserting that as the jurists of ancient Rome were in continuity with the modern scholar, they then must have used the same methodology as the modern scholar: legal science. The Chapter, having established the power of these narratives, examines the extent to which they came to predominate scholarship in the twentieth century, and reflects on the way in which the view that Roman law existed as a scientific, autonomous and isolated field, overseen by highly specialised professional legal scientists, limited the scope for interdisciplinary approaches, particularly from the social sciences, classics and social history, to be applied to the field. The Chapter then discusses the recent challenge to the dominance of these narratives, situating the arguments of this thesis within a review of contemporary literature that seeks to move Roman law on from a dogmatic approach that values science and continuity above a contextualised reading of the ancient sources and their reception. Lastly, the Chapter proposes that rhetoric, the art of developing arguments and speech craft, is a useful tool to analyse the way in which social considerations in Rome affected legal growth. Examining current literature on rhetoric and its interaction with Roman law, the Chapter then proposes the central question of this thesis: does an examination of the use of rhetoric in Roman legal argumentation reveal that the isolated, scientific nature of law at Rome is overstated and that therefore a new approach, moving beyond the dogmatic interpretation dictated by narratives constructed in the nineteenth century, is required to understand the nuanced operation of ancient law in its context?

Chapter Three of the thesis, *The Orator and Jurist Dichotomy*, looks to answer the question raised by the conclusions of the preceding chapter. This Chapter examines the rôle of lawyers at ancient Rome. The narrative of continuity, in establishing a connection between university-educated jurists of nineteenth century Germany and the jurists of ancient Rome, created an idea that the Roman jurists, largely spurning day-to-day practice, wrote about law with an academic scholarly approach. Rather, advocates, men trained in rhetoric, represented clients in the business of court cases. Jurists, while giving responses on technical points of law, were less involved with the practice of the court. Advocates, or orators, while making persuasive speeches, were limited in their legal knowledge due to a lack of

¹ More will be said on the meaning of “science” in the setting of this thesis at 1.3.

specialism, resulting from juristic professionalisation. The Chapter challenges this understanding. It examines Roman education in the late Republic to reveal the extent to which Romans, far from professionalised into discreet fields, were exposed to a wide curriculum, of which law and rhetoric were simultaneous elements. The Chapter concludes that this form of education gave both those who went on to be termed “jurists” or “advocates” a solid understanding of the supposed specialisation of each other’s fields. It then looks to Cicero as a case study, examining how the education of the famed orator and advocate reveals an impressive amount of legal study. From there, the Chapter reflects on the extent to which the dichotomy between jurists and orators is imposed by later scholarship because of the narratives discussed in Chapter Two. The last section of the Chapter attempts to break down this imposition and the dichotomy it creates, recontextualising jurists and orators within the legal practice of Roman society.

Chapter Four, “*Cicero, The Insider*”, takes its name from Alan Watson’s claim that Cicero, as an orator, was an “outsider” to the field of Roman law, and not truly part of the legal culture at Rome.² Building upon the stance raised in the previous chapter, that the dichotomy between jurists and orators was not as pronounced as previously supposed, and certainly not professionalised, the Chapter looks to the career of Cicero to outline his involvement not only in legal cases in the rôle of an advocate, but also his engagement and influence on law. The Chapter will propose that Cicero, far from an “outsider” to the legal culture in Rome, was an “insider”, intricately involved in all aspects of Roman legal life.

Chapter Five, *Rhetoric as a Theory of Legal Reasoning*, accepting the re-evaluation of the rôle of orators like Cicero set out in Chapter Four, looks to the relationship between law and rhetoric in the construction of legal arguments at Rome. The Chapter offers a challenge to the narrative of legal science and the notion that law at Rome, concluding that the narrative of the internalisation of legal reasoning after a scientific revolution led by Quintus Mucius Scaevola pontifex is flawed. The breakdown of the absolute dichotomy between jurists and orators, and the acceptance that many jurists and orators had an impressive knowledge of each other’s field, allows a new approach to the understanding of legal argumentation in the Republic, bringing rhetoric to the fore as a discernible method for the creation of legal arguments and for the reasoning behind legal decisions. The Chapter will look to the history of rhetoric at Rome, outlining how, from Greek origins, the Romans developed a rhetorical system of their own, applying it to their law with keen regard to the socially understood *mores* within their own society in order to institute new legal actions through topical argumentation. The Chapter concludes by asserting that rhetorical theory offers a jurisprudential basis for decision making in certain cases at Rome, in a way which had previously been disregarded by dogmatic scholarship.

Chapter Six, *Rhetorical Concepts in Society and Law*, examines the value of rhetorical argumentation as a legal device within Roman society. The Chapter examines, in turn, two concepts

² Watson (1995) 95.

which appear in Roman sources, on rhetoric, law, and within literary evidence on the *mores* of Roman society: *aequitas* and *pietas*. The Chapter begins by examining *aequitas*. It establishes what is understood by *aequitas* within the context of Roman society in the late Republic by discussing treatment of the concept within Roman literary sources. The Chapter then turns to rhetoric, and reveals how Roman rhetorical theory treats the concept of *aequitas* with regard to the construction of argument as a *locus*, a form of topical postulate. It then examines how *aequitas* appears in legal sources, and draws a link between the socially understood meaning assigned to the world within Roman society, the theory which underpins its argumentative quality in rhetoric, and its application to the law as a means by which legal arguments and decisions are derived. The Chapter then turns to *pietas* and adopts the same approach, examining the concept in Roman society, exploring its treatment in rhetorical theory, and lastly considering its application in legal sources. The Chapter concludes that a social understanding of these concepts within Roman society, twinned with a rhetorical discourse, which appreciates the best ways in which these concepts can be utilised in arguments as topics, has a direct in-put into legal reasoning in the late Republic, contrary to the dogmatic view that rhetoric was excluded from legal science during this period.

The last three chapters of the thesis apply the theoretical considerations proposed in the preceding chapters to substantive law in the late Republic in order to establish the worth of the new approach to Roman law.

Chapter Seven, *Legal Change in the Late Republic*, provides the historical, legal context for such a discussion. The chapter discusses the legal changes that occurred at Rome during the later Republic that provided the scope for the application of sophisticated legal arguments to form. The Chapter, as with the following chapters, focuses on Roman succession law, as the sources provide a more thorough treatment of that area of law than others during the period. The Chapter discusses the growth of the formulary procedure and its importance in opening up the scope for legal development from the narrower, more formalistic *legis actiones* system of litigation. The Chapter then discusses the augmentation of the rôle of the praetor in legal creativity in the later Republic, examining the extent to which his emergent involvement in the creation of new substantive law placed an emphasis on real life cases. The law instituted by the praetor, as it emerged from the practicalities of cases actually brought before him, reflected the reasoning applied in the decision making of authentic cases. The Chapter considers the effect of courtroom rhetorical argumentation, particularly topics, upon the praetor in providing legal decisions and creating new law. It then considers the reasoning behind the praetorian Edict and the interaction between the praetor and the jurists in the late Republic. The Chapter concludes that the rôle of litigation in forming the *ius honorarium* of the praetor depended upon an appreciation of socially understood *mores* and rhetorical argumentation.

Chapter Eight, *Rhetoric and Bonorum possessio*, looks specifically to legal remedies in Roman law to test the theories proposed throughout the thesis. *Bonorum possessio*, an instrument of praetorian law, which allowed for a possessor to hold the property of a testator against the normal rules of testament outlined in the *ius civile*, appealed specifically to *aequitas* before the praetor as the crucial condition upon which a possessory interdict could be granted. The Chapter outlines the operation and development of *bonorum possessio*. It then considers the way in which the praetor arrived at his decisions for *bonorum possessio* by considering extant evidence. The Chapter discusses the application of *aequitas*, as a socially understood norm, and as the postulate for topical argument in cases of *bonorum possessio*. Appealing to legal sources, the Chapter argues that the rhetorical arguments form the basis of the legal decision in these cases, and consequently is the basis of the reasoning behind the law, rather than reliance on the internal logic of legal science.

Chapter Nine, *Rhetoric and the Querela inofficiosi testamenti*, turns to a second legal instrument in succession law to test further the worth of the methodological approach proposed in this thesis. The chapter discusses the development and operation of the *Querela inofficiosi testamenti*, a suit, based on *pietas*, to allow an expectant heir to claim a portion of an estate against the normal *ius civile* rules of a testament. The Chapter will outline the rôle of topical argumentation concerning the socially understood conception of *pietas* in the derivation of legal decisions in regards to the *Querela inofficiosi testamenti*, particularly with reference to the nature of the hearings before the large jury court, the *centumviri*, which naturally appealed to the oratorical flourishes of rhetorically trained advocates. The Chapter then turns to the legal sources and evaluates the extent to which *pietas*, and the rhetorical theorising around the concept, is treated by juristic sources and rescripts in the legal literature. The Chapter proposes that the rhetorical and social conceptions of *pietas* are fundamental to the formation of a new legal instrument that overrides the *ius civile*, rather than the law deriving its forms purely from an appeal to the logic of an internalised legal science.

Lastly, concluding remarks are made that sum up the overall argument of the thesis: rhetorical arguments, finding a basis in socially understood values, were crucial to Republican legal development.

1.2. Methodological Issues.

This is a thesis about methodology. The thesis lends itself to part of an emergent challenge to an accepted methodological approach to the treatment of Roman law.³ Chapter Two, *The Challenge to Dogmatism: New Methods in Roman Law*, discusses the methodological considerations which arise from this challenge in depth, so a thorough analysis of the adopted methodological stance of this thesis is not provided here. Nonetheless, consideration will be given to the sources used in this thesis, particularly their potential shortcomings.

Secondary material requires little explanation. The thesis will consider the reception of Roman law with an appreciation of the scholarship which has contributed to the current complex position in the field.

Major consideration, however, must be given to the use of ancient sources. The focus of this research is on the Roman late Republican period. This period has been chosen as the focal point for several reasons: first, this is the period in which the birth of legal science is suggested to have taken place; secondly, this is a period of immense legal and political shift; thirdly, some legal sources for this period exist; lastly, the period offers substantial evidence for the development and application of Roman rhetoric with regards to law, especially succession law, particularly through Cicero. That said, it is necessary to state from the outset that the ancient sources do not provide an all-encompassing overview of Roman society, or Roman law. There are, unfortunately, great gaps in our knowledge resulting from the loss or lack of sufficient evidence. This makes any attempt to proclaim certainty in any general statement about Roman Republican life problematic; yet it does not disqualify the capability intelligently to conclude probable understandings of Roman society and law from the sources which are available. Yet it caveats its approach to the sources which are available by appreciating not only the lack of completion they provide of the totality of Roman society in the late Republic, but also their potential bias to the views of the particular Romans who wrote them. Cicero, for instance, our most prolific source, is taken with a pinch of salt, as all his pronouncements are heavily dependent upon the context in which they are written, coloured by their argumentative, political and personal purpose.⁴ This bias does not discount their worth, but rather indicates a level of discernment and framing is required in their use: Cicero's view is not necessarily 'the Roman view', but it is 'a Roman view'. An attempt is also made to provide a fuller indication of the period of the late Republic by appealing to Roman sources which come from both earlier and later periods of Roman history. These sources, though not necessarily providing a view of Roman society during the late Republic, offer a glimpse of Roman values leading

³ Tuori (2007); du Plessis, ed. (2013), (2016); Bryen (2014); du Plessis, Ando & Tuori, eds. (2016) encapsulate the most recent efforts in this direction.

⁴ Lintott (2008) 33; Steel (2004) 233-253 point to Cicero's sometimes wanting relationship with the truth, the whole truth, and nothing but the truth.

up to and deriving from that period. These sources, though imperfect, are of value, as they provide a track of the intellectual development of ideas at Rome. When a source is used, a footnote is provided if the veracity or general applicability of the statements made are dubious.

1.3. A Note on the Definition of “Science”.

The term science will be used throughout this thesis to describe particular approaches to law, and the context in which it is used will provide some insight into what is meant by the term. Nevertheless, it is necessary to provide a clarification about the various uses of the term science from the outset, as language, period, and precise intellectual context often result in diverse meanings for a term, which, *prima facie*, has an ordinary meaning. Periodisation and contextualisation of these concepts is vital to providing an accurate representation of their meaning

In ancient Greek, the terms used to denote qualities which imbue notions akin to modern science are φρόνησις (practical wisdom), ἐπιστήμη (understanding), and τέχνη (craftsmanship, or art).⁵ None of these terms is synonymous with modern notions of science, and each has been afforded deep engagement in philosophical thought as to its precise meaning. The Aristotelian term κατηγορία (categories) is also of importance to the conception of modern science, presenting the systematising framework for categorisation. Again, these terms were developed and specialised over time, and an appreciation of their specific application at particular periods is essential to a clear understanding of their meaning, rather than the imposition of anachronistic or culturally inappropriate meanings, resulting from the conflation of cross-temporal and cross-cultural use.

In Latin, the two terms used to denote scientific qualities are *ars* and *scientia*.⁶ Neither of these is representative of modern scientific methodology, yet they present foundational scientific ideas. The Latin *praedicamenta*, which relates to Aristotelian categorisation, though it adds Roman cultural conceptions to the original Greek is also of importance within its context. As too are *genera* and *species* as means for categorisation. These terms, within their context, form the fundamentals of what would later be attributes of what was regarded as Roman legal science.

In German, the term for science, *Wissenschaft*, has wide application. *Rechtswissenschaft*, or legal science, forms part of this modern notion of scientificity. The German notion of

⁵ Platonic understandings of φρόνησις contain an ethical quality, see: Engberg-Pederson (1985) 286. Aristotle too counts it among intellectual virtues in the *Nicomachean Ethics*, book six. Yet, the attribution of modern scientific nomenclature to a practical dimension of wisdom is fundamentally misplaced. The concept of ἐπιστήμη is understood knowledge. Foucault convincingly argues this includes a cultural dimension in its semantics and that this precludes its scientificity see: (1980) 197. The final concept, τέχνη was more concerned with acquired skill through practice in the individual as a learned trait, see, among others: Papillion (1995); Roochnik (1996).

⁶ For an overview of the framework of the Roman conception of knowledge, see Lehoux (2012).

Rechtswissenschaft encompasses modern conceptions of the scientific method and a clear and specific approach to law.⁷ The use of synonymous terms for science in other modern European languages, though not perfectly synonymous, share this conceptualisation of scientific modernity. Modern science, as a theory, methodology and practice, differs to early concepts, which share in its intellectual heritage, but are distinct. An acute awareness of these differences is necessary to a contextualised account of historical usage of these terms.⁸ *Wissenschaft* and *scientia*, though related, offer very different metres for the measurement of scientific law. Acknowledging this from the outset is important to understanding the points of this thesis.

⁷ Schulz (1946) 1-4. Schulz gives a complete definition to *Rechtswissenschaft* as an all-encompassing systematic approach to thinking about law, embracing all aspects of legal process and formulation, which can be illustrated by the laws which result. This view is complete insofar as it is the culmination of earlier thoughts on legal science developed over the century which preceded Schulz, about which more is discussed at Chapter Two.

⁸ For the problem of the “historicising” of “scientific rationality” as a means towards explanatory self-evident truth, see: Kuhn (1962); Shapin & Schaffer (1985); Jacob (1999).

2. The Challenge to Dogmatism: New Methods in Roman Law.

A long-standing strain of scholarship has viewed the Roman jurists as engaged in a scientific exercise, as academic lawyers removed from the practical and social realities of everyday law. This view came to a climax during the nineteenth century, when the German Historical School asserted Roman juristic science as one of the most impressive features of Roman law. Viewing themselves as legal scientists, continuing a tradition set out by the Romans millennia before them, these German scholars ascribed a modern conception of science to the Romans that altered scholarship's relationship to Roman legal sources until the present day. It is my contention that this view is ill-founded. Rather, I propose that the jurists of ancient Rome did not isolate themselves within the esoteric confines of a legal science, but were in fact actively engaged in the legal practice of the day, drawing on a variety of skills and methodologies. Many of the approaches taken by Roman jurists have been discounted from the consideration of scholarship since the dominance of the scientific view proposed in the nineteenth century, not least the effect had by rhetoric on legal argumentation. This thesis aims to provide a re-appraisal of our understanding of the Roman jurists by returning to available Roman sources in order to establish the utilisation of rhetorical argumentation in Roman legal texts. This approach not only reconsiders the tools by which jurists arrived at legal solutions, but also recontextualises the schema within which Roman law and lawyers have been understood in modern scholarship.

This Chapter will present a challenge to the dogmatic view that Roman law is an isolated, autonomous legal science and conclude that the value of the contemporary challenge to that stance is increasingly worthwhile in its treatment of Roman legal sources and their reception. First, this Chapter will examine the origin of the dogmatic view, and outline its various claims, with particular attention to the claim of Roman law as science, enclosed within its own system to the isolation of other fields. Secondly, it will examine how this view established itself as the dominant narrative of the twentieth century, showing how the scholarly fixation on systematisation and rules led to the neglect of sources viewed as extra-legal and therefore of little significance. Thirdly, it will examine the bases for a challenge to this narrative, outlining its suspect origins and reliance upon the foundation myth of Roman legal science in the late second/early first centuries BC. Fourthly, this will be followed by a literature review of emergent contemporary scholarship, which has, in the last half a century or so, sought to re-evaluate the methodological approach to Roman law. Lastly, it will outline the scope of this thesis with reference to the debate between dogmatism and its challenge, proposing my own view that the traditional interpretation of Roman law deriving little from extra-legal sources is deeply flawed, and that the over attachment to the narrative of legal science has limited a just appreciation of the influence of rhetoric on the law at Rome.

2.1. The Reception of Roman Law, The Historical School and Legal Science.

Roman law in the West, so the story goes, has “two lives”: one, its original incarnation at Rome as the law of the archaic Kingdom, the ill-fated Republic, and the sprawling Empire, until its ultimate fall; then, two, a millennium or so later, its resurrection in the Middle Ages as the model for good law-making, the fashioner of the law of the Roman Catholic Church, the origin of the medieval European *ius commune*, and the teacher of the law codes of all countries of the civilian legal world up to this day.¹ This metaphor is not altogether unhelpful. While Roman law never completely died, it faded into obscurity.² The fall of Rome in the West and the ascension of various German tribes to power led to new legal systems, with the *Corpus iuris civilis*, as compiled for the emperor Justinian in the sixth century AD, lost to Western eyes.³ Not until around AD 1100, with the recovery of the Digest, Code, and Institutes from the East, did Western scholarship engage with Roman law once more. After five centuries of absence, Roman law returned to scholarly consideration, finding a home at Bologna under the headship of Irenius.⁴ It is at this stage that the continuous modern study of Roman law in Western Europe begins, and from this point that the second life of Roman law began.

This section will examine the history of Roman legal scholarship from its rediscovery in the Middle Ages and trace the intellectual patterns that emerged in relation to its study. First, the rediscovery of Roman law is considered. The revival of Roman law in the twelfth century is of significance to future approaches taken within European scholarship. It is in twelfth century Italian universities that the inception of the modern treatment of Roman law began, and an appreciation of how these early revivalist scholars framed their approach to the study of the ancient law underpinned the treatment of ancient texts for the next millennium. Tracing the course of interaction with Roman law into the modern period, the second part of this section will address the German Historical School, the most prominent proponents of the modern conception of Roman law as legal science. The context of

¹ Vinogradoff (1909) 4. Vinogradoff describes the uptake of Roman law in the twelfth century as a “ghost story”, stating that it forms a “second life of Roman law after the demise of the body in which it first saw light”.

² While the texts of Roman law in the West were not available, traces of the influence of Roman law could be found in legal institutions in Western Europe, see Stein (1999) 38-41. Some lingering Roman law was also present in the local laws of the successor states to the Western Empire. See Robinson, Fergus & Gordon (2000) 10-23. Schools had developed before the recovery of the *Corpus iuris civilis*, which, though deprived of sources, addressed the little Roman law they had, in particular, the Merovingian School, Carolingian School, and some study at Pavia and perhaps Rome and Ravenna. See Wieacker (1995) 23. That said, Stein points out that from the loss of Ravenna by the Eastern Empire, no trace of direct texts from the *Corpus iuris civilis* can be found in Western legal writing for five centuries: Stein (1956) 124.

³ Johnston (1999) 133. Study continued in the Byzantine East, notably at Constantinople and Beirut, see Wieacker (1995) 23. For recent overviews of legal continuation in the Byzantine Empire, see: Hartman & Pennington (2012); Wagschal (2015); Chitwood (2017).

⁴ Jolowicz & Nicholas (1972) 492; Stein (1999) 46-47. Johann Carion recounts that “Ein gelart man genant Wernherus, den Accursius offt nennet Irenium ... der hat Römische recht Bücher jnn Bibliotheken gefunden und widder an das liecht bracht Die har Lotharius befolen jnn Schulen zu lessen vnd widderumb darnach zu sprechen jnn Kaiserlichen gerichten.”, see: (1532) 138-139.

the Historical School will be examined, outlining the historical, social and intellectual conditions in which the idea of autonomous legal science was constructed in nineteenth century Germany. Lastly, this section will summarise the arguments of some of the key figures of the Romanist branch of the Historical School, setting out the arguments which became foundational for the establishment of a dogmatic narrative of systematic, autonomous legal science up to the present day.

2.1.1. The Intellectual Context of the German Historical School.

Roman law was rediscovered in the West in the twelfth century at Bologna, and the first school to engage with the topic was that of the Glossators.⁵ Throughout the Middle Ages the nature of engagement changed, as various trends in intellectual thought treated Roman sources with differing approaches, such as the Commentators.⁶ The Roman Catholic Church also began to engage with Roman law, and, through its deep influence on European society, promulgated its value.⁷ By the fourteenth century, the humanist movement, influenced by philology had a lasting impact on the understanding of Roman law.⁸ The authority of the commentary of Romanist professors on the law in this period led to the so-called *ius commune*, increasing professorial opinion to the level that *communis opinio doctorum habet vim consuetudinis*.⁹ As modernity beckoned, the period of the Enlightenment changed the nature

⁵ Named for their “glosses” on Roman sources. Irenius, head of the School, is credited with the rediscovery of Roman law. The work of the Glossators remained primarily academic and pedagogical, for an overview, see: Jolowicz & Nicholas (1972) 492; Wieacker (1995); 32-38; Johnston (1999) 134. Stein (1999) 46-47. During this period, a more liberal study developed among the *ultramontani*, at Orléans, see: Kelly (1984); Wieacker (1995) 41-43; Stein (1999) 54-58; Robinson, Fergus & Gordon (2000) 61-63, or for a more substantive overview of their approach, Volante (2001). For the extent to which the legacy of ancient Roman law lingered in the West after the fall of Rome, different regions experienced different effects, for perspective, see the variation for instance in: France, Gaudemet (1955); England, Winfield (1925); and Italy, Leicht (1956).

⁶ The commentators attempted to find solutions to contemporary legal problems in Roman law. For an overview, see: Wieacker (1995) 55-61; Stein (1999) 71-75; Robinson, Fergus & Gordon (2000) 59-71.

⁷ The canon law of the Roman Catholic Church maintained many Roman elements, see Wieacker (1995) 18-22. Roman law and canon law eventually became intertwined, see: Wieacker (1995) 53-54; Stein (1999) 49-52; Robinson, Fergus & Gordon (2000) 72-88. According to Legendre, the interconnectedness between canon law and civil law was so pronounced, “one cannot understand either without the other”, see (1961). The twelfth century monk Gratian and his *decretum* engaged deeply with Roman law, see Kuttner (1949). In 1580, the Roman Catholic Church produced the *Corpus iuris canonici*, emulating Justinian’s compilation.

⁸ Humanism sought to understand how the Romans understood their own sources and had a particular regard for spotting interpolation. For a broad overview, see: Wieacker (1995) 61-67. For a recent and considered approach to legal humanism, see Cairns & du Plessis (eds.) (2016).

⁹ “The shared opinion of scholars has the force of custom”. In the mid-sixteenth century, a discernible shift is notable from humanism back to a more applied understanding of the law, in which the Commentators, as scholars of a practical law, re-assert their eminence amidst the growth of the applied *ius commune*. See, for instance, the surprising praise afforded to the Commentator Bartolus, whom the Humanists reviled, by the Humanist-trained Melancthon in c. 1532 reported by Kisch (1967) 228-233. While the pervasive influence of Roman law in many parts of Europe is certain, the notion of a complete system through a shared ideology does not accurately reflect the diversity of the reception, see: Cairns & du Plessis, eds. (2012).

of interaction with Roman law, and by the seventeenth century another approach to Roman law was adopted by natural lawyers, who viewed Roman texts as illustrative, but not authoritative.¹⁰ During this period, however, Roman law found itself applied with rigour to the formation of legal codes, which had been systematised out of the modernist desire for rationality and order.¹¹ This trend posed a more nationalistic outlook than the *ius commune*, in line with a general shift in terms of the social conception of nationhood.¹²

An examination of the social, historical and cultural conditions of Germany in particular is necessary in order to understand the Historical School. In 1806 the *Immerwährender Reichstag* (the perpetual diet) of the Holy Roman Empire at Regensburg was, with the rest of the Empire, amidst the turmoil of the French Revolutionary Wars, dissolved.¹³ The Holy Roman Empire had received Roman law as a means to provide cohesion in its territory.¹⁴ The collapse of the Holy Roman Empire in the early nineteenth century created a political disruption that had ramifications for legal scholarship in Germany, not least due to the failure of the German Confederation to replicate the previous complex political unity.¹⁵

¹⁰ The natural law movement has its origins in the Law of Reason, which grew out of Enlightenment rationalist thought, for examples of this kind of thought in a politico-legal setting in the 17th century, see: Hobbes (1642) 1.2.; Spinoza (1670); Puffendorf (1672). For a philosophical contextualisation of Hobbes and Puffendorf regarding law, see Haakonssen (1996) 31-46. These rationalist philosophers appealed to reason as a means by which the law could be systematised, drawing a link between the logic of Roman law and rational, mathematical forms. From there, enlightenment scholars such as Christian Thomasius (1705) and Christian Wolff (1748) applied this methodology to the law directly, with an emphasis on Roman law as a guiding hand. The result was the eventual creation of systematic law codes in Europe, which legitimised themselves on the appeal to the Law of Reason. These Codes include the *Allgemeines Landrecht für die Preußischen Staaten in 1794*; the *Allgemeines bürgerliches Gesetzbuch* in Austria in 1811; and, most influentially, the Napoleonic Code in 1804.

¹¹ On the Napoleonic Code of 1804 and early modern codification more generally, see: Wieacker (1995) 269-275.

¹² The 1648 Peace of Westphalia set the groundwork for the assertion of the sovereign European nation state, see: Croxton (1999).

¹³ The last action of the *Reichstag* had in fact occurred three years earlier on the 25th of March 1803, when it passed the *deutsche Mediatisierung*, the major restructuring of the territorial framework and administration of German states, as well as a move to secularise German speaking lands. For an overview of the fall of the Holy Roman Empire, see: Wilson (2006) 709-736; Whaley (2012). For a good examination of contemporary reactions to the fall of the Empire, see: Burgdorf (2012) 51-76.

¹⁴ Wieacker (1995) 176 -195.

¹⁵ The short-lived German Confederation (*Deutscher Bund*) lasted, with some interruption, between 1815-1866. Attempts to find unity in the German states after the fall of the Holy Roman Empire were unsuccessful, failing to cover the fractures from the destabilisation left from the overthrow of a millennium of complex and delicate inter-state relations. The *Zollverein* states in the North of Germany made some move towards a customs union, but the growth in territorial expanse of *Mittelstaaten*, the domination of “old” Prussia over militarily weaker and less wealthy states, and a general economic downturn in the wake of the Napoleonic conflict made unity difficult to achieve, see: Murphy (1991); Sheehan (1993). The growth in Liberal Nationalism, rooted in the French Revolution, also created a sense of disunity in the period known as the *Vormärz*, when German states exercised strict censorship on the populations, eventually erupting in the failed revolutions of 1848, see: Davis Randers-Pehrson (1999). The war between Austria and Germany in 1866 led to further resentment between German-speaking peoples, with the question of ever further unity increasingly becoming centred on a duel of *Realpolitik* between Austria and Prussia over the *Klein- Großdeutsche Lösung*, see Wawro (1996). The conclusion came from Prussia’s assertion of its military dominance in the Franco-Prussian War in 1870, and Bismarck’s push for unification under imperial Prussian headship, see: Hargreaves (1991).

The political disintegration of the Holy Roman Empire presented a political vacuum in which new legal methods could develop. The intellects of nineteenth century Germany came alight, as the German Historical School of law, influenced by various intellectual trends, emerged as a related, but not univocal, solution to Germany's legal predicament.¹⁶

The most obvious distinction that emerged in the Historical School was between Germanism and Romanism.¹⁷ In short, does the future of the contemporary law in Germany lie with an assertion of the Roman law, which had been received from the *ius commune*, or from the customary, native German laws, which had persisted from their indigenous origin?

The three principal voices of the Germanist branch of the Historical School were Karl Friedrich Eichhorn (1781-1854),¹⁸ Jacob Grimm (1785-1863),¹⁹ and Georg Beseler (1809-1889).²⁰ They sought to restore the pre-Roman, customary law of the German peoples.²¹ Ultimately, the ability of the Romanists to propose their conception of the legal system, in a way which appealed to reason

¹⁶ Any attempt to trace the intellectual influences of the Historical School is precarious. Wieacker warns that "one must be aware of the facile notion of 'influences'", see (1995) 287. This statement seems to go too far, it seems unconvincing to argue that some influence does not arrive from our forebears and that ideas spring from a rationalistic vacuum. That said, it is true that to assign a direct lineage to the Historical School does not appreciate the multifaceted and complex conditions that arose to their approach. The School did not profess a unity of ideas, so a common heritage is more difficult to ascertain, but the intellectual trend of their time informed their judgement. A long standing attempt has tried to attach Romanticism to the foundation of the Historical School, see Wieacker (1995) 286, f.n. 27. For a good appraisal of the links of German interaction with Roman law, see: Whitman (1990) To this day Savigny is still linked to the *Heidelberger Romantik*, see Schmidt (2009); De Mazza (2009) 198-199. Though his romantic credentials were in doubt even in his lifetime, the romantic Creuzer, in an 1804 letter, referred to Savigny as a "Doric column" with a "thoroughly systematic nature", in Wieacker (1995) 290 f.n. 34. Despite his character, Savigny was nevertheless influenced by broad romantic themes. Classicism also held sway, as did the Enlightenment, see: Wieacker (1995) 289 – 292. None was universally foundational.

¹⁷ Wieacker (1995) 325-326.

¹⁸ In 1814, sharing a similar methodology, Eichhorn and Savigny co-founded the journal *Zeitschrift für geschichtliche Rechtswissenschaft*, co-authoring the piece 'Über das geschichte Studium des deutschen rechts'. The approach adopted by Eichhorn is close to Savigny's call for a scientific-historical appreciation of law, as shown in his 1808 book, *Die Deutsche Staats- und Rechtsgeschichte*. By his later career, in response to Puchta, he had developed a more dogmatic approach, divergent from Savigny, see: Eichhorn (1823). This approach was taken on by Gerber, whose logical pronouncement of the law forcibly called for a German law existing within a closed system, leading to claims of "killing the German soul in Germanic law", a romantic nationalist slogan reported by Wieacker (1995) 321. For Gerber's views, see: Whitman (1990) 221-222.

¹⁹ Jacob Grimm, more romantic in his approach, espoused a theory of German law which appealed to a nostalgic nationalism, presenting law as a structure bound to the German people as a whole, see: *Deutsche Rechtsalterthümer* (1828), for instance.

²⁰ Georg Beseler, whose interest in practical policy was more pronounced – he undertook a political career as a member of the Prussian Chamber and Upper Chamber – sought to capture a live sense of law within the people of the nation, *Volksrecht*, see: Beseler (1843). Beseler's verbose denunciation of Roman law as a "national disaster" for the unity of the German people led him into direct conflict with Puchta and the Romanists, see: Wieacker (1995) 324. Beseler's involvement in nationalistic 'democratic demands' weakened his political case against the positivistic science of law proposed by Puchta and the Romanists, see: Wieacker (1995) 323-325. A sad *coda* to Beseler's nationalistic German law is its appropriation and misrepresentation by the NSDAP in the 1930s, see: Bender (1979) 107; Tuori (2007) 169-170.

²¹ For an overview of the context of law in Germany prior to the reception of Roman law, see: Wieacker (1995) 71-90. A more cursory account is given at Stein (1999) 38-41. The Germanists of the Historical School provided deep analysis of German law from an historical-scientific perspective, most notably Gerber (1846).

and political neutrality, was more expedient to the German state.

2.1.2. The Romanist Historical School.

Within the bounds of this complex historical framework, the Romanists of the Historical School began to establish legal science. ‘Science’ became the watchword by which the Historical School sought to establish a legitimate truthfulness to law.²² The desire to attach scientific worth to Roman law was not only rooted in an idealisation of the principles of the Enlightenment, but also to the threat posed to the position of Roman law in German states following the decline of the *Reichskammergericht*. Scientificity provided Roman law with a supposed validity, which offered its proponents a means by which they could further arguments for its continued use.²³ The Historical School not only engaged in the creation of systematic legal science, but also began to attribute legal science onto ancient legal texts. In this way, the beginnings of a dogmatic scientific approach to Roman law emerged.

The first scholar of the Historical School, Gustav Hugo (1764–1844), came from the tradition of the rationalistic Göttingen School of philology.²⁴ Hugo’s approach was an attempt to use the scientific methods of philology in application to law, replacing abstract appeals to natural law with a rational positivism. This general theory of positive law, in turn, becomes an applicable form of “inductive” natural law, a law which can be derived from the internal coherence of the positive system.²⁵ Hugo’s legal science is not an appeal to an abstract law of reason, but rather to a realisable logic within an internal system of law. Although remaining somewhat obscure, Hugo plays a seminal rôle in the creation of modern legal science, anticipating the aspiration of systematic law, and providing the philosophical framework for the intellectual development of such a project.

While Hugo provided the groundwork, Friedrich Carl von Savigny (1779-1861) established the Historical School as a programme.²⁶ Savigny’s writing had a decidedly political aim: the re-establishment of a useful legal science harking back to his understanding of the *ius commune*. Important to Savigny’s understanding of the achievement of this aim was his view that legal science arises from

²² Puchta, for example, provides the two criteria of legitimate and correct law as scientific truthfulness and an attachment to the *Volksgest*. Puchta (1877) 29; (1875) 60-61. See 1.3. for a note on the meaning of science.

²³ Puchta, for instance, in criticism of the Germanists, stressed the advanced nature of Roman over German law, comparing the former to Europeans meeting primitive American tribes for the first time. Puchta (1877) 12. For more on this see Bender (1979) 54-69.

²⁴ Wieacker (1995) 301-303. Alongside this influence was that of Kant, whose methodology of criticism was an important influence on the origins of the philosophical conceptions of the Historical School.

²⁵ Hugo’s works are difficult to access, yet his *Lehrbuch eines civilistischen Cursus* (1832) and *Lehrbuch des heutigen römischen Rechts* (1826) set out his fundamental claims.

²⁶ Wieacker provides a concise bibliographical discussion of Savigny and his place within German legal history, (1995) 303-316.

the tradition of historical forces, which can be used to provide the systematic and theoretical input to the philosophical foundations of science, and a scientific output of utilisable, systematic law, which fits within the culmination of the culture (*Volkgeist*) of the people whom it serves.²⁷ Savigny was determined to make law scientific in both an historical and philosophical way, and did not stray from this programmatic manifesto throughout his scholarly career.²⁸ Savigny attempted to establish an intellectual continuity of the ancient sources of Roman law on a continuous trajectory to the modern age, where the same systematic application of the law can establish a modern use for ancient laws. In 1814 Savigny established, together with Eichhorn, a journal (*Zeitschrift für geschichtliche Rechtswissenschaft*) dedicated to the pursuit of legal science. In its first article, setting out the manifesto of the journal (*Über den Zweck dieser Zeitschrift*), Savigny declares his thesis that law is necessarily intertwined with the trajectory of its history and only a methodical historical science of law can determine and uphold valid legality.²⁹ This led to vigorous campaigning in order to achieve legal science in Germany, notably his pamphlet *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*. For Savigny scientific law was produced by an educational process by which the *Volk* (which for him was a cultural conception of the German people) realise the finality of legal science through an historical treatment of a continuous legal growth, rooted in the Roman law of the Middle Ages.³⁰ The complex relationship between *Volk*, history and science is often seemingly contradictory and difficult to comprehend, but the essence of Savigny's programme is that education through an historical study of law would lead to an organic adoption of modern legal science, without the need to diverge from tradition and enforce rationalistic codes. A famous rift emerged between Savigny, who rejected mass codification, and Thibault, who hoped codification would provide national unity.³¹ Posthumously, in 1884, Savigny's final and incomplete work *System des heutigen römischen Rechts* was published. While this late work continues the main thrust of his earlier agenda, to some extent he retracts his need for traditional considerations in favour of a more systematic approach.³² The system of law which Savigny advocates exists in an uneasy conceptual balance between positive law and tradition, framed within the methodological interpretation of historical science. The "institution" takes on the foreground and while there still existed some "organic connection" among the "legal relationships" of the individual, the *Volk*, the institution, and history, Savigny's attempt to express a complete vision of this scientific encapsulation of law was never realised with clarity.

²⁷ The principal work of importance in this regard is *History of Roman Law in the Middle Ages* (1815).

²⁸ Wieacker (1995) 308.

²⁹ Savigny (1815) 1-17.

³⁰ Notably, the teleological perspective to Savigny's legal history reveals the influence of Hegel, which became more pronounced in the work of Savigny's pupil, Puchta.

³¹ Wieacker (1995) 310. Especially at f.n. 27.

³² Savigny (1846).

The last figure of centrality to the foundation of the Historical School of Romanists, Georg Friedrich Puchta (1798-1846), a pupil of Savigny, who assumed the headship of the School during his mentor's silence, developed ideas of legal science with a focus on conceptual formalism. Puchta rejected the *Volksgeist* promoted by Savigny and emphasised the supremacy of the jurist in the creation of pandectism.³³ Puchta, following Hegelian teleology, viewed law in progressive stages, culminating in science.³⁴ Puchta ultimately rejects the "external phenomenon" of the people and focused on what he viewed as the characteristic scientific methodology contained within the texts themselves. Far from discussing "legal relationships", Puchta developed a system of conceptual law, in which jurists are able to trace concepts within texts throughout the history of law and apply them within a system. He states that the jurist should be able to "trace upwards and downwards the derivation of each concept through all the intermediaries which had any part in its construction".³⁵ The system of law is devised within a pyramid of concepts, each of which has a pedigree, traceable to its ideological inception, and applicable in its systematic correctness to contemporary use. Puchta proposes that systematisation provides the law with a legal correctness and an inherent truthfulness, insofar as it follows a logical consistency in its development from the concept.³⁶ The jurist, as the legal scientist, has a position of primacy in the understanding, interpretation and application of law within the established logic of the system, presenting law as a "scientific deduction", to the exclusion of moral, social and political reality.³⁷ Puchta's attachment to formalism directed the law away from social reality, but, at the same time, it also established the foundation for the positivist legal science that followed him.

The second half of the nineteenth century was dominated by the idea of legal science, and particularly by the ideas of pandectism set out by Puchta. A series of scholars, developing the logical constructs of the founders of the Historical School, began a process of setting out law as what Viehweg called "a positive science", an autonomous system from which rules could be established solely from recognised concepts and doctrines.³⁸ The law was a closed system, gapless, with no *lacuna*, able to construct new rules from within the methodology of its own system.³⁹ The jurists, as professors of the science, were able to construct neutral legal pronouncements from the law's internal logic, and offer rules indifferent to society, within a system indifferent to politics.

³³ For more on Puchta and Savigny and their relationship to legal science, see Jakobs (1992) 31-51.

³⁴ Puchta (1828).

³⁵ Reported in Wieacker (1995) 315.

³⁶ For Puchta this transformed jurisprudence into a scientific discipline, see (1975) 59-61.

³⁷ Puchta (1875) 18, 22, 174, 244-247. Also, see Puchta (1843).

³⁸ Viehweg (1965) 181.

³⁹ The idea of a gapless system of law has a long history of expression. Savigny calls for "unity and completeness of the totality of sources" (1839) 262. See also: Voigt (1879) 39-42; Wieacker (1995) 316-318.

2.2. The Dogmatic Narrative: Legal Science in Modern Scholarship.

The idea of legal science penetrated the twentieth century, continuing the trend in scholarship that had developed in the previous hundred years. Of all the nuanced claims made by the Historical School, two endured with pre-eminence into the scholarship of the next century: first, the narrative of continuity; secondly, the conception of law as an internally coherent, closed, autonomous methodological system from which rules can be derived without the requirement of consideration of external factors. This section examines each in turn.

2.2.1. The Narrative of Continuity.

The notion of continuity became a driving factor of the Historical School's idea of legal science. The narrative presented legal science as a constant trajectory of concepts, beginning with a moment of revolutionary scientific innovation in the late Roman Republic and thence a constant tradition of scientific methodology through the classical jurists, the compilers of law under Justinian, the Glossators of the Western rediscovery of law, Commentators, Humanists, and up to contemporary jurists. Not only did the methodology persist, but also the type of lawyer, the ancient Roman jurist and the nineteenth century legal scientist were presented as sharing a profession, sharing a craft and tradition, which linked them in an unbroken continuum. The power and allure of this supposed connection is almost metaphysical, it is not without reason that the "spirit" of Roman law became the invocation used to summon the spectre of continuity. Jehring, for instance, in his 1907 work *Geist der römischen Rechts*, traces the continuance of Roman legal spirit back to ancient times:⁴⁰

Dreimal hat Rom der Welt Gesetze diktiert, dreimal die Völker zur Einheit verbunden, das erstemal, als das römische Volk, noch in der Fülle seiner Kraft stand, zur Einheit des Staats, das zweitemal, nachdem dasselbe bereits untergegangen, zur Einheit der Kirche, das drittemal infolge der Rezeption des römischen Rechts, im Mittelalter zur Einheit des Rechts; das erstemal mit äusserem Zwange durch die Macht der Waffen, die beiden andern Male durch die Macht des Geistes.

Jehring, in his threefold history of Rome's impact on law, stresses two features: unity (*Einheit*) and spirit (*Geist*). For Jehring the spirit of law had been removed from a cultural reflection of the people

⁴⁰ Jehring 1907 [1993 reprint] 1.

whom the law served, akin to Savigny's *Volkgeist*, rather becoming subsumed and encapsulated by the methodology of the law itself: the spirit of Roman law was the continuing structure that persisted through the ages, even if the substantive content of the law changed.⁴¹ Here we discover, within the continuity narrative of the early twentieth century, a concept which we may call *Rechtsgeist*, a spirit of law. It is this spirit of the structure of the law which unifies people throughout history – and the nature of this structural spirit is scientific methodology.

The idea that a continuity exists in the methodological approach to Roman law is appealing to the Romanist, ever fearful of accusations of antiquarianism. Gadamer argues that the idea of tradition is appealing to the legal historian as it is rooted in the thesis that meaning can be discovered in historical texts.⁴² Burke analyses this trend within the general interpretation that all Western European thought on Roman law is seen through the lens of a theory of general connected progress from an origin towards a conclusion.⁴³ Wieacker, acknowledging the “idea of continuity”, claims it to be the “presupposition of the historian of private law”, as in order to understand the reception of law, one must see it in supposed continuation.⁴⁴ For Whitman the notion of continuity was encapsulated in the pride of modern professors at the thought of their inclusion in a grand tradition linked to the Roman jurists whom they venerated:⁴⁵

German professors of Roman law could regard themselves as the heirs of a very great scholarly tradition. Every German professor of Roman law could base his pride on the image of ancient Roman society, the society that held jurists in supremely high esteem.

The way in which German scholarly jurists transported this esteem and awarded it to themselves is two-fold: first, the strength of the university tradition, and the elevation given to Roman law in Imperial Germany provided them with a platform to assert their intellectual power; secondly, the German professors, enraptured by a feeling of grandeur at their own supposed inheritance, promoted the narrative of their own position.

Legal science became the hallmark by which Western scholarship on Roman law was able to express its continuity, proposing a shared methodology from the outset of the law to modern engagement, as Osler argues:⁴⁶

⁴¹ Jehring 1907 [1993 reprint] 48.

⁴² Gadamer (1965) 274.

⁴³ Burke (2002).

⁴⁴ Wieacker (1995) 27. Wieacker sees the nature of “reception” of law as fundamentally linked to the idea of “continuity” in scholarship, as a “process of assimilation”, by which the laws of a country are not lost, but slowly integrated and merged with native laws, see (1995) 93. This allows Wieacker to propose that Roman law is far from an adoption of foreign law, but rather is a living “spiritual and intellectual” continuity, see (1995) 94.

⁴⁵ Whitman (1990) 29.

⁴⁶ Osler (1997) 395. For a fuller discussion of this idea, see 393-397.

The whole of European legal history is to be subsumed as *eine wissenschaftlich Voraussetzung* for the ultimate goal of the legal development of the human race: in a word *Rechtswissenschaft*.

The history of Roman law became a unified trajectory under the auspices of shared scientific methodology. Finley points out that this narrative becomes a powerful force in uniting the complex history of Roman legal scholarship into a unilateral course towards the realisation of legal science.⁴⁷ In particular, the textual fixation proposed by Puchta to ascribe an on-going similarity in the approach taken to textual analysis as an extended project over millennia is essential to the recognition of similar activity in ancient lawyers among modern scholars. As Gilmore states, “the appeal to an unchanging text creates the illusion of community”.⁴⁸ Tuori, whose contribution to unravelling the power of the continuity narrative is significant, argues that the creation of a link between the ancient and modern has been the establishing lens through which Roman law has been viewed in modernity. Tuori argues that the scholarship of modernity has done much to fool itself into a narrative of continuity in order to assert a traditional validity to Roman law, even to the extent that “Roman law was not found but constructed, both legally and historically”.⁴⁹ The power of the narrative of continuity from antiquity to the modern age is attested both in its explicit adherence, and in the implicit acceptance of this view throughout the twentieth century.

Kaius Tuori, in his important work, *Ancient Roman Lawyers and Modern Legal Ideals* (2007), provides a powerful analysis of how later scholarship created a disconnect between the reality of Roman legal practice and the abstraction of later scholarship of Roman law into an ideal scientific form. Tuori’s objective is to provide an explanation for “discrepancies between the Roman sources and the reconstruction of events in historiography”.⁵⁰ The case presents Roman legal science as a formulation of modern lawyers ascribing a scientificity back onto ancient times, what he calls the “patriotic narrative”. The famous contention, discussed at length in this thesis, that Q. Mucius Scaevola *pontifex* provided the impetus of Roman legal science through his systematisation under Greek influence in the late Republic is challenged.⁵¹ For Tuori, the root of the mistaken narrative in Roman law is founded in the attempts by the Historical School Romanists to impose a scientific method upon the law. He argues that as a result modern law developed a “pre-occupation with science” as a “characteristic” feature of Roman law.⁵² Tuori draws a cautious distinction about the kind of analysis which results from this presumption of systematisation as a fundamental component of law in Rome: are we dealing with

⁴⁷ Finley (1986) 390-397.

⁴⁸ Gilmore (1941) 3.

⁴⁹ Tuori (2007) 124.

⁵⁰ Tuori (2007) ix.

⁵¹ Tuori (2007) 67

⁵² Tuori (2007) 21.

“Roman law created by the ancient Romans;” or, rather, “the product of later Romanistic and Pandectistic scholars”.⁵³ Tuori is unconvinced that the Romans themselves engaged in the kind of scientific formalism which is ascribed to them by later scholars. Rather, he argues that Roman legal scholarship has begun to accept its own assertion that Roman legal science came into being during the Classical Republican period and that the attribution of scientific credibility was as well understood and accepted by the Roman jurist as by the German Pandectist. Tuori outlines the broad thrust of his criticism of the accepted theory of legal history as follows:⁵⁴

In the modern continental theory of law, if such generalisation can be made, there is a widespread hypothesis or an assumption that the body of law or legal norms together forms a legal system, which is formulated, studied and perpetuated by legal science.

Foremost among the ideals of modernity which were superimposed onto the Roman legal mind was that of science. From the earliest interaction with Roman law in Lombard Italy the reception of Roman law has adopted a utilitarian approach with regards to its application to contemporary jurisprudence – the *usus modernus* for ancient law. The underlying reason for this formulation, according to Tuori, lay not primarily in the evidence of the sources but rather in the motivation of the scholars who proposed it, stating that “the interest of the Historical School in Roman jurists’ law was partly based on the fact that the Romanistic branch of the Historical School itself promoted jurists’ law”.⁵⁵

The narrative of continuity provides an important contribution to the understanding of the motivation of the German Historical School to impose modern values onto ancient law. It goes some way to providing an explanation for the preclusion of rhetoric from legal scholarship.

2.2.2. The Narrative of Legal Science.

Alongside continuity, the second narrative which penetrated scholarship in the twentieth century was that of a gapless, autonomous system of Roman legal science, which existed within the logical confines of its own system, free from the influence of external intellectual factors. As discussed, the idea that law was free from social, historical, political and economic factors and existed as an autonomous science was proposed as early as Savigny, but was cemented by Puchta, and had become a motif of twentieth century theory in Roman law. The concept is connected to the continuity narrative insofar as the exclusivity of law to legal reasoning is argued to have been rooted in antiquity and continued until

⁵³ Turori (2007) 22.

⁵⁴ Tuori (2007) 21.

⁵⁵ Tuori (2007) 66.

modernity. This narrative established a particularly limiting effect on Roman legal scholarship, confining the parameters in which the subject ought to be approached to the narrow dogmatism of legalism.

The narrative follows Savigny in the exclusion of social, political and economic contexts to legal autonomy.⁵⁶ Pugliese argues that the Roman jurist did not argue outside the confines of the law.⁵⁷ Jehring contends that the integrity of the structure of the law was maintained even with substantive changes.⁵⁸ The autonomy of law was not only about the exclusion of extra legal consideration but also of law as a “gapless” system, which is more interested in doctrine than history.⁵⁹ Law as a “system”, complete and integral became the pervasive view in the pursuit of science.⁶⁰ With the need to have specialised professionals interpreting the “*essoterische Wissenschaft*”.⁶¹ Adherence to the view of scientific, autonomous law became deeply entrenched in the dogmatic consensus of the twentieth century, as the next section of this thesis outlines.

2.2.3. Adherence to Narratives: Dogmatic Consensus.

The ubiquity of the adherence to the dogmatic narratives which pervaded Roman law in the twentieth century is attested by the observance to the doctrine of legal autonomy and traditional continuity. First, the influence on the Historical School on scholarship in the first half of the century led to Roman legal scholarship following the notion of legal science with vigour. Secondly, the creation of law codes, in particular the *Bürgerliches Gesetzbuch*, which came into effect in 1900, grew out of the Historical School’s treatment of Roman law as a legal science, which provided a structural model for the application of doctrinal principles to contemporary law.⁶² Thirdly, codification brought a new problem for Roman law. As the code offered a modern encapsulation of the spirit of legal science, the swift development of scholarship considering the code became the focus of academic attention. The code was the ‘new Roman law’. The older laws of the Romans had been consigned to history by the creation of a truly modern civil law. For Roman law scholars, this presented a “crisis in Roman law”, as

⁵⁶ Savigny (1814) 12. Followed by Koschaker (1966) 265-269; Wieacker (1995) 308-316.

⁵⁷ Pugliese (1973).

⁵⁸ Jehring (1907) 48.

⁵⁹ Lenel (1861). This is akin to Zimmermann’s neo-pandestist approach, see 2.2.3.

⁶⁰ See Reinmann (1990) 837-897. This position influenced later views of law as a normative but complete system: Bulygin (1993); Raz (1979) 79-102.

⁶¹ Kaser (1978) 127 – an “esoteric science.”

⁶² The *Bürgerliches Gesetzbuch* came into effect on the 1st of January 1900, though its development had begun in 1881, and its usage in principle passed by the *Reichstag* in 1896, an earlier draft of 1888 had required significant revision before the code met legislative approval. For a good summary of the process of drafting and the means of effect, see Wieacker (1995) 371-386

examination of the ancient texts became a truly historical exercise.⁶³ This realisation caused some consternation. Yet, the narrative of scientific Roman law remained in vogue and pre-eminent. The last development of the twentieth century, bringing us to our current period, is the attempt to use Roman law, and the science of codification, to construct a harmonised European civil law, dependent upon the trajectory of the narratives of science and tradition, and asserting, as was asserted in Germany in the nineteenth century, that scientific law modelled after Roman doctrine offers a sensible solution to legal diversity in contemporary Europe.

The continuation of the programme of legal science developed by the Historical School dominated the first half of the twentieth century. Some attempts at divergence were made.⁶⁴ Yet the acceptance of the notions of juristic continuity in tradition back to Roman jurists and the willingness to accept an autonomous and scientific law rooted in the first century BC prevailed. Scholars of the early twentieth century were particularly impressed by the methods and conclusions of the Historical School in regards to ancient Roman law, and thoroughly endorsed the approach.⁶⁵ The extent to which this view became central to discussions on Roman law in the twentieth century is perhaps best evidenced by the extent to which textbooks offer the stance as the standard description of the schematic in which Roman law operates.⁶⁶ The stance has been so ardently adhered to that it informs opinion even to this day.⁶⁷ The view captured scholarship in a dogmatic inflexibility, and, with each new generation, the narrative of continuity and autonomous legal science grew in potency, as the detachment from the construction of the narrative led to a unified acceptance of its received truth. The dogmatic understanding of Roman law became standard and until the latter half of the twentieth century, little dissent appeared.

The effect of the codification of law in Europe had a disruptive effect on Roman legal scholarship, however. Whilst the narratives of continuity and autonomous science continued to prevail in historical scholarship, broader legal academia began to turn away from the study of ancient Roman texts, as the contemporary, autonomous system of law, found in the Roman based law codes, provided a systematic legal science that was practical and applied. The German *Bürgerliches Gesetzbuch* (BGB)

⁶³ Zimmerman (2001) 48. Scholarship from the time bears out the idea of a feeling of crisis beginning in the late nineteenth century, see: Bekker (1885) 87; Gradenwitz (1887) 31.

⁶⁴ For instance, Stroux (1926).

⁶⁵ Lepointe (1926); La Pira (1934); Schulz (1946); Viehweg (1965) 26-39; Kaser (1962) among others.

⁶⁶ Muirhead (1947) 17: “The advance of the law was due mainly to the professional activities of the jurists. These activities were not only intensified, but by the adoption of Greek dialectic methods became systematic”. Buckland (1953) 19: “It was in this period, of about two centuries from Augustus onward, that Roman juristic science reached its highest point ... There was not a sudden uprising of a group of brilliant lawyers: there was a continued development from the times of Quintus Mucius Scaevola and Servius Sulpicius Rufus”. Nicholas (1962) 1: “in their (the jurists) hands law became for the first time a thoroughly scientific subject, an elaborately articulated system of principles abstracted from the detailed rules which constitute the raw material of law”. van Warmelo (1976) xix: “Roman law should be recognized as an international science”.

⁶⁷ Zimmermann (1996); Harries (2006) 92-100; Ibbetson (2016) 28-40; Hilder (2016) 71.

came into effect in 1900. It was followed by a series of pandectist law codes in many of the countries that are now called “Civilian” in their system of law.⁶⁸ Codification had been a project of later members of the Historical School and the achievement of codified law, particularly in Germany, was seen as a triumphant achievement of the programme for scientific law.⁶⁹ At the outset of codification, Roman law retained its centrality to the law, as, what Zimmermann calls, “an indisputable tool in interpreting the new code, in resolving doctrinal disputes and in filling gaps in the law”.⁷⁰ To some extent, this remained true.⁷¹ However, the new codes produced a rush of scholarship focussed primarily on the content of the “new law”, ignoring the Roman law on which they had been based.⁷² This focus removed the impetus to use Roman law, and the Historical School, whose rôle in articulating the codes, became overlooked by a new scholarship determined to engage scientifically with the contemporary law.⁷³ Roman law, which had once held primacy in Germany, had now fallen behind the rise of the new law code, and this was not only reflected in the relegation of the ancient law to a pedagogical tool, but also in the demotion of its significance to curricula in universities.⁷⁴ Codification had led to a lull in Roman legal scholarship, to the extent that talk turned to “crisis”.

Nonetheless, the suppression of Roman law had become part of the programme. The creation of law codes was in effect the creation of a new system of autonomous, scientific law, based upon the doctrine of the Roman model. Koschaker pointed out that the programme of the Historical School must always result in a positive legislative process, as the only way in which the project could find “meaning”.⁷⁵ And, true to this claim, the twentieth century followers of the Historical School supported

⁶⁸ The Swiss Civil Code, the *Schweizerisches Zivilgesetzbuch*, the second Pandectist code, was adopted in 1907 and effective in 1912; other codes had a similar history, such as the Austrian *Allgemeines bürgerliches Gesetzbuch* in 1840; the Italian *Codice Civile* in 1942; the Greek *Αστικός Κώδικας* in 1946; among others. Earlier codes in the French style following the Napoleonic Code of 1804 formed a separate though linked lineage. For an overview of codification and the process by which it came about, see Wieacker (1995) 363-405.

⁶⁹ Codification of law had been called for by many proponents of the Historical School and their followers, see: Jehring (1852) i, 2; (1861) 2; Bekker (1871) 2; Windscheid (1904) 81; Mommsen (1907) 587. Windscheid called for a code to provide the “dream” of accessible law, see (1904) 75. This pronouncement by Windscheid is of particular note, as he, a keen student of Savigny’s, went against his teacher’s wishes. Savigny had denounced codification as “inorganic” and “unscientific”, yet, by the later part of the nineteenth century, consensus in the Historical School had moved on from the pronouncements of its progenitor, see Savigny (1814) 123, 162. Koschaker would later comment that Savigny’s attempt at combining both historical and doctrinal approaches to Roman law would be like “mixing fire and water”, see Koschaker (1966) 283. Interestingly, Savigny found a truer successor in Otto Lenel, who shared his scepticism to the codification movement, see Lenel (1889) 213.

⁷⁰ Zimmermann (2001) 3.

⁷¹ In France, the new code relied on Roman law to inform its fissures – Zimmermann (2001) 4 – in Prussia, Roman law remained as “*ratio scripta*” – Eckert (1998) 37 – in Austria, Roman law was still a reference point to aid understanding of the new codified law – see, Brauneder (1987) 217.

⁷² The abundance of scholarship on the codes was commented on at the time, even within five years of the codes effect, see Laband (1906) 2.

⁷³ Koschaker comments that on examining scholarship on the BGB from the early-to-mid twentieth century, “one will hardly ever find the name of the Great Pandectists”, see (1966) 190.

⁷⁴ Lautner (1976) 57; Friedberg (1896) 10.

⁷⁵ Koschaker (1966) 258.

the transformation of ancient Roman law into a pedagogical residue, in favour of the promotion of the scientific study of the new law. The focus had been transferred from an historical to a doctrinal approach to law, and ancient Roman law, having been superseded by the codes, became an historical subject. This marked the final move in twentieth century scholarship from the Historical School to pandectism. The historicisation of Roman law made consideration of the Roman law within its own context irrelevant to the conversation on legal doctrine.⁷⁶ As the legal doctrine was the principal consideration, the need to examine interpolations in original texts was diminished.⁷⁷ What was important was the science of the doctrine as it had been projected traditionally through the ages, not the social or argumentative bases upon which the law had been created. An historical-comparative approach developed, under the auspices of Ludwig Mitteis, but an active rôle for Roman law became substantially diminished, as it was relegated to an historical, antiquarian position.⁷⁸ Bekker was a central proponent of this separation of the historical and the doctrinal, aiming at the separation of the two discourses by “thinking apart” ancient and modern law.⁷⁹ This would in turn create a necessary bifurcation between the historical sources, which had helped model the new law, and the new law of the codes, which existed as a scientific doctrine practically applicable to the modern world. This represents what Jehrning called going “beyond Roman law by means of Roman law”, the ability to move into a modern scientific law from ancient scientific models, but eventually to arrive in the teleological culmination of a modern autonomous law no longer dependent on the ancient texts.⁸⁰ This idea of moving out of the ancient texts into a modern setting had a pedigree, Kuntze praised Windscheid for his attempts to “courageously rise above the tyranny of Roman law”.⁸¹ This ability to overcome antiquity and move towards a truly modern legal science was the ultimate aim of the Historical School professor, to become what Lenel called a “*Wahrer Jurist*”.⁸² This signalled the movement from Historicism to pandectism and the completion of the telos of the programme, the achievement of legal science. Zimmermann frames this transformation as a series of three emancipations: the codification emancipates law from contemporary legal doctrine; contemporary legal doctrine becomes emancipated from ancient Roman law; and, thirdly, the establishment of intellectual unity based on “common tradition”.⁸³ This intensifies the nature of the separation of modern law from ancient law and the separation of doctrine from social consideration. For Zimmermann, the pandectist movement created a “new era” of law, in which the code achieves the aims of a project to create a doctrinal science of law, resigning historical and social consideration to an examination of pure doctrine from which a comparative aspect can be given to the creation of

⁷⁶ Zimmermann (2001) 18.

⁷⁷ Koschaker (1966) 20.

⁷⁸ Mitteis (1891). See also Zimmermann (2001) 27-34.

⁷⁹ Bekker (1871) 2.

⁸⁰ Jehrning (1873) 14.

⁸¹ Kuntze (1856) 20.

⁸² Lenel (1889) 226.

⁸³ Zimmermann (2001) xix.

scientific law.⁸⁴ The project is ultimately political and mirrors the programmatic writings of the Historical School in nineteenth century Germany to a Europe wide scope in the twenty-first century. For Zimmermann, the realisation of this new law is the recreation of a modern autonomous legal system free from a separated historical discourse and that by the mid-twentieth century the codification meant the fact that “Roman law had been conclusively superseded and abolished seemed self-evident”.⁸⁵

Zimmermann, as a neo-Pandectist, is keen to stress the elimination of the historical consideration of Roman law to the doctrinal significance of modern legal science. For Zimmermann, historical consideration of the law is outwith the scope of statutory positivism, brought on by earlier scholarly positivism, pushing towards codification, as he outlines:⁸⁶

For the positivistic judge within a codified system this means that the ‘old’ law prevailing before the enactment of the code has to be ignored even if it appears to offer a more appropriate solution. Hence, for instance, the widespread reduction of the historical argument to an exploration of the preparatory ‘paper trash’.

The place of the pure history of law is made distinct from the usefulness of doctrinal law. Zimmermann is not unaware of the restrictions of this position, noting the impression of the BGB as a “prison cell for legal scholarship”.⁸⁷ Others too note the limitations, Kaser points to the exhausted nature of scholarship within the codified system by the 1970s.⁸⁸ Yet, while a new approach was desired, to afford legal scholarship a new appreciation for the contemporary law, the history of law, for Zimmermann is undesirable; rather what he calls for is a history of legal doctrine. While this seems, *prima facie*, to be an insignificant difference, the distinction is acute. A history of law is a history of how law is made, the societies from which these laws come and an appreciation of the argumentative postulates upon which these laws are founded. A history of legal doctrine is a history of the trajectory of an idea, with no consideration to the contextualisation of that idea’s origins, so long as it can be plotted within the trajectory of a continuous dogmatic science, so long as it fits in the system. The history of legal doctrine is a comparative exercise, which hopes to pluck ideas (in this case, laws) from an historical situation and implant that idea into contemporary law, with scant consideration to the potential social disjunction that this creates. Zimmermann’s answer to the deceleration of scholarship in contemporary law involved

⁸⁴ Zimmermann (1996) 112.

⁸⁵ Zimmermann (2001) 51-52. Zimmermann attempts to support this claim by a solitary and somewhat unconvincing appeal to the Dutch Abrogation Act 1838 (*Afschaffingswet*) at Art. 1., where it states “*het wettelijk gezag van het romeinsche regt is en blijft afgeschaft*”. There seems some difference, as I will argue in depth throughout this thesis, between the abrogation of Roman law as a utilisable legal source within a system of law, and the relegation of Roman law to a spent historical force no longer capable of informing legal reasoning.

⁸⁶ Zimmermann (2001) 51.

⁸⁷ Zimmermann (2001) 53.

⁸⁸ Kaser (1972) 154.

an historical appeal, but only insofar as the historical scope was dogmatically limited to a doctrinal study, he outlines thus:⁸⁹

Legal historians were therefore called upon to turn their attention to the history of legal doctrines and institutions so as to prepare the foundations for a contemporary comparative scholarship in private law.

The focus of legal history, for Zimmermann, was to provide a doctrinal survey for the production of a doctrinal basis to advance contemporary legal doctrine. The two central themes here are the old narratives of the Historical School: continuity to antiquity, which affords doctrines authority; and the desire for the espousal of an autonomous system of law, where ancient law is decontextualized from the society in which it originated and from the argumentative basis upon which it was formed, and integrated into the doctrinal system of modern law, as though it had been purposely built for that system. The argument misses the point: ancient law was not constructed for a comparative integration into a new contemporary system. The “paper trash” of the history of law reveals this discarded reality.

Zimmermann’s project, like the Historical School’s, is ultimately political. The reason behind the comparative project to root law in a common doctrinal, scientific tradition is programmatic. The programme is the development of a “New *Ius Commune*”, a European wide harmonisation of private law based on the supposed sharing of doctrine from the Roman tradition.⁹⁰ The idea is strikingly idealistic in its approach.⁹¹

This new *ius commune* will have to be built around shared values and generally recognized legal methods as well as common principle and guiding maxims, and it will have to be shaped by judges, legislators, and professors, acting in cooperation with each other.

These shared principles and values are the inherited Roman doctrines which have, through the historical appreciation of traditional legal doctrine, been implanted through a comparative process in modern law. Zimmermann uses comparative law as a means by which to show shared law between particular countries, as though these laws were asserted in isolation without regard to the societies in which they were enacted.⁹² Zimmermann’s 1996 book, *The Law of Obligations, Roman Foundations of the Civilian*

⁸⁹ Zimmermann (2001) 104-105. The ten reasons for the survival of Roman law from history which Zimmermann provides elucidates this stance, see (2016) 458-461.

⁹⁰ Zimmermann (2001) 107.

⁹¹ Zimmermann (2001) 109.

⁹² Zimmermann (2001) 109-151. This provides a clear outline of the methodology applied by Zimmermann, where he presents similar legal concepts among jurisdictions and argues for their commonality as ideas, free from considerations of their social developments, for instance: offer and acceptance in South Africa and England (130); mistake in South Africa, England, and the Continent (130-133); misrepresentation in Roman law, South Africa, the Continent and England (133-136); undue influence in South Africa, Roman-Dutch law, France, and England (136-138); anticipatory repudiation in South Africa, Roman-Dutch law, England, the Netherlands, and Roman

Tradition, presents an entire compendium which roots civilian legal concepts in comparative doctrinal history. Society's exemption from the way in which law is created has led Zimmermann to propose the abandonment of what he calls the "nationalistic" tendency of legal scholarship to insist upon reflections that assert the laws of the countries in which the scholars are situated, rather than adopting the approach of a comparative European doctrinal similarity.⁹³ In particular, scholarship in legal history must move away from the history of the law in the historical context of the society, and move to a doctrinal history, which stresses the transnational nature of shared doctrine in European law.⁹⁴ Zimmermann even points to shared ideas between "common" and "civilian" legal systems.⁹⁵ The programme for a European private law code is not without support, particularly as the European Union pursues policies of "harmonisation" and "ever greater union".⁹⁶ The feasibility and desirability of this result is outwith the scope of this thesis. The issue is rather that the argument proposed to underpin it is a house built upon sand. The deliberate neglect of the social context from which laws derive and the arguments that underpinned the development of these laws is an acceptance of a dogma built on narratives of dubious origins. The pretence that law can be separated from the society in which it developed and implanted or transplanted across systems separated by culture, place, or time is predicated upon narratives developed in nineteenth century Germany for the political purpose of asserting Roman law after the fall of the *Reichskammergericht*.⁹⁷ This approach depended on the construction of narratives of continuity

law (138-141); cancellation as a remedy for breach of contract in Roman law, Roman-Dutch law, Germany, South Africa, England, and France (141-143); specific performance in Roman law, Roman-Dutch law, South Africa, England, and the Continent (143-147); Aquilian liability in Roman law, South Africa, and England (147-148); *actio iniuriarum* in England, Roman-Dutch law, Roman law, Germany (148-151). The methodology applied is to find general principles which doctrinally unites the development of these laws and ties them together in a broader framework of development, linking the origin of the rules to the exclusion of their historical and social development.

⁹³ Zimmermann (2016) 470: "We will have to overcome the nationalistic isolation of legal scholarship that is a consequence of tailoring law curricula around national codifications. Students will have to be made to see the fundamental connections and the European character of our legal culture".

⁹⁴ Zimmermann (2001) 110; (2016) 253.

⁹⁵ Zimmermann (2001) 111-115. Zimmermann is particularly keen on the use of so-called "mixed jurisdictions" as an entry point to a discussion of shared tradition between "common law" and "civil law" systems, see for instance: Zimmermann (1995); (1996); (2001) 151-170; (2004).

⁹⁶ Arguments for a movement towards a European Civil Code include: Kötz (1996); von Bar (1996); Zimmermann (1996); (2001); (2006); (2009); (2016); Lesaffer (2008); Wagner (2009); Nieuwenhuis (2015). Journals have been dedicated to the topics since the 1990s: *Zeitschrift für europäisches Privatsrecht* (since 1993); *Review of Private Law* (since 1998). Commissions have been set up to discuss proposals: *The Lando Commission (Commission on European Contract Law)*, begun in 1982, which has published its proposals as *Principles of European Contract Law* (1994); the 1997 commission *Towards a European Civil Code*, which proposed its ideas in an eponymous book (2004); several academic subgroups derived from this commission, including *The Joint Network on European Private Law*; another commission, *The Common Frame of Reference*, was founded in 2001, providing a draft copy for harmonised contract law in 2003, an EU parliamentary resolution in 2007 made the objectives clear: "even though the Commission denies that this is its objective, it is clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be a European code of obligations or even a full-blown European Civil Code", Gerhard Wagner, using the familiar vocabulary, hailed such a move as "an immense scientific achievement", see Wagner (2009) 204. The European Parliament has made its desire for a European Civil Code clear three times: in 1989, in 1994, and in 2000.

⁹⁷ The idea of "legal transplantation", a phrase coined by Alan Watson, had taken on significance in the methodology of comparative law as a mode by which to compare and transfer laws between legal systems. Watson

and science in law, which were not reflected in the historical sources. The culmination of these movements was the legal codifications of the twentieth century and statutory positivism. This led to a call for the separation of historical study of ancient texts and a new engagement with a contemporary, autonomous, codified law. However, this codification limited the scope of legal scholarship to within the narrow confines of the code itself. In order to rejuvenate scholarship, a new approach, based on the Mitteis School, argued for a history of legal doctrine to provide a comparative aspect to the supposedly shared tradition of legal science across Europe. This comparative approach is argued, most pre-eminently by Zimmermann, to provide the basis for a new, internalised pan-European scientific law, founded on the tradition of legal doctrines shared by European scholarship in a trajectory of autonomous legal science founded in the first century BC. This approach limits histories of law, which examine the social implications involved in legal creation. The dogmatic exclusion of these histories prevents doctrinal history from realising the foundational origin of its philosophy is not based upon the reality of history, but on the circular reasoning of constructed narratives of continuity and science. A re-evaluation of the origins of these narratives, through an approach which appreciates the historical context of law, can help to evaluate the extent to which neo-pandectism is founded upon an unsteady basis.

proposes the concept in detail in *Legal Transplants: An Approach to Comparative Law* (1974)b. Watson eventually claimed that legal borrowing, even as early as the Roman Republic, was the principal means for legal development, Watson (1974)a 95. Indeed, he claims, “usually legal rules are not peculiarly devised for the particular society in which they now operate”, but rather borrow what is required from societies around them as a means of continuing good practice, see: Watson (1977) 98. Watson’s approach has an accepted difference from the logic-based formalism of pure science of law, nor is the idea that law develops from social experience, as encapsulated in Wendell Holmes’s pronouncement, “the life of law has not been logic; it has been experience”, see (1881) 1. Rather, Watson plays on that to claim, “the life of law has not been logic, it has not been experience; it has been borrowing”, (1974)b 79. Watson’s comparative approach, as a third way to the absolutes of formalism and realism, attempts to promote the use of “law in the books” as understanding “law in society” without engaging in a conflation of the two, see Watson (2007) 35. The approach has traction in the field of comparative law: for a quick overview of the uptake of the idea of legal transplantation in recent scholarship, see: Schauer (2000); Glenn (2003) Graziadei (2006); Fedtke (2006) Mousourakis (2013) Halliday & Shaffer (2016). For more theoretical analysis see: Watson (2013); Cairns (2013). While it is outwith the scope of this thesis to offer a more complex and thorough criticism of Watson’s abiding claim that legal development is from borrowing, rather than organic growth from within societies themselves, it offers, in its overall conclusions, a tentative negation of that idea in broad terms.

2.3. Narrative Origins: The Mucian Foundation Myth.

The fixation of scholarship with legal science in the wake of the Historical School and throughout the twentieth century led to the attribution of modern concepts to the Romans. Foremost among these attributions was the projection of legal science onto the Roman jurists. Of particular concern to adherents to the dogmatic narrative was the establishment of scientific practices among the Roman jurists. Some debate emerged as to the first among the Romans to purport the principles of science and take on the rôle as the first legal scientist. The debate centred on two figures: first was Servius Sulpicius Rufus; second was Quintus Mucius Scaevola *pontifex* (who was ultimately favoured). In the identification of the figure who founded legal science at Rome, modern scholarship established its founding myth and venerated its founding father. From this attribution the narrative of continuity, what Tuori calls the patriotic narrative, could be concretised.⁹⁸ For dogmatists, the establishment of legal science at Rome was the validation of modern efforts at the establishment of legal science. In this section, I will first outline the arguments for the foundational figure of Roman legal science. I will then consider its implications for the methodology of law at Rome and the origins of “science”. Lastly, I will offer apposite criticism to this attribution.

2.3.1 The Mucian Revolution: Legal Science at Rome.

The two chief contenders for the title of founding father of Roman legal science are Servius Sulpicius Rufus and Quintus Mucius Scaevola *pontifex*. Other candidates for the position, such as Cato the Elder, based on the antiquity of his discussion of law are proposed, but rarely find adherence.⁹⁹ The adoption of scientific views at Rome is a necessary component of the narrative trajectory of legal science, and the need for a founder of scientific law reflects the desire of later scholars to attribute their own methodological tool set back into antiquity.

Servius Sulpicius Rufus (c.106 BC – 43 BC) has a claim to the foundation of legal science based upon his treatment of law as, what Cicero calls, science (*ars*).¹⁰⁰ Tracts of sixteenth century

⁹⁸ See Tuori (2007) 21-69.

⁹⁹ Jörs is the most ardent proposer of the view that Cato was crucial in early legal development, attributing cautelery jurisprudence to his invention based on the Catonian rule at Dig. 34.7. and discussion thereof by Paul at Dig. 45.1.4.1. See Jörs (1888) 3111 f.n.1. Tuori points out that Jörs had revised this stance in his later works, see (2007) 42. Puchta had also held the view that Cato was the foundational character in legal science, before he discovered Mucius, see (1851) 618.

¹⁰⁰ Cic. *Brut.* 41, 152. Whereas Mucius is praised for his use of the law (*usus*), Servius is said to have treated it scientifically as *ars*. A discussion of the etymology and meaning of *ars* as science is provided at 1.3.

European scholarship had a tendency for crediting Servius with the creation of *iuris scientia*.¹⁰¹ While Mucius was largely ignored by early scholars, Servius received attention as the progenitor of legal categorisation up to the eighteenth century.¹⁰² Gibbon particularly attributes legal creation to Servius.¹⁰³ The fervour for Servius's input was stymied by the discovery of Mucius's influence in the eighteenth century, but there continues to be an undercurrent of scholarship which praises Servius's foundational importance to legal science. Stein offers some support for the view that Servius holds a central place in the development of Roman legal science.¹⁰⁴ This view has some favour with others.¹⁰⁵ Yet the acknowledgement of Servius as the innovator of legal science is dubious (not only on a narrative level) due to the total lack of surviving writing. The idea that Servius can be accredited as the founder of a discourse of legal science on the tenuous basis of a contemporary comment by Cicero and an intuition of later scholarship limits the persuasiveness of an attempt to canonise him as the saint of systematic law.

The arguments for Quintus Mucius Scaevola *pontifex* (died 82 BC) are more forceful. Scholars up until the eighteenth century overlooked Mucius in favour of Servius.¹⁰⁶ Yet, as the interest in legal science increased, the pre-eminence of Mucius intensified, as is shown by the flattering comments of Maiansius in 1764:¹⁰⁷

Hoc certum est Q. Mucium Scaevolam ex jurisconsultis primum fuisse regularum collectorem et ut erat acutissimo ingenio, fortasse etiam inventorem.

It is certain Q. Mucius Scaevola was first of the jurists to collect rules (systematically) and that as he was very sharp-minded; perhaps even the inventor (of this method).

Thus began an increasing uptake on the view that Mucius offered more than previously had been thought regarding the birth of legal science. By the mid-eighteenth century Hugo, while still attributing "science" to Servius, offered Mucius the title of the first didactic lawyer.¹⁰⁸ Haubold noted the extant controversy between the two characters for the position of the first legal scientist in 1826.¹⁰⁹ By the later eighteenth century, the pendulum had swung over to Mucius as the more favourable candidate.

Puchta identifies Mucius as the first lawyer to write categorically and present law as a real science, noting that this, based upon the work of laudable jurists before him, marked a "revolution" in

¹⁰¹ Budaeus (1557) 7, 59. Rutilius (1537) 11-116, 121-127; Hottomannus (1548) 162.

¹⁰² Heineccius (1755) [1716] 226-228.

¹⁰³ Gibbon (1788) in Bowersock, Clive & Graubard, eds. (1977) 390-397.

¹⁰⁴ Stein (1966) 41-42; (1978) 175-184.

¹⁰⁵ Bretone (1970) 7-16; Waldstein (1993) 85-147; Paricio (2002) 549 – 561.

¹⁰⁶ Tuori (2007) 36-38. Tuori notes the scant attention paid to Mucius prior to the eighteenth century.

¹⁰⁷ Maiansius (1764) 183.

¹⁰⁸ Hugo (1806) 341-342, 352-354.

¹⁰⁹ Haubold (1826) 211-212. This was also noted by Sanio (1835) 5, 22-24.

the treatment of law at Rome.¹¹⁰ Sanio, though more tentative, also believed that Mucius was responsible for the birth of legal science.¹¹¹ Voigt notes that after the innovations of Mucius, law at Rome became a systematic, closed legal science.¹¹² Krüger calls Mucius, “*Gründer der Rechtswissenschaft*”.¹¹³ The twentieth century brought more spirited attributions. Gerard points to Mucius as the initiator of autonomous law.¹¹⁴ Lepointe dedicated a book to Mucius as the founder of the “*esprit scientifique*” of Roman law.¹¹⁵ Schulz was bombastic in his praise for Mucius as the founder of legal science.¹¹⁶ The trend continued into the late twentieth century. Stein discusses Mucius’s rôle in the foundation of legal science.¹¹⁷ Watson states that, “Quintus Mucius deserves praise for being the first to arrange the civil law *generatim*”.¹¹⁸ Frier follows Schulz in attributing Mucius with a revolution in the approach to law, but offers a more nuanced view that he founded analytical jurisprudence.¹¹⁹ Nonetheless, he states that Mucius’s innovations “intensely marked a quantum leap in legal science”.¹²⁰ Schiavone takes the same view, calling Mucius the father of the method of Roman law.¹²¹ Behrends offers a compromise: Servius invented formal method, Mucius invented scientific method; both were, in a technical sense, scientific.¹²²

The consensus then of the last 150 years is that Quintus Mucius Scaevola *pontifex* (exempting some residual calls for Servius) founded legal science at some point in the late second or early first century BC at Rome. Mucius, much more so than Servius, offers some source material to justify this claim, with 46 quoted opinions appearing in the Digest.¹²³ His knowledge of the law, and intellectual and moral value, is attested to in ancient literary sources (that is, Cicero).¹²⁴ But what about these texts offers a basis for a claim that scientific method is rooted in the writings of Mucius? Surely more than

¹¹⁰ Puchta (1875) 174-175, 244-249.

¹¹¹ Sanio (1858) 39-42. He provided a revision to his earlier work mentioning the controversy between Mucius and Servius, attributing the creation of legal science to Mucius (1845) 136-152.

¹¹² Voigt (1858) 39-42

¹¹³ Krüger (1888) 59-62.

¹¹⁴ Gerard (1911) 46.

¹¹⁵ Lepointe (1926).

¹¹⁶ Schulz (1934) 33, 36-37; (1946) 64, 94.

¹¹⁷ Stein (1966) 45-47.

¹¹⁸ Watson (1974)a 155.

¹¹⁹ Frier (1985) 159-163. Frier goes on to call Mucius, “the father of Roman legal science and of the Western legal tradition, as “undeniably the earliest jurist to have significant impact on the juristic tradition at Rome, see Frier (1985) 168.

¹²⁰ Frier (1985) 171.

¹²¹ Schiavone (1976) 95-110; (1998) 59.

¹²² Behrends (1976) 287–290.

¹²³ Tuori (2007) 34 f.n. 64.

¹²⁴ Cic. *Brut.* 40., 147.; *Caec.* 18, 50., 24.69.; *Off.* 2.16.57.; 3.15.62; *Verr.* 2.10.27., 2.13.34., 3.90.209.; *Leg.* 2.19.47; *De or.* 1.53.229.

simply their antiquity? What change is so fundamental to the presentation of Roman law in Mucius's writing that it indicates revolutionary change?

Mucius's opinions, as they appear in the Digest, do not appear to offer an out of the ordinary bent towards categorisation, nor do they explicitly set out a theory of classification. They do offer, for the most part, sound opinion on the law. What is ascribed to him is a style of writing, found in later jurists, certainly imperial juristic codification, to a particular mode of writing. This style, which is called scientific, results from the categorisation of law into *genera* and *species*.

The legal sources testify to Mucius's position as the first scholar to engage in organising the law in this way, (Dig. 1.2.3.41.):¹²⁵

Post hos Quintus Mucius Publii filius pontifex maximus ius civile primus generatim in libros decem et octo redigendo.

Quintus Mucius, the son of Publius, and a pontifex maximus, became the first to produce a collection of the civil law, arranging it into eighteen books.

While there is some evidence of a clear movement towards a compendium of law, evidence is far too fleeting to associate Mucius with a revolutionary methodological shift. Ulpian quotes from Mucius seven times in relation to categorisation and definition, none is demonstrative of a clear scientific style.¹²⁶ Pomponius quotes him only once in this way.¹²⁷ Paul twice, though critically.¹²⁸ A sole book on *Horoi* containing definitions of Mucius is also in the Digest.¹²⁹ Further references unrelated to categorisation to work *ad Q. Mucium* is found in the Digest.¹³⁰

The stress placed upon Mucius seems to be wishful thinking more than the result of clear and irrefutable evidence. While Mucius offers an insight into early juristic opinion his writing on the law does not present an obvious scientific methodology, nor does his writing present a style of thought which can be viewed as revolutionary. The conclusion that Mucius's writing represented this scientific shift appear to have presumed – for, due to the narrative of autonomous science, such a shift must have

¹²⁵ Dig. 1.2.3.41.

¹²⁶ Ulpian quotes Mucius on definitions regarding firewood (Dig.32.55.pr.); the inclusion of items in legacies (Dig. 33.9.3.pr; Dig. 33.9.3.9.); persons included in *usus sui gratia paratum* (Dig.33.9.3.6.); interpretation issues surrounding the clause *quod eius causa emptum, paratumque esset* (Dig. 34.2.10.pr.); legacies of silver (D.34.2.19; Dig.34.2.27.pr..) and the use of *vis* (Dig.43.24.1.5.).

¹²⁷ On the issue of the inclusion of women's dinner dresses in the legacies of cross-dressing senators (Dig.34.2.33.pr.).

¹²⁸ On the issue of *possessoris quod inter genera possessionum posuit* (Dig.41.2.3.23; Dig.50.16.25.1).

¹²⁹ Dig. 50.17.73.

¹³⁰ Kaius Tuori provides an exhaustive compilation of Mucius in the Digest: (2007) 35-37. Alongside the texts already discussed, Tuori points to 140 quotes of Mucius by Pomponius and seven by Modestinus.

occurred – rather than evidenced, and the attribution of scientific law to Mucius has been accepted without concrete proof, but rather has been accepted for its narrative force.

2.3.2 ‘The Big Bang’: Greek Science as a Singular, Revolutionary Event.

The narrative of legal autonomy presented a problem for the reality of legal science. Scientific categorisation had been an importation of Greek philosophical thought. However, if Roman law was indeed an autonomous and internalised system, beginning with the revolution of Mucius and extending to the modern age, how could the external force of Greek philosophical thought have penetrated the mind-set of an already extant juristic class at Rome, and why did this external philosophical influence not persist throughout the ages? This section is interested in the consideration given by legal scholarship to the input of Greek thought to Roman law; a fuller discussion of how Greek philosophical ideas came to influence Roman ideas is given elsewhere in this thesis.¹³¹ The notion that Greek philosophical thought affected juristic thinking in the late second/early first century is largely uncontroversial. However, the preceding claim that has found consensus in scholarship since the Historical School is highly dubious: the idea that Greek science only penetrated the Roman legal mind once, as a single creative injection to provide the methodological tools necessary to create a ‘scientific’ system, and that after this initial input, the influence of Greek thought withered away to nothing, as Roman law internalised its own logical precepts and became autonomous. As quickly as Roman lawyers adopted Greek science, they are supposed to have excluded its on-going contribution, removing any external influence on legal doctrine after borrowing the utilisable methodology of categorisation. Akin to the Big Bang, the idea is that a sudden burst of revolutionary creativity shaped a new and impressive law of categorisation and science, and that from that event all future scholarship depended in continuity, with no further external input required. The law was made into perfect science as all aspects of legal creation were attributed to this singular incident, to the exclusion of continuous philosophical or social input. This section will summarise this position and cast doubt on its value.

The notion that the Romans adopted Greek philosophical thought in order to categorise legal rules has an overwhelming consensus in contemporary scholarship. Coing argued that there were Aristotelian influences in the way the law was formulated.¹³² The use of Greek philosophical modes by Roman jurists is noted by Behrends.¹³³ Ducos points to evidence of Greek influence in concepts of

¹³¹ See section 5.1.1.

¹³² Coing (1952).

¹³³ Behrends (1976).

law.¹³⁴ Nörr points to the logical considerations in juristic thought which evidence an appreciation of Greek categorical models.¹³⁵ A point supported by Talamanca.¹³⁶ Wieacker argues that the institutional roots of Roman law are Greek in origin.¹³⁷ Stein traces the impact of Greek thought in the creation of *regulae iuris*.¹³⁸

All of these scholars, while appreciative of Greek influence, link legal science to the Mucian Revolution – the idea of a singular injection of Greek categorisation. Among the most ardent supporters of this view is Fritz Schulz, whose attestation to the impact of Greek thought as a revolutionary burst is as forceful as his insistence on isolated, legal autonomy. Schulz gave the idea of Mucian adoption of Greek scientific principles fervent support, claiming it “proved to be verily the fire of Prometheus” for the development of Roman law.¹³⁹ The idea of sudden impact through the input of Mucius gained almost complete acceptance.¹⁴⁰

Nonetheless, no sources exist to substantiate such a view. The ongoing influence of rhetorical and philosophical influence is proposed by this thesis. The stance that such continued interaction must be precluded is determined upon the basis of a dubious grand narrative of continuity and legal science. Not on what the Roman sources outline.

2.4. The Challenge to Narratives: “Beyond Dogmatics”.

A growing movement to examine the extent to which Roman law is influenced by and impacted upon by society has emerged from the 1960s, particularly inspired by J.A. Crook’s *Law and Life in Ancient Rome*.¹⁴¹ This scholarship is fundamentally interdisciplinary insofar as it considers historical, sociological, economic and legal dimensions of study with equal vigour. The increase in this kind of scholarship is evident in the wide array of monographs, edited volumes, books and conferences which have adopted this method of conceiving research into the Roman legal past and present. Whereas there has never been a complete disregard by historians of law, or of history by lawyers, this scholarship forms a fundamentally new trend insofar as it is basically methodologically divergent from earlier forms

¹³⁴ Ducos (1984).

¹³⁵ Nörr (1972).

¹³⁶ Talamanca (1977).

¹³⁷ Wieacker (1953).

¹³⁸ Stein (1966). This approach had further support, see: Nörr (1972); Schmidlin (1976).

¹³⁹ Schulz (1946) 64.

¹⁴⁰ Schulz (1946) 68; Stein (1966) 36; Frier (1985) 163. Though Alan Watson is of the opinion that Schulz overplayed the impact of Greek via Mucius, see: (1974)a 193-195.

¹⁴¹ Crook (1967).

of cross-disciplinary scholarship. Earlier scholarship which has shown an historical interest in legal sources has tended towards an understanding of law-in-action as opposed to law-in-books and has been rooted firmly in the “law and society” movement. This scholarship has generally been concerned with attempting to understand how law operated practically in the Roman world, not only on the doctrinal considerations of the legal texts which we have inherited and, as a result, embraced economic and sociological considerations in order to reconstruct an understanding of the law’s ancient operation.

Newer scholarship has built upon this approach, but also differs from it in its aim. Whereas the first wave of interdisciplinary scholarship tended to reconstruct law as it was in Roman society and to distinguish that with doctrinal legal understanding, to separate “*la difference entre la vérité juridique et la vérité historique*”, the latest wave has less concern for understanding everyday practice.¹⁴² The second wave of new scholarship is more interested in the law itself, how and why it developed in reference to social and anthropological interpretations. In many respects, this approach is more akin to postmodernism than the kind of structuralist style of the social-science approach. Bryen points to the roots of this movement in critical studies and the humanities, stating that “it is worth adding that nearly all of these new histories are at least somewhat conversant (many are downright fluent) in what most American academics would label as Critical Theory.”¹⁴³ Bryen points out that this approach is anthropological and comparative in its methodology and ultimately concerned with locating legal meanings within a field which is “dialogically negotiated” within a broad understanding of social interactions.¹⁴⁴ Whereas this critical approach has a tendency towards a more doctrinal and formalistic understanding of law, it is acutely aware of external pressures and their altering effect on legal development of law beyond juristic input.

The two methodological approaches which have emerged share a commonality in their rejection of the dogmatic tradition which had confined Roman legal scholarship to doctrinal law. The doctrinal view of Roman law as *ratio scripta* has been replaced by new understandings which expand the framework in which it can be examined and imagined. The necessity for this re-envisioning of the approach taken to the study of law results from the limitation of the doctrinal approach in providing an explanation for why the law developed in Rome in the way it did. The challenge presented by these approaches is not unproblematic in that they require a redefinition of many accepted ways of thinking about law.

¹⁴² Winkel (1996) 125.

¹⁴³ Bryen (2014) 349.

¹⁴⁴ Bryen (2014) 349.

2.4.2. The Law and Society Movement.

The foundational text to the challenge of dogmatism is J.A. Crook's *Law and Life of Rome* (1967). Crook frames the book as neither about Roman law, nor about Roman social and economic life, but rather "about Roman law in its social context. An attempt to strengthen the bridge between two spheres of discourse about ancient Rome by using institutions of the law to enlarge understanding of society".¹⁴⁵ While aware of the limitations of a sociological approach, mainly due to a lack of utilisable evidence from the period, the application of a 'law and society' methodology in the approach to Roman law had a profound impact on understanding the development of law within its own context at Rome, rather than as isolated, scientific principles autonomous from society.¹⁴⁶

This approach gained increasing traction in the latter half of the twentieth century, to the extent that it presented a true alternative to dogmatic, legal science. Much of the literature produced focussed on the methodological nature of the change in approach, focusing on a justification for the new style against the backdrop of the primacy of legal science.¹⁴⁷ This was tied to a broader movement in legal history more generally, which aimed to recontextualise perspectives in light of society.¹⁴⁸ This approach eventually resulted in more comprehensive charts of Roman law in the context of the society in which it was practically used, relying on the Roman sources, without the lens of modern intellectual conceptions. Among the most successful of these are Jane Gardener's *Women in Roman law and Society* (1986); J.A. Crook's *Legal Advocacy in the Roman World* (1995); and David Johnston's *Roman Law in Context* (1999).¹⁴⁹ A wellspring of articles adopting this approach, alongside monographs, released the flow of a varied new current of scholarship attempting to locate Roman law within the context of

¹⁴⁵ Crook (1967) 7.

¹⁴⁶ For an overview of the methodological approach taken, see Cotterrell (2006) 62-69.

¹⁴⁷ Aubert & Sirks eds. (2002); Crook (1996); Ernst & Jakab eds. (2005); Travers (2010).

¹⁴⁸ Friedman (1986). The origins of the law and society movement within the field of law can be tracked to a jurisprudential dispute between the legal formalism and conceptualism that permeated legal discourse at the turn of the twentieth century, and drove the positivist legal agenda, and the approach taken, particularly in America, by legal realists. The relationship between law and society became an increasing approach within the school of legal realism, which sought to undermine the internalised, doctrinal approach to law and appreciate the social implications in the formation and practice of law – the difference between what Pound calls "law in books and law in action". The law and society movement began as an extension to this realist methodology, and soon found itself applied to legal history. For legal positivism see: Kelsen (1967) For the realist challenge, see: Pound (1910) For an overview of the debate, see: Halperin (2017)

¹⁴⁹ These works are acutely aware of their position in the framework of a new approach: Gardener, for instance, notes that the legal "material needs a historical frame of reference if it is to be of use in shedding light on the nature of the society which produced it" (1986) 1-2. She contrasts her historical-social approach to the doctrinal approaches taken in earlier works which aimed to examine particular areas of Roman law, such as Corbett (1930) on marriage, or Buckland (1908) on slavery.

Roman society. The result of this movement was an increased interdisciplinary approach among the areas of law, ancient history, classics, economics and social theory.¹⁵⁰

The law and society approach to the study of legal history offered a re-contextualisation of Roman law. The earlier processes of a dogmatic approach which had succumbed to the narratives of legal autonomy and patriotic continuity had relegated interaction with Roman law to a conceptual approach that salvaged legal principles from the corpse of the ancient legal system in order to transplant them into modern usage, ignoring the context whence they had come. By revitalising an interest in the social dynamic in which these concepts arose, the law and society movement drew attention to the intrinsic relationship between rules and the circumstances which result in them. The crisis in Roman law, its negation to a series of dusty books, dead to the practice of the modern age, but of some passing interest as the bones from which good legal concepts were picked, was overturned – to understand the concepts of Roman law, one now had to understand Roman society; to understand modern law, one had to understand the historical track from which it came.

2.4.3. A Fresh Approach: “Beyond Dogmatics”.

The second phase of the challenge to the dogmatic approach to Roman law arose from the law and society movement. This later approach was concerned with moving beyond the restraints of the dogmatic method and offering an appraisal of the Roman law on its own terms. Rather than attempting to reconstruct the law as it was at Rome based on textual evidence, this approach sought to consider methodologies from within the social sciences in order to provide an explanation of the multifaceted stresses which result in legal creation and change.

In recent years, a body of scholarship has begun to explore these issues.¹⁵¹ This movement can rightly be framed as an extension of the law and society movements insofar as it owes an obvious methodological debt to the challenge offered to the kind of functionalist isolationism, which the law and society movement began to break down. In the 2003 compendium *Beyond Dogmatics: Law and Society in the Roman World*, the editors, in their introduction, expressly point to the worthiness of the law and society approach, which allows for a realisation that there is no concrete divide between law and society but that “the absence of a meaningful collaboration between ancient historians and scholars of Roman law has created a false division”.¹⁵² The kernel of this statement was the assertion that the

¹⁵⁰ Treggiari (2002)

¹⁵¹ A non-exhaustive list of recent compendiums of scholarship in this mould: du Plessis, Ando & Tuori, eds. (2016); du Plessis (2016); du Plessis (2014); Cairns & du Plessis, eds. (2013); Cairns & du Plessis, eds. (2007) Tellegen-Couperus (2003).

¹⁵² Cairns & du Plessis (2003) 8.

vanguard approach of the law and society movement had been recognised as valid, scholarship now appreciated that a false division had been created by the rampant internalisation of legal discussion on Roman law, and now, the purpose of scholarship was not to prove the failure of the dogmatic approach, but to move beyond it and pursue a new methodology.

2.5. Rhetoric as a New Approach to Roman Legal Argumentation.

This thesis aims to provide a new approach to the framing of argumentation in Roman law, providing an analysis of the input of rhetoric in the development of legal concepts in the late Republic. While, as has been made clear in this chapter, the dogmatic approach to Roman law has limited the extent to which factors deemed as extra-legal, and therefore outwith the closed system of autonomous law, have been included in a consideration of Roman legal development, some work has been done in the field of law and rhetoric. This section will provide a summary of literature on the intersection of rhetoric and law, with a particular reflection on Olga Tellegen-Couperus and Tessa Leesen, before providing a clarification of the positions adopted in this thesis.

2.5.1. Rhetoric in Roman Law: A Review of Current Trends.

In line with the acceptance of the narratives of continuity and legal science, rhetoric was discounted from legal scholarship as extraneous to Roman scientific law. Schulz states that the jurists of ancient Rome:¹⁵³

Stood fast and refused to suffer the noisome weed of rhetoric, which chocked so much else that was fine and precious, to invade their profession.

Schulz argued that the isolation (*isolierung*) of the Roman jurists results from legal methodological autonomy through science and the professionalisation of the juristic class.¹⁵⁴ Rhetoric, the speciality of the orators, or advocates, was, in this understanding, left well alone by jurists whose time was spent in the study of law. Schulz was not alone in this view, Horak, in discussing the Roman jurists reception of rhetorical theory in Cicero's *Topica*, which will be discussed more thoroughly later in this thesis, states:¹⁵⁵

¹⁵³ Schulz (1946) 55.

¹⁵⁴ Schulz (1946) 54-56.

¹⁵⁵ Horak (1969) 48.

der römischen Jurist scheint zu sehr in den Schranken seines Fach befangen zu sein, als dasz er so Ungewohntes hätte in seine Wissenschaft integrieren können.

Other scholars agree with this prognosis.¹⁵⁶ It forms part of the general impression of rhetoric as excluded from the consideration of law as a separate discipline dealt with by a separate professionalised group. This separation was rooted in the narrative of legal scientific autonomy. It also arose from the continuity narrative as modern professors, whose expertise was rooted in the specialism with the law and not in rhetoric, supposed their ancient forebears to have operated in the same conditions as themselves. By these means rhetoric was excluded from discourse in Roman legal scholarship in favour of the dogmatic approach to legal science, as outlined in this chapter.

Some attempt to rehabilitate the rôle of rhetoric was made in the twentieth century. Yet, it was not until the turn of the new millennium that a realisation of the worth of an examination of rhetoric was approached with purpose. In the vanguard of this movement is Olga Tellegen-Couperus.

Tellegen-Couperus offers a challenge to the prevailing view by providing a re-evaluation of the ancient sources on the basis that the Historical School, in asserting the pre-eminence of logic, had delimited the extent to which rhetoric had an influence on legal argument by subsequent scholars for the reconstruction of classical Roman law, as she states:¹⁵⁷

It was only to be expected that the legal historians who undertook this job took over the ideas of the Historical School with regard to law and science: they assumed logic ruled the law and that rhetoric had nothing to do with it. Consequently, they distinguished between juridical sources and non-juridical sources: they regarded the first category, including the *Corpus Iuris* and Institutes of Gaius, as useful, but the second category, containing for instance the rhetorical works of Cicero and Quintilian as irrelevant ...

This understanding of the exclusion of rhetorical sources is in keeping with an understanding that the Historical School and subsequent scholarship adhered dogmatically to narratives of science and continuity. The distinction drawn in the sources reflected a distinction drawn in the author of the sources.¹⁵⁸ Orators or Advocates were supposed to differ greatly in their methodological approach to jurists, who formed a professionalised group of academic lawyers, and limited themselves in the main to legal science, in the same way that orators limited themselves in the main to rhetorical theory. This distinction will be challenged in Chapter Three.

¹⁵⁶ Schmidlin (1970) 198; Nörr (1977) 48; Fuhrmann (2000) 65.

¹⁵⁷ Tellegen-Couperus (2003) 16.

¹⁵⁸ Tellegen-Couperus (2003) 16.

For Tellegen-Couperus the initial challenge lay in the presentation of rhetoric as a conceivable means by which Roman jurists could inform their arguments. This focussed primarily on an appraisal of rhetoric in the classical period of Roman law. In Tellegen-Couperus's edited book *Quintilian and the Law* (2003), an approach which provides an appreciation of rhetorical argument in relation to the law is adopted. Robinson offers a survey of the unappreciated extent to which Quintilian uses rhetoric to offer a communicative argument of law.¹⁵⁹ Katula argues that the use of rhetoric to create emotion in the courtroom leads to an inevitable relationship between rhetoric and law.¹⁶⁰ Rodríguez Martín adopts this approach from a specifically Roman perspective, revealing how the *iudex* might arrive at a decision from a persuasive rather than a legal origin.¹⁶¹ Tellegen-Couperus takes this point to draw out the interaction between style and law, and how, in the pursuit of winning a case, the ultimate goal of any advocate, the use of emphasis can be pivotal.¹⁶² The most intriguing of the chapters provided in the book, by Tellegen, offers an approach to the famed *causa Curiana* of 92 BC, contesting that the case had more ramifications for rhetoric as an argumentative method by which the law developed than had previously been assumed.¹⁶³

Tellegen-Couperus's work began to focus more thoroughly on the effect of rhetorical thought in classical juristic argumentation, particularly around the controversies between the Sabinian School and Proculian School. Tellegen-Couperus sought to re-appraise the controversies outwith the internal system of law, offering an approach which did not rely solely on legal reasoning, but on explorations of other forms of reasoning, like rhetoric.¹⁶⁴ While, the foundation of an approach which provided an approach inclusive to rhetorical sources had begun, Tellegen-Couperus did not begin, though called for, a concerted appraisal of rhetoric in Roman law.

Tessa Leesen answered this call in *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (2010), which focusses on the controversies between the two *sectae* of Roman lawyers, the Proculians and Sabinians, as a means by which to examine the methodology and argumentation employed in juristic writing.

Leesen is conscious of the penetration of the narrative of the adoption of legal science on modern scholarship's understanding of Roman law. Adherence to this narrative has precluded an

¹⁵⁹ Robinson (2003) 59-66.

¹⁶⁰ Katula (2003) 145-156.

¹⁶¹ Rodríguez Martín (2003) 157-167.

¹⁶² Tellegen-Couperus (2003) 237-245.

¹⁶³ Tellegen (2003) 191-200.

¹⁶⁴ Tellegen-Couperus (1993) 471: "Un des raisons de mon scepticisme réside dans le fait que ces chercheurs, tout comme d'ailleurs ceux qui cherchent l'explication de la différence entre les écoles dans des critères scientifiques, pensent que les controverses relèvent de la théorie juridique, et cela me semble inexact ... Selon un grand nombre de chercheurs, les écoles étaient des '*schools of thought*', des instituts scientifique qui représentaient deux tendances dans la science du droit de l'époque".

appreciation of the influence of extra-legal subjects, especially rhetoric, on juristic thought. Jurists remained legal scientists whose methodology reflected that mindset. They are portrayed not as practical lawyers, but as academics. Leesen argues that: ¹⁶⁵

The dogmatic approach to Roman jurisprudence has spilled over into modern views on the Roman jurists themselves. They are not seen within their historical context, but are regarded as a class of unworldly armchair scholars.

Lessen's work acknowledges the narrative forces which have dominated the discourse on Roman law, building upon the growing challenge to dogmatism to offer an approach which includes rhetoric as a legitimate source in which legal argumentation can be located.

Previous interpretations of the controversies between the Sabinian School and Proculian School indicated a fundamental philosophical or political difference creating the distinction in conclusions, based on an application of the same legal methodology from differing postulates, resulting in methodological similarity, but divergent conclusions.¹⁶⁶

Leesen follows Tellegen in his analysis that the origin of the *ius respondendi* lay in Augustus's attempts to control and unify the issuing of *responsa*.¹⁶⁷ Tellegen had argued that the *ius respondendi* was used as a centralising tool to limit the excessive *responsa* of the schools which diminished from legal certainty.¹⁶⁸ The schools, he argued, had their origin in groups of jurists coming together to form a place where "juridical problems were discussed and opinions were given under the direction of a leading senator well-versed in law."¹⁶⁹ Tellegen argues that the right to respond was granted to the leaders of the two schools after a juristic split dating from the time of Augustus.¹⁷⁰ He concludes that, given that both these leaders issued divergent opinions, the practical consequence was controversy, leading to the termination of the *beneficium* by the emperor Hadrian.

To this context, Leesen adds the second "key" of rhetoric to her analysis of the controversies, arguing that rhetorical theory, specifically the *topoi*, were "apposite methodological tools in the hands

¹⁶⁵ Leesen (2009) 19.

¹⁶⁶ Karlowa (1885) 663 viewed the distinction as one of "*Verschiedenheit der Grundrichtung*" where the Proculians based their opinions on a progressive, outward looking "*Preregrinische Anschauungen*" as their postulate, whereas the Sabinians took a more conservative, traditionally Roman starting point. Voigt (1889) 1.22. also argues that the controversies resulted from a conservative and progressive political outlook. Similar arguments can be found: Schulz (1951) 164-165; Schwarz (1952) 380-381; Kaser (1971) 275; Liebs (1976) 259; Albanese (1979) 431; Pugliese (1991) 408; Falchi (1981) 285.

¹⁶⁷ Leesen (2009) 20-29.

¹⁶⁸ Tellegen (1988) 264-311.

¹⁶⁹ Tellegen (1988) 281.

¹⁷⁰ Tellegen (1988) 282.

of the jurists.”¹⁷¹ The link between jurisprudence and the topics is not in itself new.¹⁷² However, Leesen’s analysis, which traces controversies to forms of topical argumentation found in Cicero, provides an important and innovative inquiry into the extent to which the jurists’ writing can be seen in a rhetorical light.¹⁷³ Leesen argues that, in providing a compelling link between topical argumentation and the controversies she will provide both a re-evaluation of the worth of rhetoric to Roman law and strengthen the argument proposed by Tellegen that the leaders of the schools held the *ius respondendi* during the Principate.¹⁷⁴ This approach offers an inventive analysis of juristic writings, which makes a valuable contribution to challenging a dogmatic reading of Roman legal sources.

Leesen’s approach offers an alternative exposition of the reason for controversies in Roman law, looking to the link between the law in practice and the law in books and providing an analysis which considers the interrelated nature of prescribed law and applied law. While some of the attachment of controversy to legal argument proposed by Leesen is speculative, her argument nevertheless reveals a new methodology in the tracing of the archaeology of legal opinions at Rome, appreciating rhetoric as a means by which legal arguments can be constructed.

The recent trends in the realisation of rhetoric as a perceptible basis for juristic argumentation at Rome widens the parameters of investigation in legal reasoning at Rome from the narrow bounds of dogmatic legalism. This thesis aims to progress with this approach, examining the extent to which rhetoric was present in legal argumentation in the late Republic.

¹⁷¹ Leesen (2009) 29.

¹⁷² Viehweg (1953) argued for a link between rhetoric and law. Whereas Leesen argues that topical argumentation was used to support existing stances of law in controversy, Viehweg argued that rhetoric may have been a source of juristic innovation - a stance with which I have great sympathy.

¹⁷³ Leesen (2009) 32-40. In her introduction, Leesen thoughtfully considers the definition given to *topica* and rhetoric before engaging in her study. She relies on Cicero to provide the primary definition, noting that this would have been a text extant to the Roman jurists themselves. Cicero is followed closely in his comments on the application of *topoi*, see: Cicero, *Top.* 2.7., 2.6-4.24., 21.79-26.99., 3.11., 17.66. This is substantiated by reference to Quinti. *Inst. Or.* 5.10.20-22.

¹⁷⁴ Leesen (2009) 44.

2.6. Summary of Findings.

Narratives of continuity and legal science developed from the German Historical School of the nineteenth century and imposed themselves dogmatically upon Roman legal scholarship. These narratives deeply informed scholarship's treatment of the Roman sources, ascribing modern concepts back onto modernity, and establishing science as a key feature of ancient Roman juristic treatment of law. These narratives were ill founded. They led to the preclusion of rhetoric from scholarly consideration, as an extra-legal and therefore superfluous device. This was a misstep. This thesis will go on to propose that rhetoric was a central feature of legal development at Rome.

3. The Orator and Jurist Dichotomy.

This Chapter will focus on the dichotomy between jurists and orators that supposedly existed in Republican Rome. The dichotomy is the bifurcation of individuals into two groups of professional specialists: the first, jurists, academic lawyers; the other, orators, rhetoricians and speakers. The separation was based upon the narratives of continuity and legal science. The first narrative ascribed the practice of modern academic lawyers to the Republican age, supposing that ancient lawyers had as little to do with rhetoric, just as their modern counterparts. The second narrative maintained that as law had become an autonomous science after the Mucian Revolution, jurists, as legal scientists, required specialisation and professionalisation to interpret it, and thus excluded themselves from other groups. This Chapter refutes that claim. First, it examines Roman education to reveal the multifarious nature of subjects studied and the lack of qualification and professionalisation present at Rome. It then looks at the education and early career of Cicero as a case study, in order to establish the lack of exclusive specialised education and practice at Rome. It then examines the nature of professionalisation at Rome, concluding this is overstated by the dominant scholarly position. Lastly, it looks at legal practice at Rome to establish a more nuanced appreciation, concluding that jurists and orators were not strictly separated, nor mutually exclusive, but very often the same, or similar, people engaged in the same, or similar, activities.

3.1. Roman Education in Law and Rhetoric.

Early Roman ideals regarding the education of children were rooted in the family, the *paterfamilias* controlling the schooling of those in his power. Education had a strong moral tone and was devoid of enterprise towards holistic, intellectual idealism. Barclay sums up the early period of education as “not the transmission of knowledge; it was the transmission of tradition”.¹ This characteristically utilitarian Roman tradition of education was displaced by a growing acceptance of Greek intellectualism.² This involved a movement towards systematic training and dialectic engagement at the cost of the slow, customary progression of native Roman tradition. The core of this included a widening of taught subject matter to include Greek rhetoric and philosophy. It also brought about a modification in the administration of education, as specialist teachers – either slaves or hired freemen, commonly Greeks – were engaged to provide in-depth education to male children of the upper classes.³ The introduction

¹ Barclay (1959) 159.

² Gruen (1984) 250-272 provides a helpful sketch of this process.

³ Seneca the Elder outlines that before the Augustan age all teachers of rhetoric were slaves or freedmen – see Sen. *Controv.* 2. Praef. 5: “by a custom hardly to be approved, it was shameful to teach what it was honourable to

of teaching in Greek modes of philosophy and rhetoric is particularly important in bringing about a cultural shift in Rome during the second century BC, which led not only to social change but also to an intellectual enlightenment in law.

The basic conception of rhetoric is that persuasive public argument could be taught and intellectually rationalised.⁴ Within the Roman context, the origins of an attempt to teach rhetoric began with an initially well received Athenian embassy of noted Greek rhetoricians in 155 BC.⁵

The initial zeal with which Greek thought was received, particularly by the young, was set back by a reactionary suppression of Greek thought by a traditionalist intransigence. Nevertheless, resistance proved futile and eventually even the bitterest critics of the reception of Greek ideas waned in their belligerence.⁶ By the second half of the second century the reception of Greek ideas as a central feature of Roman education - and Roman culture more broadly - was more assured.

The educational spirit of the later second century BC and into the first century BC can rightfully be termed 'Greco-Roman', following on from the broad embrace of Greek educational ideology at Rome.⁷ Following on from the educational theories of the fifth century BC Sophistic movement, a divergence occurred between the scientific philosophy of Aristotle and the Isocratic rhetorical programme.⁸ The influence of Aristotelian categorisation on the law is taken as the most evident influence on later developments towards legal science at the turn of first century BC.⁹

learn." Cicero, though in agreement about who performs the majority of teaching, is rather more gracious in assessment of its honour, viewing it as appropriate for those of a particular class - see Cic. *off.* 1.151: "medicine, architecture, and the teaching of honourable subjects; these pursuits are honourable to those of the appropriate class".

⁴ Habinek (2005) 28-59; Connolly (2009); Steel (2017).

⁵ Cic. *De or.* 2.155; *Tusc.* 4.5.; *Academica* 2.137; Gell. *N.A.* 6.14.8-10; Plut. *Vit. Cat. Mai.* 22.

⁶ Resistance to Greek pedagogy had been entrenched from the on-set of Greek influence on Roman culture. The strength of feeling against rhetorical and philosophical teaching is exemplified in a *senatus consultus* of 161BC which banished teachers of these disciplines from Rome - see: Suet. *Rhet.* 1. This decree seems to have had little impact given the reception afforded to the Athenian embassy, the continued growth in Greek teaching and the continued interest of Romans in Greek thought: Aemilius Paulus, for instance was accomplished in Greek oratory and had his children educated after that fashion (Plut. *Vit. Aem. Paul.* 6); Sempronius Gracchus, father of the famed Brothers Gracchi was of such acquaintance with rhetoric that he was able to impress an audience at Rhodes with his skill in 164BC (Cic. *Brut.* 70). The growing approval of the reception of rhetoric and philosophy was by no means universal. Cato the Elder became the emblematic personification of the bind to Roman traditional morality and opposition to foreign corruption of Roman thought. His famous anti-Greek pronouncements contained barbed attacks on rhetorical tutelage: "Grasp the matter and the words shall come themselves" (*Rhet. Lat. Min.* 375); "Greek literature will be the ruin of Rome" (Plut. *Vit. Cat. Mai.* 23.); and his denunciation of the Greek orator as merely "a good man able to speak" (Sen. *Controv. Paref.* 9; Quint. *Inst Or.* xii 1.1.). Nevertheless, even Cato in old age eventually accepted that there was something in Greek thought (Cic. *De sen.* 3; Plut. *Vit. Cat. Mai.* 2), as the tide of Roman intellectualism tended toward the more hellenophilic.

⁷ Heath (2017).

⁸ See Gwynn (1926) 30-60 for a broad outline of the historical context of this divergence. Heath (2017) gives a good overview of Greek pedagogy in rhetoric.

⁹ Schulz is convinced that the formalising qualities of systematisation are the principal influence of Roman legal development in the Hellenistic period of Roman jurisprudence - Schulz (1946) 39: "The formative discipline of Greece enabled the natural and national energy of Roman legal science to reveal itself: *doctrina vim promoviti*

The Isocratic programme was designed for a broad political education, which nurtured an intellectual culture, or *παιδεία*, which had become prevalent in Hellenistic thought.¹⁰ The rhetorical education of the Isocratic programme in many ways outshone the Aristotelian programme in regard and in its popularity.¹¹ Its rhetorical focus had an impact on Roman oratory and Roman rhetorical manuals developed after the Greek fashion. Rhetoric became an increasingly important tenet of Roman political and social life during the preceding century, reflecting the acceptance of its primary place in education. From the end of the second century BC to the beginning of the first century BC, Roman education, reflecting Roman culture, had accepted Greek influence with increasing fervour. The ideology which had underpinned early Roman education reflected the traditionalism of the culture – the *mos maiorum* – through the influence of Greek conceptions of *παιδεία*. This had transferred to an ideology of intellectual idealism, philosophical thought, eloquent rhetoric and political awareness. Gwynn claims that this new Greco-Roman culture can best be ideologically captured in the term *humanitas*.¹²

The course of the first century BC was rife with political disruption. This disruption, nevertheless, coincides with both the period of legal creativity most associated with the creation of legal science and our most attested period of educational practice. The reception of Greek educational ideals had become widespread in the last years of the second century BC: Romans had begun in significant number to learn Greek; to educate their children according to the Greek models; to become intellectually influenced by Greek ideals; and to view knowledge of Greek thought as a mark of sophistication. Nevertheless, some reluctance to fold completely to Greek thought remained. Marius was able to rise to the office of consul despite Sallust's assessment that "he practised neither Greek eloquence nor the manners of town-life".¹³ Opposition to Greek thought took on a renewal in the first years of the first century BC as it became associated with upper-class decadence and as a pastime for the idle urban elite. This led to a second censuring of the teaching of rhetoric and philosophy at Rome by edict of the censors L. Lucinius Crassus and Cn. Domitius Aenobarbus in 92BC. The text of the edict is reported by Suetonius in full:¹⁴

insitam." Watson too, though reluctant to grant Greek philosophical input too much sway in Roman legal development, grants Greek philosophy the credit of the basic tools of systematic, categorisation – Watson (1974): "the Greek contribution was the double invention of γένος, genus and εἶδος, species." Similar attitudes to Greek influence are found elsewhere: Stein (1966) 36; Frier (1985) 163; Berman (1983)139. These reports of the influence of Greek thought on law tend towards examining Hellenistic ideas in purely Aristotelian terms. That is to say, they see Greek influence as supplying a form of systematisation which the Roman jurists utilised; however, they remained reluctant to examine rhetoric as relevant to Roman jurists during that period.

¹⁰ Connolly (2009). Cic *Inv. Rhet.* I.1-5.; Quint. *Inst. Or.* I.pr. 9-20, 12.2.21.

¹¹ Connolly (2009)

¹² Gwynn (1926) 58

¹³ Sall. *Iug.* 63.3. Plutarch also provides an amusing account of Marius's reasoning in not accepting Greek rhetorical or philosophical training at Plut. *Vit. Mar.* 2,22: "It is said of him that he never learnt to read Greek, nor ever used the Greek language for any civilised purpose, thinking it foolish to learn a language which was taught by men who were themselves slaves."

¹⁴ Suet. *Rhet.* 1. The authenticity of this text has been questioned - see Marx (1894) 144. However, it seems more likely than not to be accurate, see Gwynn (1926) 61. Its substance is corroborated by Tacitus – see Tac. *Dial.* 35.

Renuntiatum est nobis, esse homines qui novum genus disciplinae instituerunt, ad quos iuventus in ludum conveniat; eos sibi nomen imposuisse Latinos rhetoras; ibi homines adulescentulos dies totos desiderare. Maiores nostri, quae liberos suos discere et quos in ludos itare vellent, instituerunt. Haec nova, quae praeter consuetudinem ac morem maiorum fiunt, neque placent neque recta videntur. Quapropter et eis qui eos ludos habent, et eis qui eo venire consuerunt, videtur faciendum ut ostenderemus nostram sententiam, nobis non placere

It has been reported to us that there be men who have introduced a new kind of training, and that our young men frequent their schools; that these men have assumed the title of Latin rhetoricians, and that young men spend whole days with them in idleness. Our forefathers determined what they wished their children to learn and what schools they desired them to attend. These innovations in the customs and principles of our forefathers do not please us nor seem proper. Therefore it appears necessary to make our opinion known, both to those who have such schools and to those who are in the habit of attending them, that they are displeasing to us.

This edict provides us with some information: that the Romans had adopted rhetorical training in a widespread way; secondly, that they had adapted it in order to fit more fully with the Latin language and Roman society, as Latin rhetoric; that its teaching in schools by trained teachers was prevalent; and that opposition to it on a conservative basis was extant. The incident is more curious given the censors who enacted it. Crassus and Domitius disagreed to such an extent that their censorship was cut short due to an abdication brought about by irreconcilable differences.¹⁵ Nonetheless, there seems to be agreement here. Moreover, Crassus is noted as the greatest orator of his day whose knowledge and use of Greek rhetoric was well known. It seems odd that he should be complicit in the suppression of rhetorical teaching, let alone, as Cicero would have it, be solely therefore responsible.¹⁶ Cicero presents some defence of his mentor by alluding to a poorer quality of instruction in teaching provided in Latin rather than Greek.¹⁷ This seems an unsubstantial reasoning for such a draconian measure as the edict sets out. Contemporary political considerations – the growth of popular movements and the democratisation of

– who, though evidently aware of Cicero's revisionist defence of Crassus as author at *De or.* III 93, nevertheless reports on the edict more closely to the version provided by Suetonius.

¹⁵ Cic. *De or.* II 45.

¹⁶ Cic. *De or.* III 93-95.

¹⁷ Plotius Gallus is noted as the first to teach rhetoric at Rome in the Latin language – see Suet. *Rhet.* 2. Cicero mentions enthusiasm for his teaching in a letter to Titinus but also cautioning against teaching in Latin – see Cic. *Titinius*, 1: “For my part I remember that when I was a boy a certain Plotius for the first time began teaching in Latin. People flocked to him and everyone anxious to learn trained with him. It distressed me that I was not free to do the same, but I was held back by the authority of very learned men who held that minds could better be nourished by Greek exercises.” In *de Oratore*, Cicero presents Crassus as defending his censorship by outlining that where good tuition in Latin could be found it is superior, but in the case of the growing number of schools of Latin rhetoric, they remained below par – see Cic. *De or.* I. 94.

rhetorical skill through Latin tutelage - may be a more compelling reason for the banishment of Latin rhetoricians.¹⁸ Nevertheless, the timing of the edict seems unusual within the broader trends of Greek influence at Rome. Teaching of rhetoric was widespread at this time in Rome and several of the highest ranking Romans of the time, including Crassus, were scholars of rhetorical art, though to what extent these teachers could be termed *latini rhetores* is unknown.¹⁹ Plotius Gallus remains the only verified teacher of rhetoric in Latin at this time; nevertheless, it seems absurd for the passing of an edict had he been the only one in existence.

The scope of the edict, certainly as given by Suetonius, goes further than the expulsion of teachers of rhetoric in Latin but rather to the expulsion of all teachers of rhetoric in Rome, a practice which was widespread. The impact of the banishment was certainly not fatal to rhetoric and philosophy at Rome. The rhetoricians and philosophers returned to Rome after the Social War, as the *lex Julia* offered citizenship to Latins and Italians who had not revolted and ushered in a more popular political approach. Rhetorical education, after this startling interruption was revived. In the late 80s BC, we are presented with the *Rhetorica ad Herennium*, the oldest surviving rhetorical textbook in Latin.²⁰ In the late 80s BC, at the precocious age of around twenty-one, Cicero had produced his own rhetorical handbook in Latin, *de Inventione*.²¹ Rhetoric, by this period, had come to be viewed as effectively Roman enough to avoid further suppression. The Romans had in fact, “fashioned Greek educational principles into a uniquely Roman form of citizen training”.²²

Roman education did not specialise, nor professionalise. Neither in law, nor in rhetoric. Rather, it offered a comprehensive ability to engage in the study of both.

¹⁸ L. Licinius Crassus was an optimate with a conservative leaning. During his consulship of 95BC the *lex Licinia Mucia* was passed, requiring that everyone bar citizens leave Rome, an indication of Crassus’s conservative political rationale.

¹⁹ Cic. *Brut.* 102-107. outlines the tradition of instruction and influence on the development of rhetoric at this time. Suet. *Gram.* 6. tells us that Aurelius Opellius was teaching rhetoric in the years up to 92BC.

²⁰ See 5.2. of this thesis for more detail.

²¹ The timing of Cicero’s *de Inventione* and its thematic similarities to *Rehtorica ad Herennium*, led not only to St. Jerome’s erroneous attribution of the latter to Cicero in the fifth century AD (Jer. C Ruf 1.16 (CCSL 79 p.12 4-5), but also to a long scholarly association between the two works, see: Hilder (2015) 14-34 for a broader discussion of the authorship and dating of - as well as the relationship between - *de Inventione* and the *Rhetorica ad Herennium*.

²² Corbeil (2001) 261. Corbeil argues convincingly that what practices were deemed as positive aspects of Greek education were “naturalised” by the Romans in the first century BC.

3.2. Cicero as a Student, a Case Study.

The education of Cicero provides a compelling and informative case study of the education provided to young Roman men of the upper classes at the turn of the second century BC. Cicero is not only interesting for the period in which he was educated but also because his education is well documented. His training, under Crassus and Mucius, places him under the tutelage of the pre-eminent jurist and orator of his time, and this allows us to track the impact of these influences on his future career. Cicero's education includes both legal and rhetorical training.

While Cicero provides an interesting case study and much can be taken from the account of his education, his exceptionality as an individual does limit the extent to which any generalisation can be drawn from his education and life. Nonetheless, information on the general conception of Roman practice in these fields is elucidated by an examination of Cicero.

Cicero's father, a member of the equestrian order, was keen that his children should receive an education that would provide them with the intellectual and moral fortitude for a senatorial career.²³ Cicero was highly receptive to his studies. His very early education was at Arpinum, but after his father's relocation to Rome, his education continued there. According to Plutarch, Cicero was able to attend specialist schools at Rome.²⁴ Cicero makes mention of receiving the bulk of his childhood education at home.²⁵ He was educated by Greeks who specialised in teaching, but was, by the end of his instruction, sceptical as to their methods.²⁶ Thereafter, he embarked on rhetorical training in Greek, having been warned away from training in Latin. The early education of Cicero was not limited to rhetorical and linguistic training. He also studied the law and had memorised the Twelve Tables as a child.²⁷ The childhood education of Cicero falls broadly in line with the teaching of general principles in fashion in Rome at the time, albeit with a particularly gifted student under the power of an educationally conscientious father. Having attained a grounding in Greek, literature, history, rhetoric, philosophy and precepts of law, Cicero undertook a course training by following famed practitioners of law and rhetoric.

Cicero undertook serious study under the tutelage of L. Licinius Crassus, "the best lawyer of the orators".²⁸ He also followed the famed orator Marcus Antonius. Antonius and Crassus were regarded

²³ Cic. *Brut.* 112; Cic. *De or.* I.113-115; III.35-36.

²⁴ Plut. *Cic.* 2.2 - 2.4

²⁵ Cic. *Leg.* 21; Quint. *Inst. Orat.* I.10.

²⁶ *De or.* II.133; III.75.

²⁷ Cic. *De Leg.* II.4.23. We can take this to having been a custom of Roman education. Cicero notes that the learning of the Twelve Tables later fell out of favour and the learning of the edict became more usual.

²⁸ Cic. *Brut.* 145.

as the best orators at Rome and became the main interlocutors of Cicero's later work *de Oratore*.²⁹ Cicero reports that Crassus and Antonius were both well educated and spoke Greek fluently.³⁰

The focus of Cicero's practical training was law and rhetoric. In these subjects, he undertook the most extensive of his tuition under the foremost practitioners of his age. That said, he continued to pursue literature and philosophy with the enthusiasm of a would-be polymath.³¹ The central focus on law and rhetoric results from their usefulness in propelling a politically ambitious man to fame at Rome. Cicero was no soldier; he sought his fame through more intellectual means. He sought out instruction from the most learned jurists and orators of the day.

3.3. The Imposition of Professionalisation.

The educational basis which has been presented so far outlines that young Romans were exposed to a broad education, which encompassed various subjects. Specialised training resulted from tutelage under practising experts, following their practice, and engaging with material in a practical way. No formal qualifications were granted in order to certify ability; no set curriculum afforded a course of study which could be followed in order to provide entry into particular career paths. Rather, following their own interests and abilities, young Romans presented themselves as the disciples of famed practitioners and proved themselves on practical merit. Nevertheless, the argument for a separate and professionalised class of jurists, as separate from advocates, is made forcefully by several adherents to the narrative of Roman legal science. I contend that the separation of jurists as a distinct class is proposed so vehemently as is necessary in order to argue that the law developed a unique, scientific legal identity in the late Republic. In reality, the proposition does not reflect the sources accurately and undervalues the extent to which an examination of Roman education in this period points to an overlap in expertise between advocates and jurists to the extent that the two titles refer to persons engaged in activities which often intersect. However, this presentation threatens the autonomy of law as a concept, as the sanctity of law as an internalised system comes under threat from rhetorical influence if the methodology of the Roman jurists is infected with extra-legal sources.

Fritz Schulz is keen to distance jurists from advocates and, consequently, the law from rhetoric. He reports that the genesis of the jurists arises from the tradition of the pontifical college and associates the authoritative isolation of the priests' college with the authoritative isolation granted to jurists as

²⁹ Cic. *De or.* III.16

³⁰ Cic. *De or.* II.1-5.

³¹ Cicero nevertheless continued training under tutors in other subjects : the scholar L. Aelius Stilo remained a source of tutelage – see Cic. *Brut.* 207; as does the poet Archias – see also Cic. *Pro. Arch.* 1 for Phaedrus – see also Cic. *De Fin.* I.16.

specialists in their field rather than as the only, legitimate source from which such authority arises, as the priests claimed.³² The development of nonprofessionals as legal commentators – timeously with the arrival of Greek influence at Rome in the second century – began a movement towards the loss of sacral law as paramount, and towards civil law as a social rather than religious consideration.³³ Schulz argues that, in addition to the continuing tradition of jurists of a religious background, a class of non-pontifical jurisconsults emerged, which he subdivides into those of an aristocratic patrician background, those of an equestrian, careerist background, and lastly those about whom we know little more than a passing reference.³⁴ The second of these groups came to prominence in the later second and first centuries BC. The equestrian jurists of the first century, the contemporaries of Cicero, form a more specialised and careerist grouping. Their prominence, for Schulz, signalled the professionalisation of the legal class and an embrace of Hellenistic systematisation. Schulz ascribes both specialisation and isolation as characteristic of their operation, stating that, “the jurists of this group, by their withdrawal from politics and their tendency towards specialisation, exhibit very clearly two characteristics of the Hellenistic spirit”.³⁵ This specialisation was a nascent form of professionalisation and their remoteness from politics was indicative of their isolation in dedicated legal reasoning. Of equal specialisation but as a categorically separate class were the advocates, to whom rhetorical and philosophical reasoning was the primary consideration, and to whom knowledge of the law did not go beyond that meagre amount necessary to their profession:³⁶

From the jurisconsults we must sharply distinguish the advocates (*oratores*), in spite of the modicum of legal knowledge which they necessarily possessed. Greek example brought rhetoric into the Roman courts; Cato’s plain, thoroughly Roman advice *rem tene, verba sequentur*, came to be thought old fashioned and out of date. Thus, from the second century onwards, there arose a class of specialists in forensic oratory; some

³² During this earlier period, Roman law was exclusively the domain of priests, notable among these are Q. Fabius Maximus Servilianus, L. Iulius Caesar, Appius Claudius Pulcher, M. Valerius Mesalla. Though the priests gradually lost hold of this monopoly to comment on law, the involvement of religious officials in the law continued: the noted jurists P. Mucius Scaevola *augur*, P. Licinius Crassus and Q. Mucius Scaevola *pontifex* for instance, all held the office of *pontifex maximus*.

³³ Early practitioners of the law as nonprofessionals included Servius Sulpicius, C. Trebatius, M. Terrentius Varro and Granius Flaccus.

³⁴ Schulz (1946) 41-43. The first subdivision, that of the noble turned lawyer, men of aristocratic birth, who viewed legal study as a social duty of their class, receive admiration from Schulz, among these: P. Alfenus Varus, Q. Aelius Tubero. He calls Sulpicius Rufus, the last of this type, “a true jurisconsult in the style of the second and third centuries” but this division of jurist lost its pre-eminence to the second type. The second class were equestrians who entered law as a career. These famed jurists include C. Aquilous Gallus; Aulus Cascellius. A, Offilius, and C. Trebatius. The third group is discussed only as an appendix to contain the names of those about whom we know little such as L. Valerius and Publius Gellius.

³⁵ Schulz (1946) 43.

³⁶ Schulz (1946) 43.

knowledge of public and private law they might have, but not enough to qualify them to give consultations.

Schulz's distinction between jurists and advocates is absolute – these classes exist as exclusive entities that operate in different occupations with different modes of operation. Interestingly, Schulz focuses on the question of qualification to provide legal consultation at Rome. In fact, he suggests that advocates may progress to jurisconsult on undertaking further study in the law in order to qualify them for that profession:

Occasionally, as the cases of Servius and Turbeo show, an advocate might develop into a jurisconsult, but that would be as a result of further studies.³⁷

This claim requires some scrutiny. The provided outline of the education and training of young Romans indicates that precise specialism resulting in qualifications required to enter a profession was non-existent in late Republican Rome. However, Schulz seems to be indicating that in order to be recognised by society as a jurisconsult, an advocate would need to undertake “further study” in order to be qualified. Schulz substantiates his claim by pointing to a reference made by Pomponius, which outlines that Q. Tubero, the advocate, became a jurisconsult after studying under A. Ofilius:³⁸

Post hos quoque Tubero fuit, qui Ofilio operam dedit: fuit autem patricius et transit a causis agendis ad ius civile, maxime postquam Quintum Ligarium accusavit nec optinuit apud Gaium Caesarem.

Tubero was a patrician who switched his attention from pleading cases as advocate to consulting on civil law, in particular after he had prosecuted Quintus Ligarius but failed to get a conviction before Gaius Caesar.

The Latin, interestingly makes no note of qualification, but rather a change of interest – “*transit a causis agendis ad ius civile*”. The notion of further study in order to meet a requirement of consideration as a jurisconsult is not mentioned. Nor is the chronology of Tubero's tutelage under Ofilius, he may well have received tuition in law prior to his abandonment of rhetoric and turned away from his oratorical efforts as a result of his defeat in court.³⁹ Schulz, presumes, however, this training was taken after his

³⁷ Schulz (1946) 44.

³⁸ Dig. 1.2.2.46. (Pomp.) It is worth pointing out that Tubero comes slightly later than the period of education under discussion in the above section. – his birth is given as 77BC. Nevertheless, he falls into a generation of men who would have been educated under the fully developed educational programme discussed. The kind of education provided to Tubero cannot have been too dissimilar to that received by Cicero in curriculum and mode of instruction. Certainly he would have been classified, as Schulz would have it in the same social environment as Cicero, who, as his senior by almost thirty years, was his opposition in the case of Ligarius in 44 BC.

³⁹ Ofilius's age is not reported. He was a pupil of Servius Sulpicius Rufus who was born in 106BC. Cicero makes note of Ofilius and holds his knowledge of law in high regard, contrasting his legal opinions to that of Trebatius Testa – see Cic. *Fam.* VIII, 21. We can presume that Servius Sulpicius Rufus had attained at least the age of twenty before he embarked on legal practice, perhaps later. One would also expect a gap of at least ten years

transition to the law, as a necessary condition of being considered fit to practise as a jurist. Had Tubero turned to law as a mature student he certainly showed an aptitude for it. Pomponius notes that “Tubero was considered most learned both in public and in private law, and he left several books in both fields of study”.⁴⁰ Nevertheless, Schulz’s contention that this transition of intellectual pursuits in some way altered the fundamental character by which Tubero was recognised by his contemporaries seems to lack convincing evidence. It seems inconsistent with what we can glean from the education of the late Republic to conclude that a demand of further study was made on Tubero in order to transfer into legal consultancy. Schulz seems, it appears, to pre-suppose such a need in order to uphold the strict classifications which he imposes on legal practitioners of the first century. His second example is that of Servius. Servius was a contemporary and friend of Cicero. Servius proved to be an unconvincing orator and as a result turned to law. Cicero mocked Servius for his oratorical inability and his uptake of law.⁴¹ Again, this provision of title does not seem to result from the attainment of qualifications or a course of pre-requisite training but rather from a natural aptitude for one field over the other despite training and practice in both. It seems that this, rather than the sharp distinction of which Schulz speaks, is the real dissimilarity between those considered advocates and those considered jurists: a reputation of merit in a particular field based upon worthwhile practice in the field. This view allows for a more fluid consideration of the rôles of legal practitioners in the first century BC, in which personal practice rather than the classification of professionalised bodies becomes the basis for distinction in law or rhetoric. This seems more in keeping with the educational practices of the period than Schulz’s portrayal of specialised professions.

Nevertheless, Schulz remains convinced that the dissimilarity between advocates and jurists is absolute. He views Cicero as an archetypal representative of orators, taking him as illustrative of the entire class, allowing for some peculiarities. From Cicero’s writing, he attempts to draw further distinction between jurists and orators, portraying a competitive opposition between what he sees as two professional groups. Of note is the discussion of the usefulness to the advocate of legal knowledge presented in *de Oratore*.⁴²

Schulz frames the discussion Cicero presents as a conversation between representatives of distinct groups: Crassus and Antonius are orators and Quintus Mucius Scaevola *augur* is a jurist. The distinction between them, he argues, is outlined in the discussion: Antonius as a more typical rhetorician is shown to have little interest in law; Q. Mucius is shown to have an eloquent understanding of rhetoric but a focus on law; Crassus, according to Schulz, is an exception as an orator with a great knowledge of

between teacher and pupil. Trebatius Testa was probably born c.84BC. A similar date would not be unreasonable for Ofilius, perhaps even earlier. Given Tubero’s birth in 77BC, it is not impossible that Ofilius taught the law to Tubero several years before his sudden switch to focus on law in 44BC.

⁴⁰ Dig. (1,2) 2.46 (Pomp.)

⁴¹ Cic. *Pro Muc.* 10.33.

⁴² See Cic. *De or.* I.166 - I.172.

law, but not such a thorough knowledge as to be considered a jurist. Schulz evidences this with reference to Q. Mucius's jest, "never have I seen the fine furniture of legal science among the household goods of an advocate".⁴³ This remark, made specifically between Mucius and Crassus, is drawn out by Schulz to represent a general truth about the expertise of rhetors in law, indicating that their specialisation as forensic orators precludes them from an in-depth knowledge of law. Specialisation is at the forefront of the separation. In his interpretation of the dialogue in *de Oratore*, Schulz argues that "the picture painted by Cicero shows that here too Hellenistic influence had led to differentiation of professions and to the emergence of a class of specialists in rhetoric".⁴⁴

Schulz's view doesn't reveal the whole picture of the professional activities of Crassus and Mucius. Crassus is exceptional as he "was universally avowed to be the best lawyer among the orators".⁴⁵ Likewise, Mucius was noted for his oratorical ability as "the most eloquent jurist of the age".⁴⁶ These two figures are exceptional within the Schulzian view: a jurist noted for his eloquence and an orator for his legal knowledge. Yet the specialisation of each of these men would preclude him from the class of the other. Can this separation really be made so distinctly?

Schulz is guilty here, in my view, of some revisionism. Pomponius's list of jurists contains some names more noted as orators.⁴⁷ Schulz explains this away as a mistake on Pomponius's part. Pomponius, he argues, has been misled by Cicero in his overly zealous use of superlatives in describing orators like Crassus's ability in law to the extent that he allowed them erroneously to be included in his list. This seems to be treating this source somewhat disingenuously, or at least putting the cart before the horse. Beginning with the conclusion that a definite distinction between orators and jurists exists, it is easy to arrive at the same conclusion as Schulz. However, following the sources themselves, such a distinction is more difficult to assert – certainly as the Romans themselves present little grounds for providing one definition over the other.

The growth of a socially recognised legal profession in the wake of Quintus Mucius Scaevola *pontifex* is an essential thread in the fabric of Roman legal science.

Schulz is adamant that the reason for this is the refusal of members of the juristic profession to "yield to the pedagogical tendencies of Hellenism".⁴⁸ The argument is that the jurisconsults remained free from the all-embracing educational ideal of Greek *παιδεία* as legal education was taught through practice and through the shadowing of legal experts after the initial training of childhood. Pointing to

⁴³ Cic. *De or.* I.136. as quoted in Schulz (1946) 45.

⁴⁴ Schulz (1946) 45.

⁴⁵ Cic. *Brut.* 145.

⁴⁶ Cic. *Brut.* 145.

⁴⁷Dig. (1,2) 2.35.-2.53. (Pomp.)

⁴⁸ Schulz (1946) 55.

the legal education of Cicero, he rather frames the education of lawyers as existing in isolation from the influences which affected the education of young Romans in other fields. Schulz is uncompromising in the self-regulation he affords to legal education:

The traditional method of legal education thus consisted in impregnating oneself, by contact with practice and professional tradition, with the spirit of the law, in 'living oneself into it'; systematic instruction of the Hellenistic type was entirely lacking. Teaching in the proper sense was abjured by the jurisconsult as being beneath their dignity. There was no legal propaedeutic, no philosophical or historical introduction to law. The jurisconsults did not discuss with their pupils the basic conceptions like justice, law, or legal science, though to the Greeks these seem to be problems of the highest, nay almost of sole, importance. The student was plunged straight into practice, where he was faced with the ever-recurrent question: What on the facts stated, ought to be *done*?⁴⁹

Schulz relies heavily on his reading of Cicero's accounts of his education in law to substantiate his claim to legal educational isolation. It is worthwhile examining these points in turn in order to reveal the extent to which they are pertinent. It is also worth noting, in passing, that Cicero is considered by Schulz as not having reached the level of jurist, despite having undergone much of the training which he insists was the essential factor in creating a differentiating methodology and distinct, professional class of jurists.

3.4. Legal Practice at Rome.

An interesting account, which sheds some light on the operation of lawyers and the way in which they were categorised in practice, is the *causa curiana* of 92BC. It provides a good measure of the level to which Schulz's claims of professionalisation and mutual exclusivity between lawyers and orators can be relied upon.

The facts of this case are as follows: Marcus Coponius made a will instituting his son or sons as heir to his estate, despite having no sons at the time of the drafting of the will. He therefore wrote his will in consideration of future sons, or a *postumus*. He placed into the will a *substitutio pupillaris* which stated that should his son or sons die before adulthood his estate should pass to M. Curius. Coponius died without sons and Curius inherited. However, the heir *ab intestato*, another Coponius, sued Curius for the inheritance at the court of the *centumviri* under the *hereditatis petitio*.⁵⁰

⁴⁹ Schulz (1946) 57.

⁵⁰ The facts are presented in various places by Cicero and later Quintilian, see: Cic. *De or.* I.180; I.242; II.25; Cic. *Brut.* 144; Cic. *Inv.Rhet.* 2.42.122.; *Top.* XX.144; Quint. *Inst. Orat.* VII.6.9. More coherent modern summaries can be found in: Schulz (1946) 79; Tellegen; Tellegen-Couperus (2000) 171-173; Tellegen (2003) 192.

In this case L. Licinius Crassus represented the defender, Curius; the pursuer was represented by Q. Mucius Scaevola *augur*. Crassus was victorious in the case. Schulz presents the case as a direct dispute between an advocate and an orator, arguing that oratorical skills undermined legal reasoning in the centumviral court.⁵¹ For Schulz the case was a one off, a cautionary tale against the unscrupulous persuasive powers of rhetoric which had no further impact upon the law, or upon the methodology of jurists, who, “resolutely marked their difference from the forensic orators: they were not the men to be impressed by Hellenising schoolmasters and rhetoricians”.⁵²

Schulz’s presentation is in line with a broad consensus of scholarship on the *causa curiana* and the separation of jurists and orators more generally. A substantially different interpretation has been put forward, however, since the 1920s, which argues that law and rhetoric were tools used by the same group of people for argumentation in court and that a distinction between jurists and orators is erroneous.⁵³

Alan Watson, who argues still for the categorical division of orators and jurists, maintains that the *causa Curiana* presents a misrepresentation of Mucius’s better judgement.⁵⁴ In arguing for his client’s case, Watson argues that Mucius was restricted to poor argumentation in adopting a rigid, literal interpretation of the will. This he claims was to satisfy the needs of the case and that “the importance of this for juristic interpretation in the Republic has been seriously overestimated”.⁵⁵ Tellegen and Tellegen-Couperus retort that the notion that Mucius would abandon his principles as a jurist in order to make this argument is unlikely.⁵⁶ I would take this criticism further and argue that, in fact, Watson’s logic is inconsistent. If Mucius is a jurist, acting as a professional within a distinct class of specialised jurists, to which the methodology of legal interpretation is a fundamental binding concept, then to what extent can we reasonably assume that Mucius would abandon the precepts of this legalistic methodology in order to play orator? It would seem an odd decision on the part of Mucius to denounce sound legal argumentation in favour of rhetoric merely as lip service to a dependent client. Watson’s conclusion therefore, that Mucius, a jurist, abandoned his juristic methodology in order to represent a client, yet at the same time remained a jurist, for which the fundamental signifier is the adoption of legalistic methodology, is fraught with tautology. It would seem more likely, as I will make clear, that rhetorical

⁵¹ Schulz (1946) 79: “Appearing for Curius, the orator Crassus appealed to the testator’s intention and was successful before the centumviral court, where orators were constantly to the fore.” Schulz’s analysis of the failure of jurists to overcome orators in the centumviral court focussed upon their inability to master the persuasiveness of rhetorical argumentation –Schulz (1946) 54: “The elements of rhetoric, which they had learned as schoolboys, were no longer sufficient armament in the battle with professional orators.”

⁵² Schulz (1946) 80

⁵³ Stroux (1949) 4. The original presentation of this essay in incomplete form was produced in 1926, yet its reprint in 1949 remains the authoritative issue.

⁵⁴ His argument follows Gandolfi’s, which proposed that Mucius was arguing from his clients interest rather than a sound legal postulate, see Gandolfi (1966) 293.

⁵⁵ Watson (1974) 130.

⁵⁶ Tellegen & Tellegen-Couperus (2003) 176.

argumentation, alongside the law, was freely employed by both pleaders, regardless of any imposed professional classification. This would explain Mucius's reasoning in a more sensible way than arguing that he, in a position of discomfort at the rôle he found himself in – despite renown as a man who pled often with eloquence – opted to adopt a poorer argument out of his client's expectation.

Wieacker presented a different view of the *causa Curiana* than Schulz, yet retained the distinction between jurists and advocates. He views the case in the light of “the classical example of the convergence of practical juristic task with the technical instructions of court rhetoric”.⁵⁷ Wieacker is unconvinced that the case hinged upon issues of interpretation of intention. Rather he argues that the case hinged upon the meaning of words, writing that, “the crucial point of the discussion was therefore not the confrontation of *verba* and *voluntas*, *rigor* and *aequitas* ... It was in reality a matter of linguistic usage and word-meaning as they had been formed by the juristic tradition of the *ius civile*”.⁵⁸ The judgement of the *centumviri* was, in Wieacker's view, a failure to understand this point of law, as much as it was a triumph for the rhetoric of Crassus. Nonetheless, the idea of a distinction of styles between the two arguers is made clear, “the most outstanding *lawyer* of the epoch personally opposed M. Lucinius Crasus [sic.], the most celebrated court orator of the time”.⁵⁹ He, yet, outlines that whilst Crassus's argument is a “masterpiece of rhetoric”, it also contains a “serious counter-argument”⁶⁰ but still draws the distinction of the juristic approach with that of the more obviously rhetorical style of Crassus and Mucius's reliance upon jurisprudence.

Wieacker's treatment of the case is a useful starting point in assessing what arguments were applied in the case and from what influences the two pleaders drew their points and style. In order to do this let's consider the arguments made and what *kind* of arguments they are. To begin, let us consider the case made by the jurist, Quintus Mucius Scaevola and ascertain if the argument necessarily adheres to a legal argument and, if it does not, whether the argument made is still worthwhile and effective.

Cicero tells us in *de Oratore* that the crux of Quintus Mucius Scaevola's submission was one of strict, literary interpretation of wills in order to assert the intention of the testator as the fundamental and decisive feature presented to the court:⁶¹

ex scripto testamentorum iura defenderet, negaretque, nisi postumus et natus, et, antequam in suam tutelam venisset, mortuus esset, heredem eum esse posse, qui esset secundum postumum, et natum, et mortuum, heres institutus.

⁵⁷ Wieacker (1967) 157.

⁵⁸ Wieacker (1967) 161.

⁵⁹ Wieacker (1967) 157.

⁶⁰ Wieacker (1967) 161.

⁶¹ Cic. *De or.* I. 180. Translated by Sutton & Rackham (1989) 125.

He was arguing the rights of the case on the literal terms of the will, and contending that the person who had been nominated heir in the second grade, as substitute for a posthumous son, who should be born and die, could never inherit, unless such posthumous son had in fact been born and died before becoming his own master.

Underpinning the case, is a clear logical argument: that a *postumus* must actually be born in order to exist and cannot exist unless he had, in fact, been born. As a result of this formulation, let him who relies upon the substitution for a *postumus* not inherit, for the nonexistence of a *postumus* has excluded the substitution clause in its entirety. This argument flows with sense as a method of interpretative method of the will. We are told, that it is an argument which results from the will in its exact wording. However, it is not enough, I propose, that we take this as a case of the mere linguistic and literal interpretation of a will in isolation, but rather as the application of a broader interpretative methodology with regards to the law itself. In order to see if this is the case, we need to compare the argument presented by Mucius and the law in relation to substitution clauses in wills in the late Republic.

Of the three kind of testate wills available in the late Republic,⁶² the only one which can be taken to be the basis of this case is a *testamentum per aes et libram*. In this form of will the intention of the testator, reliant upon the wording of the *nuncupatio* statement made during the ceremonial creation of the will, was paramount in creating heirs. The written evidence of the will on tablets provided a probative but not binding insight into the intention of the testator, the words spoken orally at the formal ceremony superseding their worth. In this instance, there is no contention as to the words spoken, but rather as to the interpretation of their meaning. In particular, the substitution provided in the will is the offending clause.

The substitution clause used by Marcus Coponius in the *causa curiana* was the *substitutio pupillaris*.⁶³ This form of substitution clause is the more complex and its operation allows for a testator to make a substitution in favour of an heir who had not reached puberty at the eventual institution of the will and therefore acted like a potential *substitutio vulgaris* which came to be regarded as effective at the death of the testator.⁶⁴

In the *causa curiana* the express clause included in the will was made for the hope that a potential *impubes* would exist at the time of the institution of the will in order for that child to act as the

⁶² The existence of a substitution clause in and of itself precludes that this is a case of intestacy.

⁶³ Another type of substitution clause, the *substitutio vulgaris* afforded the testator the option of instituting for a substitute heir in circumstances where the first appointed heir was unable to accept the *hereditas*, see: Dig. 28.6.39.2. (Iavolenus, *I ex post. Labeonis*) also see Watson (1971) 52-53 also provides a brief outline of this form of substitution clause in the later Republic.

⁶⁴ Dig. 28.6.39.pr. (Iavolenus from Labeo, book one) refers to the case of a testator creating a will for his grandsons, only one of whom was in his *potestas*. In this case, the *substitutio pupillaris* was employed as a means by which an implicit substitution could be made in order to extend the scope of the will to the other grandson.

eventual *substitutus* and heir.⁶⁵ Quintus Mucius Scaevola's argument, that as no child had been born none could exist to fulfil the rôle of the substituted child, the conditions required to fulfil the criteria of the substitution failed and therefore the will fell to the *agnatus proximus*, the second Curius, from the resultant intestacy.⁶⁶

This argument is not necessarily framed within the confines of legal categorisation – the law does not deliver a clear and distinct definition as to whether a substitution of this manner is workable.

3.5. Summary of Findings.

This chapter proposes that the dichotomy between jurists and orators during the Republic results not from Roman sources but from narratives imposed by nineteenth century dogmatism. Examining Roman education in the Republican period, the Chapter shows that a wide syllabus, including rhetoric and law, was taught at Rome. Cicero is used as a case study to illustrate this. Lastly, legal practice is examined to show the lack of discreet professionalisation between jurists and orators in the period. The Chapter concludes that a distinct professionalisation of jurists had not occurred in the late Republic.

⁶⁵ Watson (1971) 53. There is an attempt to reconstruct the express term of the will in Watson. It is mere conjecture but it can't have been dissimilar to his attempt: *si filius ante moritur, quam in tutelam suam venerit*.

⁶⁶ See section 7.4.2. for an explanation of the rules of intestacy.

4. “Cicero, the Insider”.

Having examined the education of the Roman lawyer, and the broad intellectual trends which informed his reasoning, the unravelling of the distinction between jurists and advocates becomes clearer. This distinction, asserted most prominently from the late nineteenth century, and for most of the twentieth century, categorised Cicero, as an orator, and thus as an “outsider” to the Roman jurists.¹ The reasons for this expulsion of Cicero from the canon of Roman legal writers is most succinctly set out by Watson, who suggests Cicero’s outsider status is warranted on several points: first, Cicero was pre-eminently an orator, trained in rhetoric and not specialised in civil law; secondly, Cicero, in his own writing, goes some way to detach himself from the jurists who studied law; thirdly, Cicero distances his own writings from the kind of writings undertaken by jurists; fourthly, Cicero’s writing can be seen as existing within a separate genre to works of juristic legal interpretation, discussing law in philosophical terms with a focus on natural law; and, lastly, that Cicero does not address issues in the civil law that are of most acute attention to jurists.² Watson concludes from these points that what “has to be stressed for an understanding of the spirit of Roman law, is that Cicero’s outlook is remarkably different from that of the jurists”.³ This supposed remarkably differential outlook has relegated consideration of Cicero’s juristic credentials to appendices for the greater part of the last one hundred and fifty years, supported by basic assumptions which delineate juristic and advocative mind-sets.⁴

The assumptions which underpinned the exclusion of Cicero from among the jurists have recently been framed as twofold: the assumption that, based upon nineteenth century understandings of legal science, there was necessarily a distinction between jurists and orators at Rome; secondly, the assumption that Roman law in the late Republic had achieved the level of scientificity ascribed to it with such vigour by later scholars, in that an autonomous, systematised and intellectually isolated model, free from the influence of legal practice in society had been achieved.⁵ These assumptions have made the categorisation of Cicero as an orator (and thus of no worthwhile input to our understanding of legal development in the late Republic) easier. Nonetheless, as we have seen, both these assumptions have

¹ Alan Watson’s Appendix A to his book *The Spirit of Roman Law* (1995) uses the title “Cicero, the Outsider.”

² Watson (1995) 195-200.

³ Watson (1995) 200.

⁴ In addition to Watson, there are a host of scholars who subscribe to the Romanist view that Cicero existed outwith the scope of what can be called a “jurist,” within a legal system that made a clear professional distinction between jurists and advocates, see among others: Dirksen (1858); Greenidge (1901); Roby (1902); Costa (1927); Schulz (1946).

⁵ du Plessis (2016) 1-2. It is worthwhile stressing that the question of systematisation is a question of period. It is certainly evident that systematisation of law occurred in later Roman legal history. The evidence does not provide for an attribution of total systematisation of law to the late Republican period, to project such a systematisation back on to republican sources is unsubstantiated.

undergone a recent challenge and a revision to Cicero's worth as a source, which can benefit our understanding of law, is underway.

In examining the education undertaken by Roman men of the upper classes and their subsequent training and practice when setting out for a career in law, we have seen that a distinction between the advocate and jurist was not formalised by educational standards or professionalised in the form of guilds or professional bodies. In fact, quite the opposite is shown to be the case. The education of Roman men who pursued careers in the law encompassed a curriculum which included both rhetorical and legal training. Moreover, the practice of law was open to any would-be practitioner and any distinction in the abilities of a prospective advocate or orator were largely reputational. A concrete distinction, in terms of a professional exclusivity, between jurists and orators is for the most part an invention of subsequent scholarship, particularly in nineteenth century Germany, which concluded that in order to understand the system of legal science supposed to have come to the fore during the late Republic, there was a need for a class of professionalised jurists. The claim that such a class existed in the late Republic in Rome seems to go beyond what the sources reveal to us. Quite to the contrary, in fact, the sources rather indicate that far from there being a definitive distinction between jurists and advocates those who practised law (whether as courtroom orators or advising lawyers) came from the same pool of individuals, trained in a similar series of intellectual pursuits, and whose application to legal responses, courtroom speeches or practical advice was dependent upon individual ability and reputation rather than on professionalisation and the intellectual isolation of a pseudo-priestly class of academic lawyers. On this first assumption, as outlined in the previous chapter, the assertion of a professional bifurcation falls down. No concrete distinction existed between jurists and advocates in late Republican Rome in terms of professionalised division, even though there was certainly a distinction between juristic and oratorical activities. The activities undertaken by those deeply familiar with the law often overlapped with those who had gained a reputation for speaking in court. Whereas, in reputational terms, the granting of acclaim for learning or ability in one activity or the other was naturally given - as evidenced in the use of the nomenclature given *iuris prudens* or *orator* - there existed no necessary mutual exclusivity between those engaged in rhetorical speech craft and advocacy or legal learning and advising. These terms were not used to affirm discreet professions staffed by men who engaged in similar but separate legal endeavours. Rather, they simply provided an indication of acknowledged merit in a particular field, and gave very little indication as to attainment in any other. That is to say, the man learned in law and known as an eminent *iuris prudens* was by no means held exclusively to 'juristic activities' and may have engaged - as many did - in oratory, both political and legal. His ability in rhetoric was also not inevitably deficient in comparison to known rhetoricians. The terminology was used to signify merit, not to categorise one distinct class from the other. That so-called orators were knowledgeable in law and engaged in activities thought of as juristic are attested as jurists engaging in rhetorical speeches. Whereas excellence in one activity may lead to a distinction in the title granted to an individual, this

was neither an indictment of their ability in other activities nor an indication of a professional distinction between classes of peoples engaged wholly in discreet and specialised activities.

The second assumption, that of the finality of an isolated, autonomous, internalised, scientific legal system in existence in the later Republic is also problematic. The problem is complicated not least because of the relationship between the emergence of the jurists as a specialised class and the creation of legal science, or its corollary, the emergence of legal science and its need for specialised jurists - that is, in terms of the causal link between the advent of legal science and jurists. That legal science had been achieved by the later Republic came to predominance as opinion throughout the twentieth century alongside presupposition of a distinction between jurists and advocates.⁶ The problem is essentially *cum hoc ergo propter hoc*, the reliance of the one is provided as evidence for the existence of the other, yet the two are presented as having emerged without implying the causation of the other. As noted earlier, Quintus Mucius Scaevola *pontifex* is presented as the hero of the narrative of Roman legal science, using Greek philosophy to categorise the law. At the same time, the supposition of legal science is used to underpin the need for jurists like Scaevola, despite a lack of definitive sources to conclude that such a science was extant in the later Republic. Despite the lack of evidence for the presentation of the kind of systematic Roman law that emerged in the classical period of law in the Principate⁷, the enduring narrative of Roman legal science, tied to the supposed reciprocity in the relationship between jurists and legal science, as resulting from the same complimentary causal process, is so entrenched that it is accepted with enduring adherence.⁸

4.1. Cicero, an Orator with Knowledge of the Law.

The supposed correlation between jurists and legal science led to the conclusion that by the late Republic both had arisen simultaneously as the dominant actors in the Roman legal world and that, as a result of their emergence, both extra-legal ideas like rhetoric, and extra-legal practitioners, like advocates, were excluded from an internalised study of the law. Whereas this correlation makes sense if one begins with the premise that at least one of these conclusions had been perfected (i.e. the rise of jurists as legal experts; or the internalisation of legal science) and then tracks back to a cause from which the other must necessarily exist, another approach reveals its shortcomings. The logic applied

⁶ Early claims in this direction were made by the German Historical School, see: This view prevailed among mid-twentieth century scholarship, notably: Schulz (1946) 92; Watson (1974) 171-172; Kaser (1978) 115-130, among others.

⁷ The focus of this work is, it ought to be restated, on the late Republic. The argument is that later systematisations of Roman law, which undeniably took place, ought not to be projected back without evidence to support such an imposition.

⁸ The view persists to recent scholarship, see: Harries (2006) 92-100; Hilder (2016) 71.

has underpinned both of the assumptions outlined by du Plessis and has limited the scope of inquiry with regards to the legal culture within Roman society in the later Republic. The existence of the one has evidenced the existence of the other, yet neither is posited as the cause of the other, rather each is seen as resulting from an injection of Greek philosophical thought which, once instilled into the Roman legal mind-set as a basis for systematisation, is then banished alongside all extra legal considerations from the internalised system of law.

As neither a lawyer usually listed among the Roman jurists, nor a writer who has bequeathed to us a series of responses on the civil law, Cicero has found himself outwith the scope of those considered a jurist. My contention is that this is a fundamentally erroneous position. The reason for this is not only based on the overturn of the invalid distinction between jurists and advocates in the late Republic, nor simply the failure to significantly evidence this distinction without an overreliance upon a flawed causality, but also because the evidence provided in our sources reveal Cicero's explicit knowledge of law alongside his practice in that field.

These considerations must be examined within the frame of how law operated within Roman society, rather than, ascribing other, more modern legal cultures back into history. It is necessary to attempt to view Roman law and Roman legal culture in the late Republic by placing it within its own context. In the previous chapter, by outlining the education of the Roman, an educational distinction between the jurist and the advocate has been shown to exist on very scant foundations given the level of training in both law and rhetoric received by those who are categorised one way or the other. Cicero is no exception. We must take this argument further to place this claim of the indistinct character of a pool of educated, lawyerly men in Rome within the legal culture of that society.

The term legal culture can no longer go undefined. The term itself is vague. Its precise meaning has never been definitive, nevertheless it becomes an invaluable tool in examining law in relation to society. Lawrence M. Friedman, whose work has concerned itself with the concept of legal culture for decades, and whose research makes a distinction between "external" and "internal" legal cultures separated by factors which affect the law from within the legal system and without, but which are not a definition assigned to a "static bundle of traits", but rather "an actual operating unit in the social system, which takes raw materials, processes them and produces an output".⁹ Understanding legal culture helps us to understand how law operated within a given society. As Paul du Plessis has recently argued:¹⁰

Law is not isolated from society. It exists within and is surrounded by society. Law also responds to society in various ways. If this premise is used as a starting point, then the idea of legal culture becomes an important tool.

⁹ Friedman (1969) 31

¹⁰ du Plessis (2016) 5.

The idea of the importance of cultural society to the development of concepts in the law is not new. Karl von Savigny is appreciative of social and cultural aspects as important to the way in which the law of societies responded and developed as reflective of social and cultural impositions upon the system, to the extent that the “law of a people” (*Volksrecht*) is a rejoinder to the “spirit of the people” themselves (*Volkgeist*).¹¹ That law has a relationship to society in some measure is accepted by legal scholars across a broad range of methodological positions.¹² Legal culture forms an important aspect of this appreciation. Legal culture forms the understanding of the way in which lawyers think within the bounds of the structural institutions and how structural institutions respond to the development of law as a result of this specific kind of thought, within the framework of society more generally.¹³ Legal culture forms a normative structure in which particular actions develop as a culture of those who interact with the law, and the relationship between legal development and this culture is relative.

The bonds between Roman society and Roman law are more pronounced than has been previously thought. The culture among upper class Romans in society generally and the legal culture which existed in the later Republic seem to have been inextricably linked. Law and life were related not only in the sense that law impacted necessarily upon human interactions, but also insofar as the actual practice of law was undertaken frequently by those who formed Rome’s social culture. Legal practice, juristic writing and the socio-intellectual mentality of Rome’s upper classes were naturally interconnected.

The extent of the interplay between legal culture and social culture in Rome is not only evidenced by the education of young Romans of a certain class, an education which encompassed philosophy, law and rhetoric as central components. The link between legal culture and social culture went further. Political and social interaction were also deeply tied to legal practice. Involvement in the practice of law became a not uncommon part of the course of a Roman’s career. For instance, the litigious nature of Roman public life gives an insight into the overlap between political aspects of Roman social culture and the on-going development of republican Roman legal culture. Much of the reason behind this was the lack of immediate educational specialisation, and certainly lack of professionalisation, among upper-class Romans, who engaged in varied and several occupations,

¹¹ Savigny’s text is reported in Kaser, (1971) 273ff, see Watson (1977) 1.

¹² Montesquieu on civil and political laws recognises their relations to the circumstances in which they arose, particularly to the people whom they order: “elles doivent être tellement propres au peuple pour lequel elles sont faites, que c’est un très grand hasard si celles d’une nation peuvent convenir à une autre.” Montesquieu. (1784) 19. Further attribution of the link between a people and their culture and law is made from diverse sources on diverse cultures: see for instance, van Kleffens (1968) 28. A similar expression is found in Scotland by Lord Cooper of Culross of law as a “reflection of the spirit of the people,” (1957) 199. An interesting perspective is proposed by Alan Watson who, though appreciative of the historical and social development of law, notes “the divergence between law and the needs and wishes of the people involved or the will of the leaders of the people.” See Watson (1977) 5. From all these standpoints a degree of acceptance of some relationship between law as a concept and society is accepted.

¹³ Friedman (1969) 29-44.

whether that be political, adversarial, legal or military.¹⁴ The engagement of Romans in various fields of intellectual and civic merit was not only factual but conventional. Early involvement in legal prosecutions formed a normal course of practice for young Roman men entering public life. Catherine Steel points to an “identifiable convention” of young, elite Roman men prosecuting elder statesmen.¹⁵ Though by no means a universal practice, engagement in an early prosecution was a recognised and utilised method of declaring entry to public life. Steel outlines that the prosecution of established men in Roman public life by younger, aspirant men was part of a “distinct tactic within the forensic sphere”.¹⁶ Its purpose was *prima facie* the elevation of young men to a position of note through the precocious prosecution of an eminent figure.¹⁷

What it reveals about the interaction of legal culture and social culture goes further still. The young men who undertook the prosecutions in these cases were of an upper-class elite. Moreover, they were sponsored in their undertaking by rich and politically connected individuals. Steel notes that the opportunity to take part in an early career prosecution was not dependent upon oratorical or forensic ability, but was rather guaranteed for elites within Roman society by the sponsorship and support of a network of patrons.¹⁸ Rather than being the exceptional practice of outstanding scholars and speakers, early career prosecutions were rather practised with relative frequency. This was an integration of the social culture of the Roman elite with the legal culture, which they propagated. Law and society were entwined insofar as the practice of law was a natural first step for young Roman elite men, part of the consciousness of their culture.

In view of the interwoven aspects of Roman social and legal culture, let us address the bases upon which Cicero has been characterised as an “outsider”.

The first point raised by Watson, on the training received by prospective legal practitioners in Rome, has been addressed in the previous chapter and throughout the on-going discussion of legal and social culture in Rome. Education was neither specialised nor, in fact, essential.¹⁹ It was nevertheless received by Romans of a certain class as a matter of culture. This in turn fed into Roman legal culture. Those who practised law at Rome did so drawing from a deep well of several intellectual traditions, and

¹⁴ Beard & Crawford (1985) 56-59.

¹⁵ Steel (2016) 207. At footnote 15 of her article Steel makes reference to various prosecutions made in the late Republic by young, aspiring Romans. Among these include: M. Fluvius Flaccus prosecuting Nascia Serapio as early as 132BC and examples reaching further back to before 149BC, including Livy’s description at (45.37.3) of Galba’s intervention at Paullus’s triumph in 169 BC. As she states, the work of Alexander (1990) is an invaluable resource in tracking this development.

¹⁶ Steel (2016) 223.

¹⁷ Steel (2016) 220: “Forensic activity was also a method by which young men could demonstrate how promising they were as potential members of the governing elite.”

¹⁸ Steel (2016) 222.

¹⁹ Though the unprepared and unable were not free from the reproach and scorn of detractors, including the ever-critical Cicero.

particularly, given the oratorical nature of prosecutions in Rome, rhetoric.²⁰ As the convention of early-career prosecutions indicates, the immediate involvement of young, elite Romans in the practice of law was not uncommon. In fact, the cross over between Roman high culture, dictated by politics, education and class, and the legal culture of Rome at the time were demonstrably interleaved. Cicero was no exception. As we have outlined his education was both legal and rhetorical. His application was no means less so. Any distinction between jurists and orators thought to exist was certainly not a result of education. Cicero, so precocious in rhetoric that he had written *de inventione* by the age of 21, and so schooled in law that he formed a part of the legal circle of Quintus Mucius Scaevola *pontifex*, was no outsider as a result of his education.

The second point raised by Watson is centred on the much discussed comments made by Cicero in his speech *pro Murena*. These comments certainly seem *prima facie* indicative of Cicero demarking a distinct separation between jurists and advocates. In fact, they seem to go further, asserting a form of rivalry in existence between these two clearly separated professions. The offending statements are made by Cicero to the jurist Servius Sulpicius Rufus:²¹

Et quoniam mihi videris istam scientiam iuris tamquam filiulam osculari tuam, non patiar te in tanto errore versari ut istud nescio quid quod tanto opere didicisti praeclarum aliquid esse arbitrere. Aliis ego te virtutibus, continentiae, gravitatis, iustitiae, fidei, ceteris omnibus, consulatu et omni honore semper dignissimum iudicavi; quod quidem ius civile didicisti, non dicam operam perdidisti, sed illud dicam, nullam esse in ista disciplina munitam ad consulatum viam. Omnes enim artes, quae nobis populi Romani studia concilient, et admirabilem dignitatem et pergratam utilitatem debent habere.

Since you seem to me to be hugging your knowledge of jurisprudence as if it were a darling daughter, I shall not allow you to be so mistaken as to think that this whatever-it-is that you have taken such pains to learn is in any way remarkable. I have always felt that other qualities—self-control, dignity, uprightness, sense of duty and all the others—have made you thoroughly deserving of the consulship and every other office. I shall not say that you have wasted your time in learning the civil law, but I shall say that there is no royal road to the consulship in your profession. Any career which is to

²⁰ The intellectual traditions which influenced Roman legal development in this period are diverse. In the first count, the native Roman tradition of legal formalism remained as a traditional form of customary institutions (see Schiavone (2012) 23); this was joined by Greek philosophical thought, particularly Greek methods of categorisation, in the first century BC (see, Frier (1985) 163; Schulz, (1946) 64; Berman (1983) 139); this Greek thought was adopted by Romans like Cicero, who developed a distinctly Roman derivative perspective (see, Stein (1966); the legal culture, which emerged as a practical engagement with the law, whether that be in offering *responsa*, advising clients, or representing litigants in court, provided a distinctly Roman legal tradition which merged these theoretical bases within the framework of the legal procedural framework..

²¹ Cic. *Mur.* 23. Translated by MacDonald (1989) 213.

win us the support of the Roman people must have a splendour to impress and a utility to please them.

At first, this seems to be a damning indictment of both jurists and the attainment of legal knowledge. Cicero seems keen to reduce legal knowledge to an easily obtained trifle, erroneously worked hard for by the errantly studious Servius. He seemingly attacks the pedantry of juristic methodology and sets aside the jurists as practising an ignoble art. The way in which Cicero discusses the law is easily compared to the high terms in which he discusses rhetorical arts (alongside military skill) in the same speech:²²

Duae sint artes igitur quae possint locare homines in amplissimo gradu dignitatis, una imperatoris, altera oratoris boni. Ab hoc enim pacis ornamenta retinentur, ab illo belli pericula repelluntur.

Let us agree, therefore, that there are two professions which can raise men to the highest level of distinction: that of a successful general and that of a good orator. The latter maintains the trappings of peace while the former averts the perils of war.

Watson points to this as indicative of Cicero's "outsider" status in the world of law.²³ Not only is Cicero outwardly hostile to the honour and worth of legal study, but he explicitly promotes oratory and military achievement as more worthy alternative pursuits. Watson extrapolates Cicero's comments and asserts that they express his general view of the jurists of his time, leading Watson to the conclusion that Cicero far from considered himself among their number.

In this regard the assumptions persist. First, the conclusion that a distinction existed between jurists and orators is taken as the starting point and as the lens through which one views Cicero's comments. Secondly, Watson takes Cicero as speaking with utter veracity, and generalises these attributions without appropriate consideration of their context.

Taking as a new starting point that a distinct classification of jurists and advocates in the later Republic has not yet been proven, let us examine the context in which Cicero's comments were made. Cicero's defence of Murena, a commander of the Roman army in the Third Mithridatic War, occurred after Murena's election to the position of consul. Murena was prosecuted by another candidate for the post, Servius Sulpicius Rufus, the very man to whom Cicero addresses his comments on jurists and law. Servius, though unsuccessful in his candidacy to be consul, was noted for his knowledge of the civil law. Servius prosecuted Murena for bribery with the aid of Marcus Porcius Cato, the Younger and, if successful, would have forced fresh elections. Murena was successfully defended by Cicero

²² Cic. *Mur.* 30. Translated by MacDonald (1989) 223-224.

²³ Watson (1995) 75-77.

along with Marcus Licinius Crassus and Quintus Hortensius. It is strictly within this context that Cicero's proclamations must be understood.

It is by no means an uncommon strategy of Cicero's speeches to provide scathing derision of his opponents, nor to praise the virtuosity of those whom he defends. In this instance Cicero is presented with a case where his opponents are a man noted for his learning in law and a Stoic philosopher. On his side of the argument, the defence is mounted by noted orators and his client is a respected military commander. Cicero's denunciation of juristic learning is framed within a specific attack on the abilities of Servius. It seems reasonable to take the comparison between generals, orators and jurists in Cicero as an attempt to elevate his client and his client's advocates and degrade the position of the prosecutors. It is Servius specifically who is targeted by Cicero's comments. Cicero goads his opponent by asserting that his years of study in law had amounted to attaining knowledge of a trifle. Watson claims that this shows a contempt for legal learning and a disregard for the skill of interpretation of the civil law.²⁴ But in extrapolating this as a generalised opinion of all jurists and of legal interpretations he ignores the importance of the context of Cicero's statements. Certainly accepting these comments at face value is problematic. Appreciating the motivation for Cicero's comments, a more likely inference from Cicero's comments is not to outline a contempt for the law and jurists but a contempt for Servius, to polemicise his client's accuser. Cicero and Servius, as contemporaries, had a long standing rivalry. Servius's specialisation in civil law was a product of his own design, but only after he had failed in rhetoric.²⁵ Cicero indicates that Servius's favour for the law was based on his inability to contend with Cicero in terms of rhetorical skill:²⁶

De Servio autem et tu probe dicis et ego dicam quod sentio. Non enim facile quem dixerim plus studi quam illum et ad dicendum et ad omnis bonarum rerum disciplinas adhibuisse. Nam et in isdem exercitationibus ineunte aetate fuimus et postea una Rhodum ille etiam profectus est, quo melior esset et doctior; et inde ut rediit, videtur mihi in secunda arte primus esse maluisse quam in prima secundus. Atque haud scio an par principibus esse potuisset; sed fortasse maluit, id quod est adeptus, longe omnium non eiusdem modo aetatis sed eorum etiam qui fuissent in iure civili esse princeps.

But about Servius you say well, and I will tell you what I think. I could not easily name anyone who has devoted more attention to the art of speaking and to all other subjects of liberal study than he. As young men we pursued the same rhetorical studies here, and afterwards he went with me to Rhodes to acquire a more perfect technical training. Returning from there he gave the impression of having chosen to be first in the second

²⁴ Watson (1995) 197

²⁵ Michel (1975) 95.

²⁶ Cic. *Brut.* 151. Translated by Hendickson & Hubbell (1939) 131-133.

art rather than second in the first. In fact I'm not sure that he might not have been the equal of orators of the first rank; but perhaps he preferred, what he did attain, to be first, not only of his own time but of those who had gone before, in mastery of the civil law".

This background provides us with more grounds for our understanding of why Cicero has made these comments in the trial of Murena. Cicero's speech is overflowing with sarcasm. This is by no means a unique tone for Cicero to adopt and is comparable to the vitriolic invective technique he adopts in many of his speeches.²⁷ Moreover, it is carefully calculated to undermine his opponents to maximum effect. Cicero's debasement of the law is a debasement of the efforts of Servius, it is a personal attack on a man whose rhetorical ability was no match for his own and who in turn took up the study of law as an alternative to the one in which he had been bettered. Cicero's taunt is purposefully boastful. By stating that the legal study is a trifle and a dishonourable art, Cicero is not only creating a distinction between the honour of his client and fellow defending advocates and the prosecutors before a susceptible jury, but also taunting an old sparring partner about his failure, according to Cicero, to excel in rhetoric. To use this taunt as a basis for evidence of Cicero's general view of the law or of juristic interpretation is to remove it from its context and from the motives and purpose behind its utterance. In light of this contextualisation, Cicero's claim that learning the civil law is but a trifling task implies that he himself had no struggle in attaining it, even to the extent that an enthusiastic but ultimately slow-witted try-hard like Servius had. This is not about the separation of jurists from orators but is rather about the comparative merits of Servius and Murena, and of Servius and Cicero. Cicero debases the law because in doing so he debases Servius; he elevates rhetoric and oratory because it elevates himself. This in turn elevates the position of his client, Murena, whose military skill is placed in the same elevated category of skills as Cicero's rhetorical prowess. The law's lowliness here is not representative of Cicero's actual opinion, rather it is an example of the mastery of that skill in which Servius himself struggled to impress, persuasive rhetoric.

Watson, not to be put off, presents us with a series of alternative locations in Cicero's works which appear to support a claim for Cicero's distinction between jurists and orators. It is necessary therefore to look at these in a similar manner to the statements made in *pro Murena*. They comprise of

²⁷ Cicero's treatment of Clodia in *Pro Caelio* reveals his skill at demeaning those associated with his legal opponents, see particularly Cic. *Cael.* 51; 53; 61. The scathing tone adopted by Cicero and the accusations he implies (her incestuous relationship, for instance) are representative of his use of rhetorical invective to undermine the credibility of his opponent. Cicero's "ulterior motives," that is, his use of invective as a rhetorical tool to discredit rather than as a pure statement of fact is well-discussed, see particularly, Dorey (1953) 175-180. Other examples of Cicero using invective, polemic, sarcasm and irony to undermine the credibility of his opponents are manifest. Examples include: Verres, see Cic. *Verr.*; Piso Cic. *Pis.* 22, 42, 66, see also deLacey (1941) 49-58. It is the contention here that similar motivations underline his rebuke of Servius and that it is not unreasonable to assume Cicero is engaging here with like intent. More on Cicero's use of invective more generally, not only limited to legal argumentation, can be found at: Craig (2004) 187-214; eight essays on various aspects of Cicero's invective contained in Booth (2007) Steel (2011) 35-48.

statements made generally about the nature and rôle of jurists in Roman society. The first of these is in *de legibus*:²⁸

Atticus: Sed iam ordire explicare, quaeso, de iure civili quid sentias.

Marcus: Egone? summos fuisse in civitate nostra viros, qui id interpretari populo et responsitare soliti sint, sed eos magna professos in parvis esse versatos. quid enim est tantum, quantum ius civitatis? quid autem tam exiguum, quam est munus hoc eorum, qui consuluntur? quamquam est populo necessarium. nec vero eos, qui ei muneri praefuerunt, universi iuris fuisse expertis existimo, sed hoc civile, quod vocant, eatenus exercuerunt, quoad populo praestare voluerunt. id autem in cognitione tenue est, in usu necessarium. quam ob rem quo me vocas aut quid hortaris? ut libellos conficiam de stillicidiorum ac de parietum iure? an ut stipulationum et iudiciorum formulas componam? quae et conscripta a multis sunt diligenter et sunt humiliora quam illa, quae a nobis expectari puto.

Atticus: ... But kindly begin without delay the statement of your opinions on the civil law.

Marcus: My opinions? Well then, I believe that there have been most eminent men in our State whose customary function it was to interpret the law to the people and answer questions in regard to it, but that these men, though they have made great claims, have spent their time on unimportant details. What subject indeed is so vast as the law of the State? But what is so trivial as the task of those who give legal advice? It is, however, necessary for the people. But, while I do not consider that those who have applied themselves to this profession have lacked a conception of universal law, yet they have carried their studies of this civil law, as it is called, only far enough to accomplish their purpose of being useful to the people. Now all this amounts to little so far as learning is concerned, though for practical purposes it is indispensable. What subject is it, then, that you are asking me to expound? To what task are you urging me? Do you want me to write a treatise on the law of eaves and house-walls? Or to compose formulas for contracts and court procedure? These subjects have been carefully treated by many writers, and are of a humbler character, I believe, than what is expected of me.

Watson points out that Cicero blames men of intellect for ignoring what he terms the “branch of knowledge” of universal law in favour of advising and writing about the more mundane, if practical, topic of civil law.²⁹ Again, upon the assumption that there is a separation between jurists as a distinct

²⁸ Cic. *Leg.* 1.4.14. Translated by Keyes (1943) 311-313.

²⁹ Watson (1995) 197.

professionalised class this can be read as a contemptuous statement by Cicero for the jurists and a clear indication he sees himself as something other than one. Yasmina Benferhat sums up this view succinctly:

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The small world of the jurists was narrow, their intellectual pursuit was narrow, their activities were narrow, and their lives could only be narrow. And if by chance you were not narrow-minded when you chose to be a specialist of civil law, then law was going to make you a narrow-minded person.

To assert this indicates a complete denunciation of juristic thought again requires an assumed premise of an extant distinction between jurists and advocates, or philosophers. In reality, as we have seen, the training of Roman elite men was not confined to specialism. Nevertheless, specialism certainly took place to the extent that individuals pursued whatever field they were best in, or whatever was most advantageous to them, just as Servius sought a career in legal interpretation. Cicero here seems to be bemoaning the state of the over-specialisation of individuals whose interest lies particularly in the narrow field of civil law and whose attention does not extend to other fields. What we can take from this is that a definite trend emerged in Cicero's time for specialisation in the skill of juristic interpretation and the giving of legal advice. Cicero's complaint is not that this specialisation has resulted in a class of people whose interests are completely detached from his, but rather that their interests do not expand to embrace study in other fields. Cicero himself was something of a polymath. His education and expertise extended beyond one field. His comments indicate that he feels that men of talent should expand their study in the way he has. What this does not indicate is that a definite demarcation existed by which a class of jurists operated to the exclusion of others, like Cicero. Rather, the indication is that certain individuals have specialised in the civil law to a great extent but in undertaking that specialisation in the civil law have failed to appreciate other facets of law which Cicero deems important to a true understanding of the nature of law – namely, philosophy and rhetoric. This over-specialisation is, for Cicero, a waste of talent. It is, however, not a dismissal of specialisation in civil law, nor a dismissal of a distinct class of people who could be called jurist. It is instead bemoaning a limiting attitude among certain individuals in the breadth of their knowledge which had, for practical reasons, become common place in Rome.

If we remove the assumed premise of a distinction between jurists and orators in the late Republic, we can see that the evidence can be read in a different manner to the usual interpretation. Cicero's supposedly damning comments of jurists and juristic interpretation, when examined within their proper context, at no time indicate that an exclusive dedication to one set of activities and the preclusion of other existed, nor do they indicate that Cicero held study of the law in any true disregard.

³⁰ Benferhat (2016) 78. Benferhat also points to Cicero's characterisation of Servius in *pro Murena* 43 as underpinning the narrow-mindedness of the legal specialist.

Watson's next two reasons to ostracise Cicero from the jurists as an "outsider" can be taken together: Cicero's supposed distancing of his writings from that of jurists and the subject matter about which he writes. These essentially form part of the same point, that Cicero's writing and positioning within our received Latin literature is different from the writing of civil law jurists. In a fundamental way, this claim is undeniable. Cicero does produce a body of literature which is quite different from that which we have inherited from writers who are commonly termed as jurists. Cicero is certainly less keen to comment on civil law, but rather deals in more abstract topics of natural law or social and political philosophy. Watson also points to Cicero's treatment of the civil law, in hoping to reduce it to a system, as going against the standard view of contemporary jurists.³¹ He points to the now lost book *De iure civili in artem redigendo* as having been distinct in its outlook and as being disregarded by jurists.³² The fundamental difference is that "Cicero shows a keen awareness of a philosophical dimension to law that is entirely absent from jurists".³³

Certainly, Cicero's writing extends beyond the scope of the writings of those normally listed as jurists. He does delve more into philosophy. He is more interested in natural law. He does engage in an attempt at systematisation long before Gaius. His works do not focus, in the main, on engagement with interpretative points of the civil law. Does this then preclude Cicero from a claim to the title of "jurist" and indicate a key separation of rôles between advocates and political theorists and advice giving, interpretive jurists?

Not necessarily. Cicero, I would suggest, ought to be regarded with a certain sense of exceptionalism in general. The scope, versatility and prolificacy of his writing is almost unequalled. Despite this, it seems fair to say that the approach he takes to law is distinguishable from strict civil law interpretation, he nevertheless engages with the law in a way which displays a complex and thorough understanding of it.

In his earliest work, *de Inventione*, Cicero defines jurists as those who interpret *mos* and *aequitas* and who ultimately decide, based upon that interpretation, what is the law.³⁴ Cicero's second reference to jurists in this early work outlines that when arguing a *negotialis* case it is conventional to argue from the authority of a particular jurist, *ab auctoritate iuris consultorum et contra auctoritatem*.³⁵ These two references in *de Inventione* give us an interesting starting point. In practice we see that advocates argue in court on points of the interpretation of juristic points, either for or against. We can

³¹ Watson (1995) 198. Watson bases his point on Cic. *De or.* I.42; I.190.

³² Watson (1995) 198. We know of Cicero's book *On Reducing the Civil Law to a System* by references in Gell. *N.A.* 1.22.7. and Quint. *Inst. Orat.* 12.3.10.

³³ Watson (1995) 199.

³⁴ Cic. *Inv. Rhet.* 1.11.14. This is also pointed out by the Auctor of the *Rhetorica ad Herennium* at *Rhet. Her.* 2.13.19. An overview of the context of these references has been outlined by Hilder, J. (2016) 169-171.

³⁵ Cic. *Inv. Rhet.* 2.22.68.

easily presume that this would require a level of interaction with the law, an understanding of law in relation to its equitable and customary application, for or against a client's position. Already we can see that some of the responsibility of the advocate is to argue for or against the application of the law in much the same way that a jurist posits an original position as to that law. Or, in short, that the advocate's argument in court is essentially a counter or support to a juristic argument, offering interpretation to the law in much the same way that written juristic authority has principally set out.³⁶ It is generally assumed, as the distinction between jurists and advocates is itself assumed, that this meant that there was a requirement for advocates to seek the advice of jurists in order to comprehend the law suitably to make these arguments. The reason being that, were jurists a professionalised class with a monopoly on interpretative knowledge on the law, the advocate would naturally not have had the ability to interpret the law on his own account.³⁷ This is founded on the continuing idea that advocates and jurists must have existed as distinctly separate groups.

My contention is that the reality of legal practice was somewhat different to this. Advocates and jurists were pooled from the same group of people and that the task of interpretation of the law and arguing these points in court was broadly undertaken by the same people. The extent to which a reputation was garnered as to prowess in interpretation or speaking was linked to ability in these fields, not in exclusive practice of one or the other. We can return to the *causa Curiana*, in which we see a noted expert in civil law, Quintus Mucius Scaevola *pontifex*, and a noted speaker, Lucius Lucinius Crassus, arguing over a point of inheritance. The point here is that on an issue of law each argued legalistically and Crassus won out. This is explained away as anomalous or as a chance victory for rhetorical trickeries.³⁸ Recent scholarship has shown, however, that this is not the situation and that a proper argument in law was required in the case.³⁹ The result we see is the engagement of a so-called advocate in juristic interpretation and a so-called jurist engaging in rhetoric. This forms the convention of practice, not the exception.

Why this is important in the context of Cicero's writing is that it provides a scope to include his writings on rhetorical argumentation as being implicitly about juristic interpretation. Cicero does not write about what the interpretation of the law is, but rather provides us with an outline of the skills used in order to provide that interpretation. The skills which are fundamental to the very ability to be a jurist, to decide what the law is. So, whereas Cicero does not provide the same kind of juristic writings as those who have provided us with direct interpretative analysis of the civil law, he nevertheless does provide us with writing which is juristic. The reason why it is juristic is that it outlines the fundamental

³⁶ The role and duties of the advocate to argue for his client is set out at *Rhet. Her.* 4.37.47.

³⁷ This separation of tasks, the usual need for advocates to consult jurists in order to understand these arguments, is broadly accepted. See for instance, Watson (1974) 101-110; Frier (1985) 139-196; Harries (2006) 92-100; Hilder (2016) 71.

³⁸ Wiacker (1967) 151 is the most prominent dismissal.

³⁹ Tellegen (2003) 191-201.

theoretical and philosophical bases for juristic interpretation. Legal interpretation does not take place in the vacuum of internal legal culture, it is rather fostered by society and by theory. Cicero's writing provides an explanation of the social practice and theoretical foundations which underpin that legal interpretation. In that, Cicero's theoretical writing is fundamentally juristic.

In order to prove this point more investigation of Cicero's writing is needed. As a part of this investigation we can include Watson's final dismissal of Cicero, that he does not concern himself with the civil law. Let us consider what points we require to prove in order to assert that Cicero's writing constitutes a theory of Roman juristic interpretation. First, that Cicero knew about the civil law. Secondly, that he knew how the law was applied and interpreted in practice. Lastly, that his writings made reference to principles which were applied to law, which formed law and which were in a strict sense legal. The final of these points will constitute, given its scope, a chapter in its own right. The establishment of the first two points is necessary before that investigation can take place.

That said, let us investigate Cicero's knowledge of the civil law. As discussed in our chapter on Cicero's education, we know that he received legal education under the tutelage of Quintus Mucius Scaevola *pontifex*. We know therefore that Cicero had the foundation of a legal education. That seems not to be enough to convince scholarship of his juristic credentials. Doubt is cast upon the depth of knowledge he could possibly have held.⁴⁰ So let us look at examples in which Cicero reveals the extent of his legal knowledge in his own writing.

An interesting example which outlines the level of Cicero's knowledge of law is found in a letter written to his young protégé Gaius Trebatius Testa. The letter reads:⁴¹

Inluseras heri inter scyphos, quod dixeram controversiam esse, possetne heres, quod furtum antea factum esset, furti recte agere. itaque etsi domum bene potus seroque redieram, tamen id caput, ubi haec controversia est, notavi et descriptum tibi misi, ut scires id, quod tu neminem sensisse dicebas, Sex. Aelium, M. Manilium, M. Brutum sensisse. ego tamen Scaevolae et Testae adsentior.

You jeered at me yesterday over our cups, for saying that it was a contested point whether an heir could lawfully use an *actio furti* on a theft which had been committed before he became the owner. So when I returned home, full of wine and late in the evening, I marked the section in which that question is treated and had it copied out and sent to you. I wanted to convince you that the doctrine which you said was held by

⁴⁰ Stein (1978) 184: "Cicero, whose knowledge of the law was superficial rather than profound;" Reinhardt (2003) 54, fn.4: "Cicero himself was not considered a *iurisconsultus* by his contemporaries." Although Reinhardt does note Cicero's interest in law, *ibid.*, 59: "Cicero has a keen interest in legal matter, which is not obvious for a Roman advocate as it might seem."

⁴¹ Cic. *Fam.* 7.22. See Fraenkel (1957) for a discussion of Cicero's letters to Trebatius.

no one was maintained by Sextus Aelius, Manius Manilius, Marcus Brutus. Nevertheless, I agree with Scaevola and Testa.

Cicero expresses a clear knowledge of the civil law, discussing juristic opinions on the use of an *actio furti* for a theft committed from a *hereditas iacens*. This display of legal knowledge is impressive. It is striking too given to whom it was made, the jurist Trebatius Testa, whose knowledge of the law, as a jurist, ought to outweigh that of Cicero, a rhetorician. Yet, here we find a clear and attested example of Cicero displaying a knowledge of the law which surpassed the young jurist. Philip Thomas encapsulates the conclusion with which this evidence presents us, that:⁴²

This short, informal note to a friend persuades more that Cicero was indeed advocate and jurist, rather than the positivistic criticism that he was a mere rhetorician with superficial legal knowledge hiding his ignorance by over-reliance on equity.

Thomas's conclusion is, in my view, a correct and inescapable understanding of this evidence. Cicero was capable of casting his eye over a point of law and concluding correctly from his vast experience and knowledge of the topic, even to the extent that he could engage on an even footing with a well-regarded specialist on civil law. Nonetheless, the view persists to the contrary: that Cicero was far from a jurist, but remained only an advocate who, though usually better informed on the law than most, was ultimately not of the required specialist knowledge to be considered a jurist.⁴³ This seems contrary to the facts provided here in our source. To what extent must Cicero display a knowledge of the law before he is to be considered a jurist or does his rôle as an advocate at all times preclude him?

Let us consider Cicero's position free from that dogmatic stance. Cicero's knowledge of the law seems to certainly exist, but his engagement with the law still remains as different from the regular juristic interaction – Cicero does not provide legal opinions in the standard form of *responsa*. So, building upon the earlier claim that Cicero's juristic writings are of a different nature to *responsa* but nevertheless juristic, let us consider the treatise he wrote for that same protégé, the jurist Gaius Trebatius Testa.

Cicero's *Topica* was written as a manual of argumentation for Testa, offering him a guidebook by which he can construct and formulate legal arguments in court. The very offering of this book would indicate testimony that Testa, as a jurist, would require instruction in rhetorical, topical argumentation

⁴² Thomas (2016) 11.

⁴³ Wiacker (1965) 7. Wiacker argues that the Roman jurist remained extraneous to the case, outside the practical environs of the case. The various cases where we see jurists-proper – i.e. those universally agreed to be jurists - embarking on court cases seems not to deter him. For Wiacker, the true jurist would have provided a simple and objective expression of law, without need for reason, decision-making remains a problem of law without fact, see 26: "eine Entscheidungskunst, die sich allein durch das spezifische juristische Sachproblem leiten liess."

as a result of his practical legal work. That aside, the actual substance of the work is revealing about the formulation of legal arguments in late Republican Rome.

The *Topica* forms a fundamental work on the formation and invention of legal argument. Its very purpose is to provide a young jurist with a textbook on the ways to form legal arguments from a topical basis. And, just as noted in *de Inventione*, the very rôle of the jurist is to determine these legal arguments by interpretation from custom and equity. This interpretation hinges upon the topical theory Cicero sets out here for Testa, a masterclass in the underpinning methodology of the Roman jurist.

The notion that Roman juristic interpretation was underpinned by nothing other than a single injection of Greek philosophical thought is generally accepted.⁴⁴ This seems unsuitable given the complexity and sophistication that Roman juristic thought attained. Roman jurists did not simply intuit legal outcomes from a simple patten of *genera* to *species* based on a singular and insufficient construction of categorisation. Jurists had to interpret law within the frame of society at large, with continued reference to *mos* and *aequitas*. Such a simple and insular explanation of their genius can only be upheld within a dogmatic framework which rejects the realities of law in society. By using the *Topica* as it was intended, as a guide to the formation of legal argument, we can begin to unpick the loci whence legal arguments came, and clearly see the application of the methodology which the jurists apply to the law. This application can reveal to us the worth of Cicero as a juristic source, and show us that far from being ostracised from the operation of legal experts in the late Republic, Cicero was an insider.

4.2. Summary of Findings.

The exclusion of the writings of Cicero from the canon of sources on Roman law, along with the exclusion of the historical Cicero from the personality of lawyer resulted from the acceptance of dominant dogmatic naratives that asserted their predominance over Roman legal scholarship since the nineteenth century. Cicero's exclusion depended upon a patriotic narrative that stressed a similarity between ancient Roman jurists and modern professors of Roman law, and the supposition that the modern Romanists reluctance to consider rhetoric was reflected in the ancient past. A second narrative, of legal science, is responsible for the later exclusion of rhetoric, as the historical conditions of modernity led to scientific proof establishing itself as the benchmark for valid reasoning, a burden of proof erroneously and anachronistically ascribed to the Roman jurists.

Cicero's exclusion was linked to the supposed dichotomy between the jurist and the orator, which itself resulted from the predominance of the dogmatic narratives and which is criticised in Chapter Two. The difference between jurists and orators was over stated to the extent that it presented

⁴⁴ Reinhardt (2003) 56.

the groups as highly professionalised and isolated professions, rather than titles used as a descriptor to assign deep understanding of a particular subject to men who engaged in a variety of intellectual pursuits. This dichotomy placed Cicero with the orators, and necessarily excluded him from the jurists.

This chapter has challenged that viewpoint, pointing out that Cicero had a deep knowledge of the law, resulting from his education and practice as an advocate, but nonetheless not surpassing his reputation as an orator, which, due to his extreme proficiency, became the field with which he is most associated. This chapter demonstrates Cicero's proficiency in law and reveals the limitations of the dichotomy. Moreover, it attempts to rescue Cicero's rhetorical writings from disregard by lawyers, offering a presentation of Cicero as a legal writer, though of a different type from the jurists.

The following chapter will examine Cicero's writings as a form of rhetorical theory of legal reasoning, demonstrating that Cicero's writing was not removed from the attention of Roman lawyers as the musings of an "outsider", as Watson would have it, but rather the legal writings of a type of lawyer, an "insider", at Rome, interested in the practicalities and theory of legal argumentation.

5. Rhetoric as a Theory of Legal Reasoning.

As we have established, the perceived dichotomy between jurists and advocates has often been overstated. The consequence of this separation has led to an erroneous bifurcation of two fields of learning: rhetoric and law. In reality, the education of the Roman in the late Republic led not to the creation of distinct, professional groups whose methodologies and daily practice were separated from each other – as discreet advocates and jurists – but rather that the same men, interchangeably, yet with natural dispensation toward certain endeavours, engaged broadly in an holistic practice of law, which included both rhetorical and legalistic functions. It is from this that we are able to amend the accusation by Alan Watson that Cicero remained an outsider to the field of Roman law and that with him, the field of rhetoric could be, in general terms at least, dismissed as outwith the scientific parameters of legal systematisation from the time of Scaevola *Pontifex* onwards. The contention from the previous chapter is that Cicero – and those like him, whose primary function in relation to law was to speak in courts – was far from an outsider, but rather an insider, integral to the good functioning of the Roman legal system. This chapter will develop upon that claim, arguing that not only were orators, or advocates, engaged in law in a practical sense, but that the development of rhetoric at Rome served as the provision of an argumentative theory which influenced decision-making in Roman law, and, as a cause of this, influenced the development of the law. This chapter will explore these points in three stages: first, it will examine the establishment of rhetorical theory at Rome in the late Republic; secondly, it will look at the development and practical application of rhetoric through the work of Cicero; lastly, it will draw threads of rhetoric together, bringing in evidence from the period of the early Principate, revealing the centrality of rhetorical theory to legal understanding in the period. Having examined these in turn, I will conclude that the supposed scientific systematisation of law in the late Republic did little to stymie rhetorical influence in legal development. This thesis, in the subsequent chapters, will then provide two case studies in succession law to underpin this claim: first, *bonorum possessio*; second, the *querela inofficiosi testamenti*.

5.1 The Development of Rhetorical Theory at Rome in the Late Republic.

Rhetorical theory in its origin is Greek.¹ The advent of rhetoric at Rome relates to the broader interaction between Greek thought and Roman civilisation from the second century onwards, resulting from Roman incursion into Magna Graecia and Sicily, along with a more expansive Roman policy resulting from triumph in the Punic Wars. However, the Romans, while adopting Greek models, developed their own, distinctly Roman brand of rhetoric. This section will first offer a brief sketch of Greek rhetoric, secondly survey the introduction of rhetoric to the Romans through the Greeks and thirdly, and with more emphasis, examine early Roman sources on rhetoric as an indication of Roman rhetorical theorising.

5.1.1. Greek Origins of Rhetoric.

Greek rhetoric is traditionally attributed to the Sicilian orators of the fifth century BC, Corax and Tisias, who, according to Cicero, based on Aristotle, were the first to systematically assign principles to eloquent speech.² Systematic Greek rhetoric derived from speaking in the law courts.³ By the Greek classical period, rhetoric was used practically and effectively in law courts. The use of rhetoric in Greek courts, particularly in criminal cases, was the establishment of malice in the intentions of the accused based upon probable facts.⁴ The interpretation of probability based on facts is the burden of proof by

¹ At least for our purposes. There are claims to earlier rhetorical theory in ancient Mesopotamia, but the theory of rhetoric which affected Rome was Greek, see: Cole (1991)a. For a discussion of the development of rhetoric with particular reference to Greece, see: Schiappa (2017). It should be noted that the terms Greek and Greece are being used to refer to a wide range of city state organisations over a long period of time without specific and detailed identification of specific city-states, unless explicitly referenced, but rather to the ancient city states associated by a broad Greek culture. So the term “Greek law”, for instance, is used broadly to refer to a legal model - akin to the modern term “Civilian law” used for European Roman derived systems, rather than referring to a particular, substantive body of law.

² Cic. *Brut.* 46. Another theory, also following Aristotle, states that Empedocles (another fifth century Sicilian) was the true founder of rhetoric. The actual founder is inconsequential to a Sicilian origin in the fifth century. For more, see: Hinks (1940) 61; Clarke (1953) 165 fn 1; Cole (1991)b.

³ For instance, Clarke (1953) 1. Gagarin also states at (2017) 44 the courts “were the primary venue for the development of rhetoric”. This line of argument makes sense in reference to the development of Greek law itself, which MacDowell sets out as a development away from primitive physical disputes (11-15), through trial before kings, elders and archons (15-29), to the *Heliaea* and popular or democratic juries (29-35). The need for speech, and thus rhetorical theory to regulate that speech, as the definitive measure by which a decision is made increased with each step through time, - See MacDowell (1978) 11-35. This ties in with the fabled first reason behind rhetoric as a form of dispute resolution between a strong man and a weak man, see: Plat. *Phaedr.* 273a-c; Arist. *Rhet.* 2.24.11, 1402a. While Greek political rhetoric also developed, the focus of this sketch will be the legalistic nature and origins of the field, for Greek political rhetoric at broad brush, see: Harris (2017).

⁴ Carawan 20-25. See also, Clarke (1953) 1-3.

which the Greek court operated, a rhetorical proof which Aristotle called enthymeme (ἐνθύμημα).⁵ The centrality of this probable proof to the Greek decision-making system, and the jury-based nature of trial made oratory and rhetoric the pillars upon which Greek law stood.⁶ As rhetorical theory spread from Sicily to the wider Greek world, it became subsumed by Sophistic thought on excellence within the Greek City (πολιτική ἀρετή).⁷ However, the relationship between rhetoric and law remained what Gagarin calls “intimate, complex, and controversial”.⁸ In the classical period, particularly in city-states which adopted the democratic jury institution in law, the art of rhetoric as a means of persuasion intensified, and the theory of rhetoric became pronounced in legal argument.⁹ The rhetorical system developed by the Greeks was, because of this connection, purposive to the persuasion of juries. With age, rhetoric developed a more sophisticated methodology.¹⁰ Later philosophical thought developed these models, particularly that of Aristotle, who, despite the distaste for rhetoric espoused by his teacher Plato, wrote the most influential of all Greek treatises on rhetoric.¹¹ Aristotle’s rhetoric has a decidedly political character, yet its application to law and its origin in law cannot be overlooked. It is primarily in this Aristotelian tradition that Romans interacted with rhetoric, so a brief scan of Aristotle’s conception of rhetoric is necessary to our understanding of the later Roman interpretation.

Aristotle’s treatise *Rhetoric* is of value not only for its content, but also for its treatment of rhetoric as a whole, providing a good overview of the Greek approach to rhetorical theory. Despite this, the book is often contradictory.¹² Nonetheless, it provides a good overview of an orthodox substantive view of Greek rhetoric, and reveals the basis upon which Roman rhetoric developed. From the outset Aristotle is keen to stress that rhetoric when misused is no substitute for truth and that the definition provided by laws ought to be narrow enough to limit rhetorical interpretation and to limit the discretion of judges or jurors to a minimum.¹³ That discretion, whether limited or not, is influenced by rhetoric in

⁵ Arist. *Rhet.* 1.1.3. The enthymeme in a later sense is syllogistic, but its fundamental structure is the preponderance of evidence on the logic of the probability of fact. See Carawan (1998) 20-21. For more on this development within Greek law see: Clarke (1953) 1-9; Gaskins (1991) 21-29; Kennedy (1997) 205; Gagarin (2017) 44.

⁶ The idea that rhetoric was at the centre of Greek law has by no means universal consensus, but in my view seems inescapable. See, Goodrich (1998); Gagarin (2017).

⁷ Clarke (1953) 2-3. Several theories of rhetoric developed among sophists, notably Thrasymachus, Theodorus of Byzantium, Podius and Hypias. Of particular note and relevance to later study was Protagoras (see: Plat. *Prot.* 318E-319A; Arist *Rhet.* 2.24.11; Cic. *Brut.* 46) and Gorgias (Plat. *Gorg.* 459B-C).

⁸ Gagarin (2017) 43.

⁹ Clarke (1953) 1-10.

¹⁰ For an overview of the development of rhetoric, see: Vickers (1988) 1-82; Kennedy (1994); Porter (1997).

¹¹ Plato’s distaste for rhetoric can be seen at Plat. *Phaedr.* 259E; 271D. For an overview of Plato’s thoughts on rhetoric see: Yunis (2017).

¹² Garver (2017) 133 calls the book “very slippery” for its tendency to warn against a rhetorical misdemeanour and then later endorse the same approach for the sake of winning an argument. This slipperiness may derive from Baldwin’s observation that *Rhetoric* is “hardly a manual” but rather “a philosophical survey” and thus of larger scope than educational consistency, see Baldwin (1959) 8.

¹³ Arist. *Rhet.* 1.1.7.

the arguments presented by rhetoricians. Aristotle divides rhetoric into deliberative, forensic and epideictic speeches, and accounts for these three as follows:¹⁴

Συμβουλῆς δὲ τὸ μὲν προτροπὴ τὸ δὲ ἀποτροπὴ· αἰεὶ γὰρ καὶ οἱ ἰδίᾳ συμβουλευόντες καὶ οἱ κοινῇ δημηγοροῦντες τούτων θάτερον ποιῶσιν. δίκης δὲ τὸ μὲν κατηγορία τὸ δ' ἀπολογία· τούτων γὰρ ὀποτερονοῦν ποιεῖν ἀνάγκη τοὺς ἀμφισβητοῦντας. ἐπιδεικτικῶ δὲ τὸ μὲν ἔπαινος τὸ δὲ ψόγος.

The deliberative kind is either hortatory or dissuasive; for both those who give advice in private and those who speak in the assembly invariably either exhort or dissuade. The forensic kind is either accusatory or defensive; for litigants must necessarily either accuse or defend. The epideictic kind has for its subject praise or blame.

These styles remained established into the Roman period, and their purpose was to establish a proof of the probability in the mind of the listener. As mentioned enthymeme is the central rhetorical proof by which probability accounts for facts. Aristotle assigns this proof to the production of a decision based on four perceptions amounting to this proof: opinion (δόξα); conviction (πίστις); being persuaded (πεπειῖσθαι); and reason (λόγος).¹⁵ The means by which these perceptions are moved towards probable, rhetorical proof is through the character of the speaker (ἔθος), the emotions of the audience (πάθος), and the intrinsic reasoning within the speech (λόγος).¹⁶ The whole point of rhetoric is the production of a judgement (κρίσις), based upon deliberation under these headings. Garver points to the association between rhetoric and the virtue of practical, deliberative intelligence (φρόνησις), stating that they “take it on themselves to think about matters where there is no science available”.¹⁷ For Aristotle, ethos takes on a central rôle as the most persuasive tool to the rhetorician and Aristotelian rhetorical theory situates itself in persuasion toward character and emotion, despite the caveat of maintaining an ethical outlook in speaking.

To this broad schematic Aristotle adds a discussion of the necessary categories for the two speech diaeresis (διάρρησις), or division, or collections.¹⁸ Division is the separation of areas which are not naturally grouped; collection is the grouping together of naturally linked areas of inquiry. Steel points out that division provides a structure by which rhetoric can be categorised, supporting two purposes: to make the subject more comprehensible and teachable; and to make the field of rhetoric more

¹⁴ Arist. *Rhet.* 1.3.3. Translation by J.H. Freese (1989) 32. The original division is given at Arist. *Rhet.* 1.3.1.

¹⁵ Arist. *De An.* 3.3, 428a19–24.

¹⁶ Arist. *Rhet.* 1.2.

¹⁷ Garver (2017) 140. For Aristotle on phronesis, see Arist. *Rhet.* 1.2.12.

¹⁸ Steel (2010) 77–78. Steel points to an early example of division of the Platonic Socrates at Plat. *Phaedr.* 265d2–266b5. The division here is presented in a discussion of dialectic rather than rhetoric, but is indicative of the same point.

intellectually credible.¹⁹ The need for intellectual credibility from the systematisation, Steel argues, is due to the general applicability of the techniques of rhetoric, which threaten its very status as an art. Organisation inputs a sense of intellectual merit in a field with no distinct intellectual quality, but rather a vague application across a wide section of society. Early rhetorical systems used speech divisions as the way categorically to systematise rhetoric.²⁰ Aristotle, though, as we have seen, concerning himself with a broader philosophical range in relation to rhetoric, maintains these categories.

The Aristotelian rhetorical tradition continued to have traction, particularly in the Peripatetic School, with a particular proponent in Theophrastus, who characterised rhetoric in virtues of style, clarity, correctness and ornament. In the Hellenistic period, with the general decline of the Greek city-state, rhetoric became more academic and, removed somewhat from its practical political and legal function as it became the subject of schoolteachers. In this period, there was a continued impetus for classification along an intellectual line, such as that made by Hermagoras.²¹ The academic restrictions and specialism with which the Greeks now treated rhetoric led to it coming under the influence of the major philosophical schools of the Hellenistic world. As mentioned, the Peripatetics continued in the vein of Aristotle by refining his discourse. The Academy, though initially sharing Plato's aversion to rhetorical theory, had succumbed to the teaching of rhetoric under Philo in the late first century BC, however, the discourse was dominated by more meta-philosophical discussions like whether rhetoric was to be considered an art. The Stoics, who had become the dominant philosophical school, initially did not concern themselves with rhetoric. In its later form, stoicism did inform rhetorical theory, with concepts of stoic logic being adapted as an argumentative model. Stoicism, nevertheless, was not useful in a broad sense to the rhetorician, as the stoics – sharing commonality on this issue with the Epicureans – had little to say on eloquence.²²

This broad sketch of Greek rhetoric has outlined the general development of its theory from its initial practical use in Greek law courts to the more academic treatment it received in the Hellenistic period. The purpose of this sketch was to present the theoretical position of rhetoric in its original Greek state, in order to show the foundation upon which the edifice of Roman rhetoric was constructed

¹⁹ Steel (2010) 78.

²⁰ Plat. *Phaedr.* 266d–268a.

²¹ Hermagoras was well noted in antiquity for his additions to rhetorical classification, see: Quint. *Inst. Orat.* 5.3.59. His major claim to fame is the development of εὑρεσις (*inventio*). Quintilian approves of the system, see: Quint. *Inst. Orat.* 3.3.9. Cicero has a more mixed reception, see the comparison in sentiments at: Cic. *De Inv.* 1.6. and Cic. *De Inv.* 1.11. Tacitus states that the developments of Hermagoras led rhetoric into a more academic, rather than practical sphere, see: Tac. *De Orat.* 19.

²² Cic. *Brut.* 309. Quint. *Inst. Orat.* 12.2.25. See also, Carke (1953) 8. The Second Sophistic of the third century AD was more involved in rhetorical theory: for an overview see Goldhill (2010).

5.1.2. Early Roman Rhetoric.

Roman rhetoric has an unassuming inception. Cicero states that in the beginning the Romans had no conception of an art of speaking, but in true Roman style had a rustic understanding of speech craft, which was not stylised until the influence of Greek literature and teachers:²³

Ac primo quidem totius rationis ignari, qui neque exercitationis ullam viam, neque aliquod praeceptum artis esse arbitrarentur, tantum, quantum ingenio et cogitatione poterant, consequebantur. Post autem, auditis oratoribus Graecis, cognitisque eorum litteris, adhibitisque doctoribus, incredibili quodam nostri homines dicendi studio flagrauerunt.

At first indeed, in their complete ignorance of method, since they thought there was no definite course of training or any rules of art, they used to attain what skill they could by means of their natural ability and of reflection. But later, having heard the Greek orators, gained acquaintance with their literature and called in Greek teachers, our people were fired with a really incredible enthusiasm for eloquence.

The simplicity of early Roman rhetoric, lacking the theoretical basic of Greek science (τέχνη), is exemplified in the figure of the elder Cato, whose (nonetheless supposedly able) speech was akin to Cicero's description of early Roman oratory. This straightforwardness is encapsulated in Cato's famous definition of the orator as "*vir bonus dicendi peritus*" and his advice to speakers "*rem tene, verba sequuntur*".²⁴ Despite this, Cato was the first Roman to write on oratory, albeit without long-lasting impact.²⁵ Moreover, Cicero notes that Cato had some knowledge of Greek rhetorical theory and was by no means a bad speaker.²⁶ Cato's address in Latin to an Athenian assembly of 191 BC. was well-received.²⁷ Though Cato, after a trick played with his interpreter, concluded with disfavour that "Greeks speak from their lips; Romans speak from their hearts".²⁸ Cato's antipathy to Greek influence on Roman society was not in isolation.

According to Suetonius, rhetoric was introduced to Rome in a similar way to grammar - brought by the Greeks - but had a far more difficult history.²⁹ According to ancient sources an Athenian Embassy

²³ Cic. *De Or.* I.14. Translated by Sutton & Rackham (1989) 13.

²⁴ Quint. *Inst. Orat.* 12.1 for the former; the latter is recounted by the fourth century AD rhetorician Gaius Julius Victor, and reported at Tueffel (1873) 158.

²⁵ Quint. *Inst. Orat.* 3.1.9.

²⁶ Cic. *Brut.* 67-71. For further reading on Cato as an orator see: Astin (1978); Sciarrino (2007), (2011).

²⁷ Val. Max. 2.2.2.

²⁸ Plut. *Cat. Maj.* 12.5.

²⁹ Suet. *Rhet.* 1.1.

arrived in Rome in 155 BC, bringing with it the leaders of the heads of the pre-eminent Greek philosophical schools, who were noted not only for bringing their ideas to Rome, but also for presenting these ideas with eloquence, introducing Greek technical rhetoric to rustic Roman speech craft.³⁰ The difficulty with the Roman reception of rhetoric arose from a reluctance of the Romans wholeheartedly to adopt rhetoric from its Greek origins. An edict from the censors and a decree of the Senate from 161 BC led to the praetor, Marcus Pomponius, expelling Greek rhetors – alongside philosophers – from residence at Rome.³¹ This expulsion was most likely the result of Roman cynicism to change through foreign influence and an appreciation of the dangers of rhetoric and oratory.³² The Greek orators and rhetoricians returned to Rome as private teachers, and eventually re-established themselves in public.³³ As discussed previously, the impact of Greek teaching on the Roman mind of the late second century BC led to the creation of a Roman rhetorical school, the *rhetores latini*.³⁴ The strained history of rhetoric's early period in Rome was not done, as by 92 BC the Latin rhetoricians themselves incurred the wrath of the censors Lucius Licinius Crassus and Gnaeus Domitius Aenobarbus, who decreed their disapproval at young men spending their days learning rhetoric counter to the traditions of their ancestors.³⁵ The teaching of Latin rhetoric continued in spite of this edict, and by 81 BC, a new school of Latin rhetoric had been established.³⁶ As the first century BC progressed, the vilification and suspicion, which had previously plagued rhetoric at Rome, subsided, as rhetoric became a more accepted practice in Roman society.³⁷

The early orators in Rome of merit, according to the Auctor of the *Rhetorica ad Herennium*, were the elder Cato, the brothers Gracchi, Gaeus Laelius, Scipio Aemilianus, Servius Sulpicius Galba, Marcus Aemilius Lepidus Porcina, Lucius Licinius Crassus, and Marcus Antonius.³⁸ These nine men span a near-exact century at the height of Roman public life, from Cato, who was consul in 195 BC, to Licinius Crassus, who attained the consulship in 95 BC. To these Cicero adds more names in his *Brutus*

³⁰ Cic. *De or.* II.155; *Tusculanae disputationes* 4.5; *Academica* 2.137; Aul. Gel. *A.N.* 6.14.6.-6.14.10; Plut. *Cat. Maj.* 22.

³¹ Suet. *Rhet.* 1.1.

³² See 3.1.

³³ Cic. *De or.* I.72. reveals the return of rhetoric by the end of the second century.

³⁴ We are aware that the rhetoricians returned shortly after 161 BC as the sons of Aemilius Paulus and Tiberius and Gaius Gracchus are all noted as having Greek teachers of rhetoric in their youth. G. Gracchus was taught, for instance by Diophanes of Mitylene, reputedly the most eloquent Greek of his time. For this, see: Plut. *Aem Paul.* 5.5. for Aemilius Paulus and Cic. *Brut.* 100, 104, 125. and Plut. *Tib. Grac.* 8.4 for the Gracchi. For the earlier discussion of these events in this thesis, see: 3.1.

³⁵ Suet. *Rhet.* 1.1.

³⁶ Jer. *Chron.* 174.4.

³⁷ Suet. *Rhet.* 1.1. Where he states “*Paulatim et ipsa utilis honestaque apparuit, multique eam et praesidii causa et gloriae appetiverunt*”. Translated by Rolfe (1914) 421: By degrees rhetoric itself came to seem useful and honourable, and many devoted themselves to it as a defence and for glory.

³⁸ *Rhet. Her.* 4.5.7. Cato's role in oratory has already been discussed. For more on the rhetoric of the brothers Gracchi, see Stockton (1978) and for the later orators and interlocutors of *de Oratore*, see Fantham (2004) 26-48.

as contemporaries of Cato.³⁹ Among these, he mentions C. Flaminius,⁴⁰ C. Varro,⁴¹ Q. Maximus,⁴² Q. Metellus,⁴³ P. Lentulus,⁴⁴ and P. Crassus. To these Cicero also notes the worth of the elder Scipio Africanus,⁴⁵ Sextus Aelius,⁴⁶ C. Sulpicius Gallus,⁴⁷ T. Gracchus,⁴⁸ P. Scipio Nasica⁴⁹, L. Lentulus⁵⁰, Q. Nobilior⁵¹, T. Annius Luscus⁵², L. Paulus⁵³, A. Albinus⁵⁴, Servius Flavius⁵⁵, Servius Fabius Pictor⁵⁶, Quintus Fabius Labeo⁵⁷, the experienced L. Cotta⁵⁸, the younger Scipio Africanus, and the polished C. Laelius.⁵⁹ Of all the orators of this early period, Cicero credits Servius Galba most highly.⁶⁰ These men

³⁹ Cic. *Brut.* 77.

⁴⁰ Flaminius is said to have been regarded as a good speaker by his contemporaries, see: Cic. *Brut.* 57.

⁴¹ Varro is praised more for his historical accuracy than for his speech, see Cic. *Brut.* 60.

⁴² Little more is said of Quintus Maximus than his capture of Livius in his fifth consulship, see Cic. *Brut.* 72.

⁴³ Cicero praises Quintus Metellus as being the foremost speaker of his generation, highly regarded for his speeches on behalf of L. Cotta and against T. Gracchus. See Cic. *Brut.* 81: *Nam Q. Metellus, is cuius quattuor filii consulares fuerunt, in primis est habitus eloquens.* Translated by Hendrickson & Hubbell (1939) 75: “As for Quintus Metellus, whose four sons attained to consular rank, you are of course aware that he was esteemed one of the most eloquent men of his time.

⁴⁴ Lentulus is noted as an able orator, but more praised for his knowledge of literature, see Cic. *Brut.* 77.

⁴⁵ Scipio Africanus we are told is not “without some gift in speech”. Cic. *Brut.* 77.

⁴⁶ Sextus Aelius of whom we are told at Cic. *Brut.* 77: *Numeroque eodem fuit Sex. Aelius, iuris quidem civilis omnium peritissimus, sed etiam ad dicendum paratus.* Translated by Hendrickson & Hubbell (1939) 73: To the same group belongs Sextus Aelius, the most learned man of his time in the civil law, but also a ready speaker.

⁴⁷ Gallus receives aplomb for his knowledge of Greek at Cic. *Brut.* 78 but also for his speaking: *isque et oratorum in numero est habitus et fuit reliquis rebus ornatus atque elegans.* Translated by Hendrickson & Hubbell (1939) 73: He was accounted an orator, and in other respects was a man of culture and refinement.

⁴⁸ Tiberius Gracchus’s oratorical prowess has been mentioned elsewhere. Cicero states at Cic. *Brut.* 79: *quem civem cum gravem tum etiam eloquentem constat fuisse.* Translated by Hendrickson & Hubbell (1939) 73: “and we know that he was eloquent as well as a man of influence”.

⁴⁹ Nascia, known as *Corculum*, the darling of the people, was said to be “eloquent”, see Cic. *Brut.* 79.

⁵⁰ Cic. *Brut.* 79. This Lentulus is said to be in a similar category to Nascia.

⁵¹ Cic. *Brut.* 79. Q. Nobilior, though included in the list of orators, is more noted for his love of literature and his dealings with the poet Ennius.

⁵² Cic. *Brut.* 79. Luscus is reported as reasonably eloquent in the same vein as Nobilior.

⁵³ Cic. *Brut.* 80. L. Paullus attained high rank through his eloquence: *atque etiam L. Paullus Africani pater personam principis civis facile dicendo tuebatur.* Translated by Hendrickson & Hubbell (1939) 75: “Lucius Paullus also, the father of Africanus, sustained easily by his eloquence the rôle of first citizen”.

⁵⁴ Albinus was highly regarded by Cicero for his eloquence. See Cic. *Brut.* 81.

⁵⁵ Servius Flavius was said to almost rival Albinus. See Cic. *Brut.* 81.

⁵⁶ Cic. *Brut.* 81. Noted for his knowledge of the law as well as his eloquence.

⁵⁷ Cic. *Brut.* 81. Labeo was in a similar mould and similarly accomplished to Servius Fabius Pictor.

⁵⁸ Cic. *Brut.* 82. Cotta was said to be well practised but ordinary.

⁵⁹ Cic. *Brut.* 82: *Sed C. Laelius et P. Africanus in primis eloquentes, quorum exstant orationes, ex quibus existimari de ingeniis oratorum potest.* Translated by Hendrickson & Hubbell (1939) 75: “Gaius Laelius and Publius Africanus however were in the first rank of orators; their speeches are extant, from which one may judge of their oratorical genius”.

⁶⁰ Cic. *Brut.* 82: *Sed inter hos aetate paulum his antecedens sine controversia Ser. Galba eloquentia praestitit; et nimirum is princeps ex Latinis illa oratorum propria et quasi legitima opera tractavit.* Translated by Hendrickson & Hubbell (1939) 75: But among all of these, preceding them a little in point of time, Servius Galba stood out beyond question as pre-eminent in eloquence. And in fact of Latin orators he was the first to employ those resources which are the proper and legitimate functions of the orator.

formed the bulk of early orators during the second century.⁶¹ The extent to which these men developed rhetoric on an individual basis is not attested, but rather it is clear that to the rudimentary Roman speech to which Cato alluded, they began to add by degrees more of the Greek influenced style, which they had been taught and had heard, to their speech.

While these speakers engaged in oratory and were schooled in Greek rhetoric, there was decidedly little by the way of a distinct, Roman rhetorical theory in second century. Ennius was the first of the Romans to mention rhetoric, then Cato. Quintilian and Cicero then attribute the next attempt at Roman interaction with a theory of rhetoric to Marcus Antonius Orator at some point before 91 BC.⁶² This now lost work was not well received by Cicero.⁶³ Despite the protests of the character-interlocutor Antonius in *de Oratore* that the work was written under no influence but practical experience, references to it reveal the influence of older rhetoricians, particularly Hermagoras.⁶⁴ The work did not establish a new, concrete Roman identity to rhetorical theory, but it did begin a trend towards a more thorough and meaningful Roman interaction with rhetoric. The next century brought with it a clearer notion of Roman rhetoric, culminating in definitively Roman theories of rhetoric.

5.2. Rhetorica ad Herennium, De Inventione, and Early Roman Rhetorical Theory, or ‘*Graecia Capta Ferum Victorem Cepit et Artes Intulit Agresti Latio*’.⁶⁵

With the first century BC came the first two books which, though rudimentary and essentially following Greek models, offered theories of rhetoric at Rome. The first two decades of the century were not without incident, the Social war brought sudden change to Rome and the conflict between Marius and Sulla brought political uncertainty. The period also brought a renewed distaste for philosophy and rhetoric, leading to a second expulsion of teachers in 91 BC.⁶⁶ Among this political and social upheaval, however, the art of rhetoric at Rome found transformed consideration. The books mentioned were the unattributed *Rhetorica ad Herennium* and a precocious Cicero’s incomplete textbook *de Inventione*, which he wrote around the age of 21. Each in turn contributes to the foundation of Roman rhetorical thought. However, neither is as valuable as the more complex rhetorical works composed by Cicero

⁶¹ Cicero goes on to discuss other “middling” orators who are of less consequence to our discussion, but who reveal the relatively widespread practice of speaking in public. See: Cic. *Brut.* 94-118.

⁶² Quint. *Inst. Orat.* 3.1.19.

⁶³ Cic. *De or.* I.94; Cic. *Brut.* 163.

⁶⁴ Cic. *De or.* I.208.

⁶⁵ Hor. *Epist.* 2.1.156. “Conquered Greece captured her feral conqueror, and brought the arts into rustic Latium”.

⁶⁶ See 3.1.

later in the Republic. The contribution of each will be handled in this section, followed by an appraisal of their value and impact to Roman rhetoric, specifically within a legal context.

5.2.1. The *Rhetorica ad Herennium* and Establishing Latin Legal Rhetoric.

Of the two, the *Rhetorica ad Herennium* is taken first chronologically, certainly according to Quintilian's list of the rhetors, where its publication is placed between the *libellus* of Antonius and *de Inventione*.⁶⁷ The identity of the author (whom we shall call Auctor) remains unknown, but a fair presumption is a Roman of the upper estates who would have been afforded the kind of education discussed at length in this thesis.⁶⁸ The date of the *Rhetorica ad Herennium* is by no means definite, yet the most likely, and generally accepted date, is 86-82 BC. There seems no compelling reason to doubt this consensus, and this date seems to fit with the intellectual development of rhetoric at Rome.

The content of the *Rhetorica ad Herennium* is of more concern⁶⁹. Despite its seminal rôle in the creation of the tradition of Latin rhetorical literature, the work already uses a technical vocabulary of rhetorical terminology. A trait it shares with Cicero's *de Inventione*.⁷⁰ The education of the authors in Greek rhetorical models largely explains this understanding.⁷¹ Yet notably Marx proposes an unverifiable claim of a common source for both *Rhetorica ad Herennium* and *de Inventione*.⁷² Significant difference between the texts indicates this is not the case. However, the confined intellectual sphere of a shared pool of rhetorical thought results in unquestionable similarities between the works. They nevertheless have discreet characteristics. Of interest relating to *Rhetorica ad Herennium* is the (perhaps feigned) disapproval of the Auctor for the sources that went before him, despite their evident influence on his work.

Rhetorica ad Herennium deals in turn with all five of the orator's functions: invention (*inventio*); Arrangement (*divisio*); Delivery (*elocutio*); Memory (*memoria*); and Style (*pronuntiatio*).⁷³

⁶⁷ Quint. *Inst. Orat.* 3.1.19.

⁶⁸ See Chapter Three.

⁶⁹ For an overview of scholarship surrounding the *Rhetorica ad Herennium*, see: Marx (1894); Caplan (1954); Douglas (1960); Barwick (1961); Gelzer (1962); Calboli (1969), (1972), (1998); and most recently, Hilder (2015); (2016).

⁷⁰ Of these treatises, Clarke notes that despite the supposed youth and inexperience of their respective authors both works "move with ease in the complications of an elaborate technical terminology". See Clarke (1953) 13.

⁷¹ Heath (2017). See also 3.1.

⁷² Marx (1894).

⁷³ *Rhet. Her.* 1.2.3.

The textbook serves a primarily practical purpose, focussed on useful advice to the orator. A brief summary of each in turn will provide an overview of the book,

Invention, as we have noted, takes its essential development under Hermagoras, whose influence persists to the *Rhetorica ad Herennium*. Nonetheless, the Auctor follows the subdivisions of the parts of speech (*partes orationis*) used by Aristotle, creating a synthesis of the two schools in his treatment of invention. The discussion of the Auctor largely deals in *stasis* theory, deciding on what kind of argument ought to be used from three kinds of issues (which he – and Cicero in *de Inventione* – call *constitutiones*). These three *constitutiones* form a simplification from the more usual four, and emphasise the intended practicality of the Auctor’s textbook.

Regarding arrangement, the text is rather shorter. The Auctor has a flexible interpretation to arrangement, which represents an unusual approach, even going so far in its flexibility to say that arrangement can depend upon the situation. The ability of the Auctor to re-arrange the functions of the orator away from convention indicates a confidence in the assertion of his rhetorical theory.

On delivery, the Auctor provides far more detail, acknowledging, in line with others, its centrality to making a speech, though perhaps not with more emphasis than other elements of the speech.⁷⁴ In fact, on delivery the work contains the most original observations. The Auctor is concerned mainly with two broad themes: vocal quality and physical movement; and mode of voice.⁷⁵ Interestingly, the Auctor does not provide exempla here, but rather relies on a cultural understanding of what is appealing. Nonetheless, the Auctor provides an extensive survey of connection between tone and gesture.⁷⁶ The innovations made to delivery, in the extensive treatment provided by the Auctor indicates the refocussing of rhetorical theory in the Latin language.

Memory occurs to the Auctor straight from Aristotle with no attested intercession.⁷⁷ Memory is perhaps, for our purposes, the most important of the Auctor’s functions of the orator. The reason for this is the close connection between *memoria* and the use of memorised *loci* for the invention of argument. These *loci* are related to the use of *exempla* and are tied to scenarios that are often legal in nature. Memory for the Auctor is the “*thesaurus inventorum*” from which the parts of rhetoric derive.⁷⁸ The Auctor attempts to provide a theory for memorisation as a “*doctrina atque ars*”.⁷⁹ The feats of

⁷⁴ *Rhet. Her.* 3.11.19-15.27. Cicero goes even further to stress the importance of delivery with reference to the story of Demosthenes claim that the three most important elements of the speech were “delivery, delivery, delivery,” see: Cic. *De or.* III.41.213.

⁷⁵ *Rhet. Her.* 3.9.17.

⁷⁶ *Rhet. Her.* 3.15.26-7.

⁷⁷ Barwick (1965) 213.

⁷⁸ *Rhet. Her.* 3.16.28

⁷⁹ *Rhet. Her.* 3.21.34

memory of orators is lauded for its value.⁸⁰ Of more interest to us is what is being remembered and why that is important. The purpose of memorisation is to train in the perfection of the understanding of practical performance of rhetoric, and to use examples to provide a basis for the practical execution of *loci*.⁸¹ More will be made of this in my discussion of legal *exempla* in the work, but the stress on the importance of memory is the importance of a controlled set of arguments which can be developed and adapted to practical circumstances in order to bring about controlled results. This indicates a high level of repetitious outcome in the expression of arguments, and can be seen as a socially understood reaction to particular stimuli within Roman culture. The elicitation of foreseeable reaction from appeals to specific concepts within the culture reveals how the use of *loci* as the basis for arguments related directly to a social dynamic.

The last section of the Auctor's treatment of rhetoric deals with style. Style is less *technical* than other aspects of rhetoric, yet was afforded some prominence by the Auctor.⁸² Style for the Auctor is categorised in three standard *genera*: grand (*gravis*), middle (*mediocris*), and simple (*extenuatum* or *adenuatum*); and three lesser *genera* opposing these: swollen (*sufflatum*), slack, and (*dissolutum*) drifting (*fluctuans*) or Meagre (*exile*).⁸³ The purpose of these styles is to an extent expected: for instance, grand style is to impassion or enflame the crowd and comes from amplification.⁸⁴ Contrastingly, middle style, used for proofs is used to provide balance and appeals to reasoning (*ratio*).⁸⁵ Simple style, as the name suggests, is akin to everyday speech (*sermo*) and is used for statements of fact (*narratio*).⁸⁶ Swollen, slack and meagre are exaggerated or affected variations of each of the standard styles in turn and are used as plays against the standard styles, or as defective attempts at achieving them. The Auctor discusses style in more depth on account of the virtues of style in relation to their use: taste (*elegantia*); artistic composition (*compositio*); and distinction (*dignitas*).⁸⁷ These virtues also appeal to a social sense in terms of their interpretation – they are virtuous in the recognition of their worth by the listener and

⁸⁰ Cic. *De or.* II.87.357.

⁸¹ *Rhet. Her.* 3.23.39: *praeceptoris est docere quemadmodum quaeri quidque conveniat, et unum aliquod aut alterum, non omnia quae eius generis erunt exempli causa subicere, quo res possit esse dilucidior.* Translated by Caplan (1989) 223: It is the instructor's duty to teach the proper method of search in each case, and, for the sake of greater clarity, to add in illustration some one or two examples of its kind, but not all.

⁸² Calboli (1998) 49 attributes the increased importance in style resulted from the decrease in more technical rhetoric resulting from the censorial edict of 92 BC.

⁸³ *Rhet. Her.* 4.8.11-11.16.

⁸⁴ *Rhet. Her.* 2.30.47. The explanation of how such a style is achieved is scant. For example, grand style is achieved by using eloquent language containing *gravitas*, see: *Rhet. Her.* 4.8.11.

⁸⁵ *Rhet. Her.* 2.18.28.

⁸⁶ *Rhet. Her.* 4.10.14.

⁸⁷ *Rhet. Her.* 4.12.17. The Auctor here makes some alterations to the accepted virtues of style which had been solidified by Theophrastus: correctness (Ἐλληνισμός); clarity (σαφήνεια); appropriateness (τὸ πρέπον); and ornamentation (κατασκευή), see: Vanderspoel (2010) 126. .

their use ensures that kind of interpretation. The final consideration of style is on figures of speech, such as metaphor (*translatio*),⁸⁸ or hyperbole (*superlatio*).⁸⁹

As stated, the attention we afford to the *Rhetorica ad Herennium* extends to a consideration of the *exempla* provided by the Auctor in relation to the *loci* of arguments. The fundamental purpose of the textbook was practical: either for political or legal purposes.⁹⁰ The nature of *exempla* is complex. Their purpose is the most obvious: for the training of the student in practical application of the theory presented in the textbook, and as a reference to which the practising orator may look for paradigmatic inspiration.⁹¹ Their source is more problematic, that is, whether or not their origin was from real-life practice, or whether they derived from academic imagination. Caplan's view that the Auctor 'took his material where he found it and used it to suit his primary purpose – technical instruction in the art of rhetoric' seems very likely.⁹² The most likely explanation is that the Auctor, in order to provide practically useful *exempla* derived many of his examples from real life cases, but, nevertheless, many of them varied on the theme as academic examples grounded in reality but not strictly true. *Exempla* therefore, though not in all cases providing instances of veritable cases in Rome, nonetheless reveal to us an understanding of the kind of cases which did exist, and which were of interest to the orator.

The Auctor spends a considerable amount of time examining criminal law, but within the scope of this thesis, the approach taken to *exempla* from the *ius civile* is more pertinent. The Auctor offers an in-depth discussion of the civil law and reveals a sound knowledge of legal ideas. Frier argues that in the period when the *Rhetorica ad Herennium* was written there occurred a "rise of the jurists", whereby juristic *responsa* came to prominence in a legal system overrun by the effects of the Social War.⁹³ The tendency to separate the rise of juristic *responsa* from rhetorical *exempla* and to view responses from the jurists as isolated legalistic arguments has limited the lens through which the two can be seen as interlinked. Schulz is among the most ardent proponents of the "discreet" view, arguing that the specialisation of the jurisconsult was distinct from rhetorical ideas, stating:⁹⁴

From the jurisconsults we must sharply distinguish the advocates (*oratores*) in spite of the modicum of legal knowledge they necessarily possessed.

⁸⁸ *Rhet. Her.* 4.34.45.

⁸⁹ *Rhet. Her.* 4.15.22.

⁹⁰ Gelzer (1962) 216

⁹¹ *Rhet. Her.* 3.19.32. See also, Baroin (1998).

⁹² Caplan (1954) xxiv. Levi agrees with this, see: Levi (1966) 364. There is some debate around the political nature of the *exempla* provided by the Auctor. This is outwith the scope of our consideration of them. For further considerations on this aspect see: Ungern-Sternberg (1973) 152.

⁹³ Frier (1985) 273-287. See Chapter Three.

⁹⁴ Schulz (1946) 43.

For Schulz, the singular injection of Greek thought into Roman society meant “Greek example brought rhetoric into the Roman courts”, yet it was always separate from the law and the specialisation of the jurists meant that rhetorical example remained distinct from legal consideration.⁹⁵ This seems an unusual position to take, given the nature of the *exempla* provided by the Auctor and the character of the *Rhetorica ad Herrenium* as a practical textbook for use in legal proceedings. The legal nature of the work is underpinned by the extensive discussion it offers of legal concepts.

The Auctor raises issues in relation to the civil law as *exempla* in a variety of legal topics, but we shall focus on his discussion of succession law. In addition to providing *exempla* directly from examples in law, the Auctor also presents a theory of law within his rhetorical discourse, in which he explains various argumentative approaches to positions of legal methodology. He discusses two issues of central consideration to the law: transference (*translatio*) and his delineation of *ius* into six parts.

The issue of *translatio* is an issue of the conflict of laws, and the means by which a correct rule is correctly applied in a suit.⁹⁶ The issue therefore is essentially concerned with the methodological approach by which an argument ought to be framed legalistically in order to assert predominance over other related issues: that is, the means by which one law, or set of laws, is chosen in a specific incidence over other relevant law. The Auctor discusses the issue of transference as follows:⁹⁷

Ex translatione controversia nascitur cum aut tempus differendum aut accusatorem mutandum aut iudices mutandos reus dicit. Hac parte constitutionis Graeci in iudiciis, nos in iure plerumque utimur. In iudiciis tamen nonnihil utimur, ut hoc modo: Si quis peculatus accusatur quod vasa argentea publica de loco privato dicatur sustulisse, possit dicere, cum definitione sit usus quid sit furtum, quid peculatus, secum furti agi, non peculatus oportere.

A controversy is based on Transference when the defendant maintains that there must be a postponement of time or a change of plaintiff or judges. This subtype of Issue the Greeks use in the proceedings before judges, we generally before the magistrate’s tribunal. We do, however, make some use of it in judicial proceedings. For example, if some one is accused of embezzlement, alleged to have removed silver vessels belonging to the state from a private place, he can say, when he has defined theft and embezzlement, that in his case the action ought to be one for theft and not embezzlement.

⁹⁵ Schulz (1946) 43-46. A more nuanced view is presented by Harries who claims that the jurists were far more integrated than Schulz isolationist view credits, see: Harries (2006) 45-49: claiming that juristic thought was “specialised, but it was also part of the cultural mainstream”.

⁹⁶ The Auctor discusses this as one of the three issues he examines in the work as the legal issue (*legitima constitutio*), see: *Rhet. Her.* 1.10.18.

⁹⁷ *Rhet. Her.* 1.12.22. Translated by Caplan (1989) 39-41.

The purpose of the claim is to present a challenge to the charge, in order to create a delay in proceedings. But as we can see from the example provided, and from the Auctor's own words, the means by which this is achieved is through analogy:⁹⁸

Ex ratiocinatione controversia constat cum res sine propria lege venit in iudicium, quae tamen ab aliis legibus similitudine quadam aucupatur.

The controversy is based on Analogy when a matter that arises for adjudication lacks a specifically applicable law, but an analogy is sought from other existing laws on the basis of a certain similarity to the matter in question.

Analogy, as we will go on to discuss, is a rhetorical technique. Yet, even without tracing its root in topical argumentation, we can clearly see that the Auctor provides a mode of argumentation which provides a practical solution to the application of the law. The Auctor provides subtypes for the means by which an applicable law can attempt to be transferred: absolute issues, where an issue is challenged on its own merits; and an assumptive defence, which depends on appeals to extraneous issues. This kind of separation of issues is a common rhetorical technique of analogous separation. The Auctor provides an example of absolute defence from delict:⁹⁹

Absoluta est cum id ipsum quod factum est, ut aliud nihil foris adsumatur, recte factum esse dicemus, eiusmodi:-Mimus quidam nominatim Accium poetam compellavit in scaena. Cum eo Accius iniuriarum agit. Hic nihil aliud defendit nisi licere nominari eum cuius nomine scripta dentur agenda.

It is an Absolute Issue when we contend that the act in and of itself, without our drawing on any extraneous considerations, was right. For example, a certain mime abused the poet Accius by name on the stage. Accius sues him on the ground of injuries. The player makes no defence except to maintain that it was permissible to name a person under whose name dramatic works were given to be performed on the stage

The interesting point here is not the Auctor's knowledge of the law, which I contest results from the kind of education, which he would have enjoyed in the regular fashion for a Roman of his class. Rather, the interesting point is how the Auctor uses both law and rhetorical argumentation in tandem to present a compelling argument for the cessation of the claim made against Accius. The use of an absolute rhetorical appeal in order to categorise and frame the claim and inform the choice of law reveals the extent to which rhetorical argumentation becomes a determinative factor in the practical application of law. This kind of rhetorical framing is seen more clearly in appeals made surrounding interpretative

⁹⁸ *Rhet. Her.* 1.12.23. Translated by Caplan (1989) 43.

⁹⁹ *Rhet. Her.* 1.12.24. Translated by Caplan (1989) 43-45.

methodologies, such as in the later case of the *causa Curiana*, which will be examined more thoroughly at a later point in this chapter.

The second part of the discussion in which the Auctor engages in legal theory based upon rhetoric is in his nomination of six parts of *ius*. The Auctor presents these as Nature, Statute, Custom, Precedent, Equity and Agreement.¹⁰⁰ These parts of law are re-asserted with some variation both by Cicero and then again by the Jurists. The *exempla* which are provided for the bases of these parts of law reveals that the Auctor attributes topical roots to the sources of Roman law. For each of the parts of law the Auctor provides an *exemplum* in turn.

For Nature, the Auctor presents the nourishing relationship between parents and children as evidence of a natural and indisputable bond.¹⁰¹ This example corresponds to a later discussion in this thesis about *pietas inter parentes* and how this *locus* and *exemplum* are used to inform legal change. The *locus* is essentially a rhetorical appeal to a social understanding of natural conditions.

For Statutes and Agreement, the Auctor points to the XII Tables as the example of their use, and roots the example in a practical understanding of the legal system.¹⁰² The Auctor relates these directly to legal procedure, specifically summons.

In terms of Custom, the Auctor argues the recognition of this as a valid legal source as social practice has made it enforceable, providing the *exemplum* of retrieving money from a partner or a banker with whom money has been deposited.¹⁰³ The *locus* of this argument is again social, society provides authority through continued use and by the continual recognition of that custom creates a legally enforceable status between the depositor and the depositee.

Previous judgements are treated with some discretion, and the Auctor makes note of the often contradictory nature of this source of law, pointing to the *exemplum* of the praetor Marcus Livius Drusus granting a claim for breach of contract against an heir, where his predecessor Sextus Iulius Caesar refused to do so.¹⁰⁴ A further *exemplum* is given of a single *iudex*, Gaius Caelius, who acquitted a man who had attacked the poet Lucilius on stage, whereas Publius Mucius, as single *iudex*, condemned the man who named the poet Lucius Accius. The Auctor attributes the contradiction in precedent to comparison between the deciding judges, the circumstances, the number of decisions in favour of a

¹⁰⁰ *Rhet. Her.* 2.13.19: *natura, lex, consuetudo, iudicatum, aequus et bonus pactum.*

¹⁰¹ *Rhet. Her.* 2.13.19: *natura ius est quod cognationis aut pietatis causa observatur, quo iure parentes a liberis et a parentibus liberi coluntur.* Translated by Caplan (1989) 93: To the Law of Nature belong the duties observed because of kinship or family loyalty. In accordance with this kind of Law parents are cherished by their children, and children by their parents.

¹⁰² *Rhet. Her.* 2.13.19.

¹⁰³ *Rhet. Her.* 2.13.19.

¹⁰⁴ *Rhet. Her.* 2.13.19. Marcus Drusus was praetor in 115 BC; Sextus Iulius was praetor in 123 BC.

stance. In his explanation of how this inconsistency can occur the Auctor brings in the final part, or source, of law, Equity (*aequitas*), (*Rhet. Her.* 2.13.20.):¹⁰⁵

Ex aequo et bono ius constat quod ad veritatem et utilitatem communem videtur pertinere; quod genus, ut maior annis lx et cui morbus causa est cognitorem det. Ex eo vel novum ius constitui convenit ex tempore et ex hominis dignitate.

The Law rests on Equity when it seems to agree with truth and the general welfare; for example, a man who is more than sixty years old, and pleads illness, shall substitute an attorney for himself. Thus according to circumstances and a person's status virtually a new kind of Law may well be established.

The Auctor again draws the law back to a topical argument, rooting the *locus* from which he bases the law in a socially understood concept, in this case Equity. This mode of argumentation is not dissimilar to Aristotle's description of establishing a rhetorical proof from the bases of probability resulting from a persuasive argument directed to a concept established in the audience, ἐνθόμημα. The ability to persuade on the basis of concepts like Equity and Natural law (which I will argue takes on the form of appeals to *pietas*), derives from the social nature of these concepts. They are understood within Roman society as tenets of interaction. Rhetoric is the means by which a speaker appeals to these forms in order to establish probability and proof from these forms. In this way, as the Auctor shows, the sources of law are informed by these fundamental tenets, and that the way in which the law is theorised in the separation of parts by the Auctor reflects the practical applicability of socially understood concepts to legal decision-making.

5.2.2. *De Inventione* and Cicero's Early Rhetorical Theory.

Marcus Tullius Cicero wrote seven works which survive and deal exclusively or mainly with rhetorical theory.¹⁰⁶ The first of these was the incomplete *De Inventione*, which was written at some point prior to the year 80 BC.¹⁰⁷ This early work of Cicero, as the title suggests, deals only with the rhetorical subject

¹⁰⁵ *Rhet. Her.* 2.13.20. Translated by Caplan (1989) 95.

¹⁰⁶ Cicero's other six surviving books on rhetoric and their respective dates are: *De Oratore* (55 BC); *Partitiones Oratoriae* (c. 54 BC); *Brutus* (46 BC); *Orator* (46 BC); *De Optimo Genere Oratorum* (c. 46 BC); *Topica* (44 BC).

¹⁰⁷ The exact date of the work, like the *Rhetorica ad Herennium*, is uncertain. An early date is suggested by Marx (1894) 76-80 based on a literal interpretation of the dating of the work at 91 BC, based on comments at Cic. *De or.* I.2.5. This date seems unlikely; given Cicero would have been just 15. Influences of Rhodian rhetorical traits in the work led Kennedy to date the work at some point after the visit of Molon to Rome in 87 BC, see Kennedy (1994) 117. The most suitable dating is that of the late 80s BC, in light of Cicero's acknowledgment it was written in his youth and the on-going political flux of the time, between the Social War and Cinna's dictatorship, see Achard (1994) vii.

of invention (*inventio*). The work represented an immature though precocious attempt by a young Cicero to formulate a rhetorical textbook, and though his later works offer more substantive worth to the Roman theory of rhetoric, this early addition to the canon of Latin rhetoric reveals an initial input in the field by the Republican writer who would become its master.

The work shares some commonality with *Rhetorica ad Herennium*.¹⁰⁸ Yet the more specialised nature of Cicero's approach in its depth and scope and various differences of approach reveal distinctive differences between the two works.¹⁰⁹ Nevertheless, as with the Auctor, Cicero's treatment of rhetoric reaches back into the traditional theme of topical argumentation and the provision of *exempla* to aid the process of invention to base arguments within socially understood norms to affect rhetorical proofs.

Turning to Cicero's treatment of the law, we find a similar approach to that of the Auctor, where the topical nature of the argument can be separated between undisputed (or absolute) proofs and disputed facts, which are akin to the assumptive defences of the Auctor, as Cicero outlines:¹¹⁰

Locorum autem communium quoniam, ut ante dictum est, duo genera sunt, quorum alterum dubiae rei, alterum certae continet amplificationem, quid ipsa causa det, et quid augeri per communem locum possit et oporteat, considerabitur. Nam certi qui in omnes incidant loci praescribi non possunt; in plerisque fortasse ab auctoritate iuris consultorum et contra auctoritatem dici oportebit. Attendendum est autem et in hac et in omnibus num quos locos communes praeter eos quos nos exponimus ipsa res ostendat.

As for common topics, since, as has been said before, there are two kinds, one of which contains an amplification of a doubtful statement, the other, of an undisputed fact, one will consider what the case offers, and what can and should be amplified by a common topic. For definite common topics cannot be prescribed to fit all cases; it is likely that in many cases it will be necessary to speak for and against the authority of jurisconsults. Moreover, it is necessary to consider in this issue, and in all, whether the facts of the case themselves do not suggest other common topics than those which we propose.

The use of topical argumentation in reference to the starting point, the first principle, upon which legal arguments can be based forms the bedrock for the invention of legal arguments. Cicero appreciates, considers the reasoning around, controversies in juristic opinion, and offers topical argumentation as a means by which to arrive at coherent conclusions. This approach, using rhetorical argumentation to argue

¹⁰⁸ The two texts contain much crossover. A detailed comparison between the two can be found at Herbolzheimer (1926). Further analysis of passages which represent similarity at Achard (1994) 20-21. For a full outline of the passages in question, see: Hilder (2016) 29 fn.116.

¹⁰⁹ Cic. *De. Inv.* 2.22.68.

¹¹⁰ *De Inv.* 2.22.68. Translated by Hubbell (1949) 233.

points of juristic controversy, is outlined by Leesen in reference to the later juristic controversies of the Sabinians and Proculians during the classical law.¹¹¹

5.3. Cicero's Later Rhetorical Theory: *Topica*.

This section specifically examines Cicero's *Topica* as a theory of legal reasoning through rhetorical topical argumentation.

5.3.1. *Topica*.

Cicero's *Topica* forms the most significant of his legal writings on rhetoric in relation to this thesis. *Topica*, Cicero claims, is an adaption and translation of Aristotle's works on topical argumentation, though, as Hubbell points out, the work goes beyond this, exploring more than topical arguments, and drawing in stoic and other philosophical considerations.¹¹² Cicero's intentions for writing the book are explicitly stated, to provide, at the request of his protégé Trebatius Testa, who was confused by the works of Aristotle which he had read at Cicero's villa, an overview of topical argumentation:¹¹³

Quam cum tibi exposuissem, disciplinam inveniendorum argumentorum, ut sine ullo errore ad ea ratione et via perveniremus, ab Aristotele inventam illis libris contineri, verecunde tu quidem ut omnia, sed tamen facile ut cernerem te ardere studio, mecum ut tibi illa traderem egisti.

And when I had made clear to you that these books contained a system developed by Aristotle for inventing arguments so that we might come upon them by a rational system without wandering about, you begged me to teach you the subject. Your request was made with the modesty which you show in everything, yet I could easily see that you were aflame with eagerness.

Gaius Trebatius Testa, a noted first century jurist, presents an interesting choice of dedicatee for Cicero's work on topical argumentation.¹¹⁴ As a jurist, Cicero is keen to stress to the young Trebatius the value in rhetorical argumentation for his development in the study and understanding of law. Trebatius's acute

¹¹¹ Leesen (2009).

¹¹² Hubbell (1949) 377-378.

¹¹³ Cic. *Top.* I.2. Translated by Hubbell (1949) 383.

¹¹⁴ The identity of Trebatius Testa as a jurist is examined at Francisci (1944) 233-244; Hubbell (1949) 378.

interest in the subject is also revealing, the young lawyer seems keen, judging by his repeated requests for elucidation on the subject, to gain an appreciation of a “systematic argumentation”. A diverse range of opinions has suggested the motivation of the author and the student for their interest in the text. It seems clear to me, at least, and as I will go on to outline, that the connection between topical rhetorical argumentation and the interpretation and development of the law is so intrinsically entwined that the presentation of a treatise of rhetorical theory to an aspiring jurist is an obvious dedication. The notion that topical argumentation was used as a tool by the jurists is proposed at length by Viehweg in *Topik und Jurisprudenz*. Yet Horak rebutted this view with sustained criticism, arguing that the jurists’ interest in topical argument was not extant, and that Cicero’s *Topica* essentially formed a sideshow to the real business of legal argument:¹¹⁵

Trebatius, für den die Topik des römischen Eklektikers geschrieben worden ist, scheint mit ihr so wenig anzufangen gewusst zu haben wie mit dem Original des Aristoteles. Man wird es mir weder als Überschätzung des Ciceronischen opusculum noch als Beleidigung der römischen Jurisprudenz auslegen, wenn ich meine dasz dies nicht unbedingt nur gegen Cicero und für Trebatius (und die römischen Juristen überhaupt) spricht. Schliesslich gibt es in den Büchlein so manches an Argumentationslehre, was späterer Jurisprudenz ausgiebig verwendet und heute noch verwendet. Aber der römische Jurist scheint zu sehr in den Schranken seines Fach befangen zu sein, als dasz er so Ungewohntes hätte in seine Wissenschaft integrieren können. *Nihil hoc ad ius, ad Ciceronem* – so mögen die Meister des Rechts empfunden haben.

Horak’s dismissal of *Topica* as an informative work for the Roman jurist found many adherents.¹¹⁶ It tied into the claims of the Historical School that jurists, as a discreet body of professionalised legal scientists dealing in autonomous law, could have no use for rhetorical models as set out by Cicero. Other than upholding this narrative integrity, Horak’s supposition that the jurists were too “ensnared in the boundaries” of their own profession to appreciate and to use rhetorical theory is based on pure assertion. The famous phrase, ‘*nihil hoc ad ius, ad Ciceronem*’ is again given weight to discount more thoughtful consideration of what use *Topica* had in relation to the law.¹¹⁷ A recent reappraisal of the *Topica* by Tellegen and Leesen convincingly refutes the claim of Horak and his followers that the work was useless to Trebatius, pointing to at least three of his *responsa* that include topical argumentation.¹¹⁸ Within the *Topica* too is a clear indication that its intention is to provide a work of practical use to the jurist.

¹¹⁵ Horak (1969) 48.

¹¹⁶ Schmidlin (1970) 198; Nörr (1977) 48; Wieacker (1988-2005) 613; Fuhrmann (2002) 65.

¹¹⁷ A good rebuttal of this lazy argument is given by Tellegen-Couperous & Tellegen (2006) 381-408.

¹¹⁸ Tellegen & Leesen (2017) 109-129. In particular, they point to Dig. 2.14.10.2. (Ulp.); Dig. 35.1.40.4. (Lav.); Dig. 43.20.1.18. (Ulp.).

Cicero outlines exactly at what point the jurist must be ready to call upon topical argumentation within the practice of his specialism:¹¹⁹

Toto igitur loco causarum explicato, ex earum differentia in magnis quidem causis vel oratorum vel philosophorum magna argumentorum suppetit copia; in vestris autem si non uberior, at fortasse subtilior. Privata enim iudicia maximarum quidem rerum in iuris consultorum mihi videntur esse prudentia. Nam et adsunt multum et adhibentur in consilia et patronis diligentibus ad eorum prudentiam confugientibus hastas ministrant. In omnibus igitur eis iudiciis, in quibus ex fide bona est additum, ubi vero etiam ut inter bonos bene agere oportet, in primisque in arbitrio rei uxoriae, in quo est quod eius aequius melius, parati eis esse debent. Illi dolum malum, illi fidem bonam, illi aequum bonum, illi quid socium socio, quid eum qui negotia aliena curasset ei cuius ea negotia fuissent, quid eum qui mandasset, eumve cui mandatum esset, alterum alteri praestare oporteret, quid virum uxori, quid uxorem viro tradiderunt. Licebit igitur diligenter argumentorum cognitio locis non modo oratoribus et philosophis, sed iuris etiam peritis copiose de consultationibus suis disputare.

We have now explained the topic of causes in full. From the great variety of them there is supplied a great store of arguments at least for the important discussions of orators and philosophers; in your profession, if they are less numerous, they are perhaps more subtle. At any rate private suits involving highly important issues seem to me to depend on the wisdom of the jurisconsults. For they frequently attend the trials and are invited to be members of the judge's advisory board, and supply weapons to diligent advocates who seek succour in their skill. In all suits, then, in which the phrase "in good faith" appears in the formula, or the phrase "as one should deal honestly with honest men," and especially in arbitration over the return of dowry, where the principle "as is better and more equitable," is applied, the jurisconsults are bound to be ready (with their counsel). It is they who have defined fraud, good faith, equity, the duties of partner to partner, of an agent to his principal, of mandator and mandatee respectively, and of husband to wife and wife to husband. A careful study of the topics of arguments, therefore, will permit not only orators and philosophers, but even jurisconsults to discourse fluently on questions about which they have been consulted.

Cicero seems convinced that his writing will be of some use to Trebatius, as jurists are required to construct arguments in order to justify legal opinions in particular cases. For Cicero, topical argumentation

¹¹⁹ Cic. *Top.* I.65-66. Translated by Hubbell (1949) 431-433.

equips the jurist with the ability swiftly to formulate arguments for practical scenarios, especially in cases related to good faith or equity.

In the opening lines of *Topica*, Cicero provides some further evidence of the practical duties of the Roman lawyer and his relationship to rhetoric and oratory. Cicero points out the obscurity of Aristotle's work to Roman rhetoricians, on noting Trebatius's teacher's lack of awareness of the Greek writing, reflecting on its undervaluation.¹²⁰ This can be attributed to the nascent interest of Latin interaction with Aristotelian rhetorical writing, an ignorance Cicero seeks to remedy. Cicero outlines that Trebatius has written for him on numerous occasions, presumably on law, indicating the close and necessary working relationship between those who speak in court and those who provide a detailed and specialised knowledge of the law.¹²¹ In fact, Cicero mentions that he and Trebatius had worked together in some capacity recent to the writing of the *Topica*.¹²² The close relationship between the two, and the fact that Cicero writes the *Topica* not only at Trebatius's behest, but also in repayment for the writing on law Trebatius provided for him, is indicative that Cicero felt he was providing Trebatius not only with a work of intellectual interest, but with a useful manual to benefit his practical operation as an expert on law.¹²³ Therefore, we see again, the close ties between Romans performing lawyerly duties, relying on each other's expertise and approaching legal subject matter from differing perspectives, not solely from the isolation of an imposed professional clique.

Turning to the substantive contribution of Cicero to the field of topical argumentation in the *Topica*, we find the strong and enduring influence of Aristotle throughout, yet there endures a new and decidedly Roman alteration to the original Greek ideas. Cicero ascribes the creation of systematic argumentation to Aristotle:¹²⁴

Cum omnis ratio diligens disserendi duas habeat partis, unam inveniendi alteram iudicandi, utriusque princeps, ut mihi quidem videtur, Aristoteles fuit.

Every systematic treatment of argumentation has two branches, one concerned with invention of arguments and the other with judgement of their validity; Aristotle was the founder of both in my opinion.

¹²⁰ Cic. *Top.* I.3.

¹²¹ Cic. *Top.* I.4.

¹²² Cic. *Top.* I.5.

¹²³ Cic. *Top.* I.4. Cicero states that he wrote the text: Non potui igitur tibi saepius hoc roganti et tamen verenti ne mihi gravis esse – facile enim id cerebam – debere diutius, ne ipsi iuris interpreti fieri videretur inuria. Hubbell Translates (1949) 385: “When you repeated your request again and again, and at the same time were afraid of annoying me – that I could easily see – I could no longer refrain from paying the debt lest the interpreter of the law should be treated unlawfully”. Hubbell (1949) 384 at note ‘a’ points out that the work relationship between Cicero and Trebatius most likely ties in to the provision of legal opinions by Trebatius to Cicero and his peers.

¹²⁴ Cic. *Top.* II. 6. Translated by Hubbell (1949) 387.

Cicero set out the schematic of topical argumentation in a similar way to Aristotle.¹²⁵ In the first place, he is interested with the invention of arguments as the postulate in which to frame the argumentative structure. Secondly, he turns his attention to rhetorical proofs in order to validate the results of these primary claims. Cicero provides an extensive examination of how *loci* operate, particularly through definition and etymology (*notatio*). Cicero uses the civil law, no doubt as a practical demonstration to Trebatius, to provide *exempla* for his claims. Not least, he uses the entire body of civil law to offer a form of systematic definition to the totality of a subject area:¹²⁶

Ius civile est aequitas constituta eis qui eiusdem civitatis sunt ad res suas obtinendas; eius autem aequitatis utilis cognitio est; utilis ergo est iuris civilis scientia.

The civil law is a system of equity established between members of the same state for the purpose of securing to each his property rights; the knowledge of this system of equity is useful; therefore the science (understanding) of civil law is useful.

In this formulation, the law becomes the general application of equity to reasonable solutions in a general sense, whereas laws, as specific rules, are the definitional derivation of this general claim. Cicero uses inheritance law as a means of explaining this division, outlining how the general status of “wife” accounts for a specific application of rules to account for the general equitability of that status, within the locus of what is defined as a “wife”:¹²⁷

A forma generis, quam interdum, quo planius accipiatur, partem licet nominare hoc modo: Si ita Fabiae pecunia legata est a viro, si ei viro mater-familias esset; si ea in manum non convenerat, nihil debetur. Genus enim est uxor; eius duae formae: una matrum-familias, eae sunt, quae in manum convenerunt; altera earum, quae tantum modo uxores habentur. Qua in parte cum fuerit Fabia, legatum ei non videtur.

An argument is derived from the species of a genus as follows (sometimes for greater clarity we may call a species a part): If Fabia’s husband has bequeathed her a sum of money on condition that she be *mater familias*, and she has not come under his manus, nothing is due her. For “wife” is a genus, and of this genus there are two species; one matres familias, that is, those who have come under manus; the second, those who are regarded only as wives (uxores). Since Fabia belonged to the second class, it is clear that no legacy was made to her.

The general claim on appeal to equity on the basis of definitional categorisation is that a wife through the definition of that status ought to receive particular treatment, if the claimant is not definitionally a wife,

¹²⁵ Compare 5.1.1.

¹²⁶ Cic. *Top.* II. 9. Translated by Hubbell (1949) 389.

¹²⁷ Cic. *Top.* III. 14. Translated by Hubbell (1949) 391-393.

they are specifically excluded from the rules dealing with “wives”. This deals with the early Roman form of *manus* marriage, which lost importance over the course of the Republic.¹²⁸ *Manus* marriages, which were created in three ways, the husband, or the husband’s *paterfamilias*, assumed a power and control over the wife akin to *potestas*, and took on a similar legal character to a daughter of the family.¹²⁹ Gaius sets out the law as follows. First, the Twelve Tables set out:¹³⁰

Intestatorum hereditates ex lege xii tabularum primum ad suos heredes pertinent. Sui autem heredes existimatur liberi, qui in potestate morientis fuerant.

The Twelve Tables give the estate of an intestate first to his immediate heirs. The immediate heirs are those in his power at the time of his death.

Secondly, in relation to a *manus* wife, who is regarded as in the power of her husband, thus:¹³¹

Uxor quoque, quae in manus eius, qui moritur, est ei sua heres est, quia filiae loco est.

A wife in marital subordination (*manus*) to her husband is also his immediate heir on death, because she is like a daughter.

So here, we see that the law adopts a categorical and definitional approach to the treatment of wives as immediate heirs. If a woman is a “wife” (*uxor*), she receives a portion of the inheritance; if she is not, she does not. Interestingly, Gaius does not only use a definitional *locus* in his argument, but expands his reasoning to similarity – another of Cicero’s *locus* in *Topica*.

Cicero sets out similarity as a form of analogous comparison by which the treatment of one thing ought to be regarded and treated as the other due to a definitional or practical similarity:¹³²

Etsi enim omnes loci sunt omnium disputationum ad argumenta suppeditanda, tamen aliis disputationibus abundantius occurrunt aliis angustius. Itaque genera tibi nota sint; ubi autem eis utare, quaestiones ipsae te admonebunt. Sunt enim similitudines quae ex pluribus collationibus perveniunt quo volunt hoc modo: Si tutor fidem praestare debet, si socius, si cui mandaris, si qui fiduciam acceperit, debet etiam procurator. Haec ex

¹²⁸ Looper-Friedman (1987) 281-296; Firer & McGinn (2004) 89-95 sets out various cases related to *manus* marriage, and detailing the reasons for its decline.

¹²⁹ The three forms of *manus* marriage – *coemptio*, *confarreatio*, *usus* – are set out at *G. Inst.* 1.110. An overview of the form and effect of these marriages is provided by du Plessis (2015) 126; a thorough analysis is found at Corbett (1969) 68-106. The affinity between a daughter and a wife in a *manus* marriage can be shown through the process of the release of a wife, which shares similarities with the process for the emancipations of daughters, see *G. Inst.* 1.137.

¹³⁰ *G. Inst.* 1.1.-2.

¹³¹ *G. Inst.* 3.3. Translated by Gordon & Robinson (1988) 269.

¹³² *Cic. Top.* X. 41. Translated by Hubbell (1949) 413.

pluribus perveniens quo vult appellatur inductio, quae Graece ἐπαγωγή nominatur, qua plurimum est usus in sermonibus Socrates.

For although all topics can be used to supply arguments in all sorts of debate, still they occur more frequently in some debates and more rarely in others. Well then, know the types of argument; the case itself will instruct you when to use them. For example, there are certain arguments from similarity which attain the desired proof by several comparisons, as follows: If honesty is required of a guardian, a partner, a bailee, and a trustee, it is required of an agent. This form of argument which attains the desired proof by citing several parallels is called induction, in Greek ἐπαγωγή (epagoge); Socrates frequently used this in his dialogues.

This argument uses category, definition, comparison and example to provide a set of characteristics within a specific type in order to present that as belonging to a general type, and therefore subject to the rules pertaining to that general type. In the example provided by Cicero, he uses various forms of vicarious or proxy legal characters to provide a general rule for the kind of behaviour such a character should exhibit, i.e., honesty from a trustee, bailee, guardian, partner, or, through similarity, agent. Cicero's previous example of inheritance in a *manus* marriage also contains this kind of argumentation, for as Gaius tells us: a wife in a *manus* marriage is like a daughter and therefore ought to be subject to the same general rules, that is, immediate inheritance. Gaius outlines the comparison to a daughter when he describes the formations of a *manus* marriage by *usus*:¹³³

Usu in manum conveniebat, quae anno continuo nupta perseverabat; quia enim velut annua possessione usu capiebatur, in familiam viri transibat filiaeque locum optinebat.

A woman used to fall into marital subordination (*manus*) by usage if she remained in the married state for a continuous period of one year: for she was, as it were, usucaptured by a year's possession, and would pass into her husband's kin in the relationship of a daughter.

The general rules of property and inheritance due to a wife in the power of her husband follow on as a result of attaining the status change from *usus*, as a wife is considered to be akin to a daughter within the social bond of early Republican society.¹³⁴ The resemblance between wife and daughter in social, familial relationships, through the *locus* of comparative similarity, leads to a correspondence in legal relationship. The link between the two is fundamentally topical, insofar as it is based on effects. As Cicero points out:¹³⁵

¹³³ G. *Inst.* 1.111. Translated by Gordon & Robison (1988) 75. Gaius's use of the past tense reveals that the *manus* marriage of *usus* had died out by his time.

¹³⁴ Pomeroy (1975) 154-158 considers the view that Romans placed *manus* wives in the position of the daughter from a belief that women needed familial protection. See also: Gardener (1986) 11-14. For the Roman sources, see: Lefkowitz & Fant (1992) 111-119.

¹³⁵ Cic. *Top.* IV. 23. Translated by Hubbell (1949) 397.

Ab effectis rebus hoc modo: Cum mulier viro in manum convenit, omnia quae mulieris fuerunt viri fiunt dotis nomine.

From effects as follows: When a woman comes under the manus (legal control) of her husband, all her property goes to the husband under the designation of dowry.

The similarity exhibited between a wife and a daughter in the social setting of the Roman family is enough to constitute a valid topical similarity in their comparison, and, as a result, each of these specific types of status falls within a general definitional category, which means they ought, in terms of their treatment, to receive comparably similar treatment – in this case, the same property rights on inheritance. Cicero describes the validity of this thinking in *Topica*:¹³⁶

Ex comparatione autem omnia valent quae sunt huius modi: Quod in re maiore valet valeat in minore ut si in urbe fines non reguntur, nec aqua in urbe arceatur. Item contra: Quod in minore valet, valeat in maiore. Licet idem exemplum convertere. Item: Quod in re pari valet valeat in hac quae par est; ut: Quoniam usus auctoritas fundi biennium est, sit etiam aedium. At in lege aedes non appellantur et sunt ceterarum rerum omnium quarum annuus est usus. Valeat aequitas, quae paribus in causis paria iura desiderat.

All arguments from comparison are valid if they are of the following character: What is valid in the greater should be valid in the less, as for example since there is no action for regulating boundaries in the city, there should be no action for excluding water in the city. Likewise the reverse: What is valid in the less should be valid in the greater; the same example may be used if reversed. Likewise: What is valid in one of two equal cases should be valid in the other; for example: Since use and warranty run for two years in the case of a farm, the same should be true of a (city) house. But a (city) house is not mentioned in the law, and is included with the other things use of which runs for one year. Equity should prevail, which requires equal laws in equal cases.

Cicero's explanation of validity is highly bound in examples, but the nature of the argument is dependent on example as it engages in comparative attribution, rather than extrinsic appeals to the authority of a certain position.¹³⁷ Nonetheless, it becomes clear that validity is tested against the acceptance of general conditions, into which a specific condition is assigned. These general conditions of acceptance can be framed as socially understood principles, to which specific types are definitionally dependent. As Cicero outlines, along Greek lines:¹³⁸

¹³⁶ Cic. *Top.* IV. 23. Translated by Hubbell (1949) 397.

¹³⁷ These kind of extrinsic arguments from authority are discussed at Cic. *Top.* IV. 24. Of these types of argument, Cicero states: "the Greeks call such means of argumentation ἀτεχνοί, (atechnoi), that is, not invented by the art of the orator".

¹³⁸ Cic. *Top.* VII. 31-32. Translated by Hubbell (1949) 405.

Genus et formam definiunt hoc modo: Genus est notio ad pluris differentias pertinens; forma est notio cuius differentia ad caput generis et quasi fontem referri potest. Notionem appello quod Graeci tum ἔννοιαν tum πρόληψιν. Ea est insita et ante percepta-cuiusque cognitio enodationis indigens. Formae sunt igitur eae in quas genus sine ullius praetermissione dividitur; ut si quis ius in legem, morem, aequitatem dividat. Formas qui putat idem esse quod partis, confundit artem et similitudine quadam conturbatus non satis acute quae sunt discernenda distinguit. Saepe etiam definiunt et oratores et poetae per translationem verbi exsimilitudine cum aliqua suavitate. Sed ego a vestris exemplis nisi necessario non recedam.

They define genus and species as follows: a genus is a concept which applies to several different classes; species is a concept whose special characteristic can be referred to a head and source, as it were, in the genus. By concept I mean what the Greeks call now ἔννοια (ennoia), now πρόληψις (prôlepsis). This is an innate knowledge of anything, which has been previously apprehended, and needs to be unfolded. The species are the classes into which the genus is divided without omitting anything, as, for example, if one should divide jurisprudence into statutes, custom, and equity. If anyone thinks that species are the same as parts, he brings confusion into the subject, and misled by a casual resemblance fails to distinguish sharply enough between things which must be separated. Orators and poets often go so far as to define by comparison, using metaphors with a pleasing effect. But I, unless forced to do so, will not use any examples except those supplied by you jurisconsults.

The notion of “an innate knowledge of anything which has been previously apprehended, and needs to be unfolded”, refers to a generally understood conception of particular types. The *a priori* and *a posteriori* consideration is outwith the scope of this thesis, but what is certain is that the identification of a topical root for argument is dependent upon some recognition of ascertainable grouping, and the ability to assign equitable treatment to species that fall within this general framework. In this way, comparison becomes a useful tool in order to establish analogous categories, which can be assigned to particular social understandings. The taxonomy is topical insofar as it pinpoints arguments in localities, yet it is deeply social insofar as it uses socially understood genera in order to classify these specific types within general definitional categories. Cicero shows us, in *Topica*, that this applies to law, as clearly as it applies to other socially dependent structures, as almost each of his exempla to Trebatius is legal.

Cicero’s use of legal *exempla* for topical arguments permeates the *Topica*. Among others, aside from the discussion of *manus* marriage presented above, Cicero uses legal costs for an heir to repair *hereditas* to exemplify analogy by similarity.¹³⁹ Difference is exemplified by reference to creditors’ parts

¹³⁹ Cic. *Top.* III 15.

of inheritance.¹⁴⁰ The example of *usufructus* is used for contraries.¹⁴¹ *Capitis deminutio* is raised to explain corollaries.¹⁴² Antecedents are exemplified by dowry payments.¹⁴³ Consequents by a discussion of *conubium*.¹⁴⁴ Contradictions are explained in relation to inheritance law.¹⁴⁵ Definitions are explained in terms of transfers of property, *mancipatio* and *fictio*.¹⁴⁶ In these examples, among others, Cicero feels able to present law as an example of a claim to topics on socially understood types, and derive specific argumentation from it.

The validity of topical arguments are always promoted in relation to equity (*aequitas*).¹⁴⁷ In this instance equity is the socially understood conceptualisation of justice to which a claim of justice, in natural terms, is self-understood, as it is an understood cultural norm it exists within the society. This thesis examines in a future chapter, the extent to which the culturally and socially understood norm of *aequitas* penetrates the Roman understanding of law and justice.¹⁴⁸ But, for the purposes of this chapter, the essence of the argument is that this social understanding of the concept of *aequitas* informs the identification of general *loci*, and it is this understanding which frames the application of not only equitable remedy in law, but also of the extent to which definitional categorisations can be made. To this extent, the law in general, and laws in specific, are both topical and social.

Appeals to *aequitas* through category is not, however, in and of itself, probative. There remains need for proof in order to assert the justice of any specific legal position. To this end, the need for rhetorical proof is covered by Cicero, who, in keeping with, but with some adjustment, follows Aristotle in his discussion of enthymeme (ἐνθύμημα).¹⁴⁹ Cicero's presentation of rhetorical proof is dependent, as is Aristotle's, on the formation of logical syllogism to afford the broad claim of a transition from general to specific sound validity. Yet, the topical nature of the postulate is essentially unaffected, and relies upon a first principle of an understood and accepted notion, such as *aequitas*.

Cicero completes his thoughts in *Topica* by considering the kind of inquiries which result in topical consideration. Cicero divides inquiry between general inquiry (θέσις) and particular inquiry (ὑπόθεσις).¹⁵⁰ Inquiries are also divided between theoretical and practical.¹⁵¹ In order to answer these

¹⁴⁰ Cic. *Top.* III. 16.

¹⁴¹ Cic. *Top.* III. 17.

¹⁴² Cic. *Top.* IV. 18.

¹⁴³ Cic. *Top.* IV. 19.

¹⁴⁴ Cic. *Top.* IV. 20.

¹⁴⁵ Cic. *Top.* IV. 21.

¹⁴⁶ Cic. *Top.* V. 28.

¹⁴⁷ Cic. *Top.* IV. 23.

¹⁴⁸ Chapter 6.1.

¹⁴⁹ Cic. *Top.* XIII. 55-57. following Arist. *Rhet.* 1.1.3. See section 5.1.1. for a discussion of the Greek conception of this rhetorical proof.

¹⁵⁰ Cic. *Top.* XXI. 79.

¹⁵¹ Cic. *Top.* XXI. 82.

issues, for conceptual inquiries Cicero addresses analysis for the definitional establishment for the character (χαρακτήρ) of the thing;¹⁵² for questions as to the nature of concepts, such as *what is justice?*, a comparative inquiry is required.¹⁵³ Various approaches can be taken to the achievement of rhetorical proof on these issues, and Cicero states that it is important to recognise the correct application of the corresponding *Topica* to the demanded form of inquiry.¹⁵⁴ In relation to consideration of the nature of things, which is most useful to the juristic world, Cicero turns specifically to considerations of *aequitas*:¹⁵⁵

Cum autem de aequo et iniquo disseritur, aequitatis loci colliguntur. Hi cernuntur bipertito, et natura et instituto. Natura partes habet duas, tributionem sui cuique et ulciscendi ius. Institutio autem aequitatis tripartita est: una pars legitima est, altera conveniens, tertia moris vetustate firmata. Atque etiam aequitas tripartita dicitur esse: una ad superos deos, altera ad manes, tertia ad homines pertinere. Prima pietas, secunda sanctitas, tertia iustitia aut aequitas nominatur.

When, however, right and wrong are being discussed, the topics of equity will be brought together. These are of two kinds, the distinction being between natural law and institutions. Natural law has two parts, the right of every man to his own property, and the right of revenge. The institutions affecting equity are threefold: the first has to do with law, the second with compacts, the third rests on long continued custom. Equity is also said to have three parts: one pertains to the gods in heaven, the second to the spirits of the departed, the third to men. The first is called piety, the second respect, the third justice or equity.

A thorough discussion of the ramifications of equity and piety as rhetorical ideas in relation to law is provided later in this thesis.¹⁵⁶ Here, the main point is that *aequitas* and *pietas* are called upon as the postulates for argument, as these concepts are socially understood within Roman social organisation and culture. Cicero breaks the use of these topical arguments into three forms of speeches, stating that the oratorical approach must fit the rhetorical approach: judicial speeches discuss justice; deliberative speeches attempt to establish an advantage; encomiastic speeches deal with honour.¹⁵⁷ Lastly, Cicero turns to the relationship of the law to argumentation, stating:¹⁵⁸

Sed quoniam lege firmius in controversiis disceptandis esse nihil debet, danda est opera ut legem adiutricem et testem adhibeamus. In qua re alii quasi status existunt novi, sed

¹⁵² Cic. *Top.* XXII. 83.

¹⁵³ Cic. *Top.* XXII. 84.

¹⁵⁴ Cic. *Top.* XXIII. 87.

¹⁵⁵ Cic. *Top.* XXIII. 90. Translated by Hubbell (1949) 451-454.

¹⁵⁶ Chapter Six.

¹⁵⁷ Cic. *Top.* XXIV. 93.

¹⁵⁸ Cic. *Top.* XXV. 95-96 Translated by Hubbell (1949) 455 - 457.

appellentur legitima disceptationes. Tum enim defenditur non id legem dicere quod adversarius velit, sed aliud. Id autem contingit, cum scriptum ambiguum est, ut duae sententiae differentes accipi possint. Tum opponitur scripto voluntas scriptoris, ut quaeratur verbane plus an sententia valere debeant. Tum legi lex contraria affertur. Ista sunt tria genera quae controversiam in omni scripto facere possint: ambiguum, discrepantia scripti et voluntatis, scripta contraria.

But since there should be no firmer foundation than law in settling disputes, we must be careful to summon the Law as our helper and witness. Hence there arise certain new quasi issues, but let us call them disputes about a law. For instance, sometimes the defence is made that the law does not say what the opponent tries to make it say, but something different. This occurs when the law is ambiguous, so that two different meanings can be got out of it. Again, the intent of the author is shown to be opposed to the letter of the law, so that the question is raised whether words or meaning should prevail. Again, a law is cited which conflicts with the law under discussion. These are the three situations which can raise a controversy over any written document; ambiguity, variance between the letter and the intent, and conflicting documents.

Cicero points out how easily the law can come under question and scrutiny in relation to its applicability and meaning. While he concedes the primacy of law, in a strict sense, in finding solutions to legal argument, he nonetheless promotes topical argumentation as the way in which reasoned opposition and alternative can be found to controversies in law, in keeping with his belief that knowledge of rhetoric and law are necessary in combination to succeed in Roman legal life.

Cicero posits that the topical argumentation he outlines in *Topica* is applicable to law. His book is written for a noted legal expert and provides legal examples to each of the topics raised. Cicero goes further, outlining the directly applicable argumentation in relation to legal quandaries, revealing the strength of rhetorical argumentation in forming law. The usual approach is to look at the law first, as it appears in the sources we have, mainly the Digest, or Gaius, and attempt to retrieve some form of topical root in the presentation of the law in various *responsa*. I suggest that this approach puts the cart before the horse. The law as stated in the Digest represents, for the most part, the most sophisticated and settled encapsulation of the law. While there is some scope to suppose at the reasoning which led to the law arriving at that position, in some cases with more information than others, it is imprudent to attempt to recover the rationale behind the development *post hoc ergo propter hoc*. This chapter has attempted to begin with the earlier text of the *Topica*, and examine the reasoning first and the law second. I believe there is scope to pursue such an approach more vigorously, though it is beyond the scope of this thesis, but what I have attempted to establish here is that the *Topica* was written with legal reasoning in mind, it offers the rhetorical theory that exists behind the law, and in its legal examples it shows how topical,

rhetorical reasoning led to legal conclusions, rather than working from the conclusions backwards. In *Topica*, Cicero provides Trebatius with rhetorical theory, in the hope that the young jurist will be able to apply it to his legal work. Far from useless, the *Topica* provided Trebatius with a way of thinking about legal arguments, a field which today we call legal reasoning. Horak's out of hand dismissal is misplaced.

5.4. Summary of Findings.

This chapter has focussed upon the rhetorical writing of the Romans during the Republican period to examine the extent to which Roman rhetorical theory was used to provide a basis for argument in law. The chapter began by examining the origin of rhetorical theory in Greek writing and traced the Roman response to Greek rhetorical thought during the mid-Republican period, when Greek influence on Rome increased due to increased contact between the two peoples. The chapter then goes on to examine early Roman interaction with rhetoric, revealing how, after early trepidation, Latin texts began to appear, developing Greek ideas and producing a rhetorical theory deeply reflective of Roman social needs. After exploring the early formative stage of Roman rhetoric, the chapter examines the mature works of Cicero. The chapter examines Cicero's exposition on rhetoric with a particular consideration of his treatment of law, examining how he provides rhetorical explanation for legal positions, and, particularly in his work *Topica*, provides a template of legal reasoning for jurists to use within their profession.

It is my view that Cicero's work on rhetoric and law was neither an outlier, nor an attempt to infringe upon the specialism of others roundly rejected by the jurists whom it presumed to edify. Rather, it forms part of an on-going interaction between the law and rhetoric which was central to the operation of both within Roman society. In previous chapters, this thesis has outlined how the separation of jurists and orators had resulted from the imposition of modern scholars whose view was limited by dogmatic narratives of science and continuity, rather than the Roman sources. It has revealed how Cicero, far from being an "outsider" to the world of Roman law was in fact an involved "insider". This chapter has built upon that, revealing how rhetoric formed a crucial jurisprudential method to the thinking that underpinned legal argument. Yet, presenting this grand theory of rhetoric is not enough without specifics. The next chapter will build upon what is argued here, and present the specific use of rhetorical topical concepts – *aequitas* and *pietas* – within Roman law and society, applied with regard to the ways set out by Cicero in his general theory of rhetoric.

6. Rhetorical Concepts in Society and Law.

This section aims to provide a summary of the value of rhetorical concepts within Roman law and society. The aim of this section is to reveal the potency of rhetorical argumentation by rooting the loci of arguments in their social context. The chapter argues that socially understood concepts reflect the rhetorical loci used as argumentative tools in legal argumentation. It will focus on *aequitas* and *pietas* as two, among more, of such concepts.

6.1. *Aequitas*.

The section will examine the nature of *aequitas* in Roman society and law. First, it will examine the socially understood meaning of the concept. Secondly, it will examine *aequitas* in rhetoric theory. Thirdly, it will look at *aequitas* specifically in Cicero. Lastly, it will consider *aequitas* in legal sources.

6.1.1. The Concept of *Aequitas* in Roman Society.

The concept of *aequitas* was a distinctly Roman virtue, reflective of Roman society, and attempts more adequately to define the term through an appeal to synonymy with an English word fail due to the divergent connotations that result from the social understanding afforded to the conceptualisation of *mores*. The Lewis & Short Latin dictionary provides three definitions of *aequitas*: first, “the quality of being *aequus* (syn.: *aequalitas*, *jus*, *justitia*, *fas*)”;¹ secondly, “the uniform relation of one thing to others, equality, conformity, symmetry”;² thirdly, when of men, “just or equitable conduct toward

¹ This first definition is perhaps the least helpful as it requires further explanation in relation to definition for the word *aequus*, which Lewis & Short, among an extensive definition of the term stress its relation to “equality” and “fairness”. The definition also points to synonymity with *ius*, or “right”, indicating a relation to temporal, secular justice, and *fas*, indicating a relation to divine justice and righteous behaviour.

² This second definition provides us with a more comprehensible understanding by presenting connotations to English language concepts. Lewis & Short link the Latin to the Greek concept *ἐπιείκεια*. Again, social context is required to provide a suitable definition and the Greek *ἐπιείκεια* provides us with ideas of equity, as opposed to strict law, see: Hip. *Fract.* 31.: Isoc. 18.13.: Plut. *Vit. Cat. Mi.* 4. In reference to persons it connotes fairness and reasonableness, see: Th.3.40.; Plu. *Per.* 39. It can also indicate goodness, or righteousness, see: Lys. 16.11.; Arist. .EN1175b24, where it is used alongside *χάρις*. While comparison with the Greek offers insight, linguistic similarity does not expel cultural and social complexity, for a view of the development of equitably legal remedy in the Greek legal mind, see Schiavone (2012) 88-90. See also Ostwald (2013) 135; de Romilly (2002) 17.

others, justice, equity, fairness”,³ or of gods, “a quiet, tranquil state of mind, evenness of temper, moderation, calmness, tranquillity, repose, equanimity”.⁴ These definitions are indicative, but their verbosity and their reliance upon interconnectedness to other complex social concepts reveals that a more nuanced approach is required to understand *aequitas* fully.

Periodisation is of paramount importance. The meaning and understanding given to *aequitas* changed over the vast span of Roman history. The period in which this thesis is interested, the late Republic, offers some sources which give an insight to the Roman social attachment to the term at that time. Other sources, both later and earlier, also provide a framing for the Republican understanding of what is meant by *aequitas*.

Skinner frames Roman *aequitas* as divided into two broad applications: the legal principle by which the civil law could be superseded by an appeal to natural fairness, and secondly, the general idea of fairness in the dealings between individuals, as opposed to malice.⁵

The Republican sources give some indication as to the social meaning applied to *aequitas*.

The Roman biographer, Cornelius Nepos (c. 110 BC – c. 25 BC), writing in the Republican period in which our understanding of *aequitas* is most crucial to the claims of this thesis, uses the term in application to the Athenian statesman Aristides, whose good reputation is attributed to “*iustitiae vero et aequitatis et innocentiae multa*”.⁶ The reputation he had for *aequitas* (*in primis quod eius aequitate factum est*) in the navy led to Greek city states aligning with Athens and not Sparta, with Nepos contrasting the “justice” (*iustitia*) of Aristides to the “arrogance” (*intemperantia*) of Pausanias.⁷ The passage is indicative, if somewhat speculative, in assigning deep meaning to *aequitas*, yet its link to justice and temperance are clear in the allusions made. This is reflected in another of Cornelius Nepos’s use of the term in his biography of Thrasybulus, when mentioning to the Sage Pittacus, who, when offered great gifts by the people of Mytilene, stated that as a sign of his *aequitas* he would accept but 100 acres.⁸ The tale again highlights the temperance and moderation, which is central to the meaning attached to *aequitas*, alongside just, fair dealing and a respectful good will between parties. A third, similar use, by Cornelius Nepos in his biography of Miltiades, where Miltiades is praised for his equity in his headship of Chersonesus, stating that the justice which he showed created a consensual relationship between him and

³ The exact meaning of this somewhat woolly list of vague concepts will be explored fully.

⁴ The scope of this thesis is less concerned with the theological considerations of the use of the word, but for instances of use in this context, see: Cic. *Tusc.* 1.40.97.; Sall. C. 93. See also, Fears (1981) 897-904.

⁵ Skinner (2002) 49. A similar view of these two modes of *aequitas* is given at Mousourakis (2003) 28-35.

⁶ Corn. Nep. *Arist.* 2.3. “There are many instances of his justice, equity, and integrity”.

⁷ Corn. Nep. *Arist.* 2.3.

⁸ Corn. Nep. *Thras.* 4.2. “*Qua re ex istis nolo amplius quam centum iugera, quae et meam animi aequitatem et vestram voluntatem indicent*”. Translation: “Out of what you offer, I do not want any more than 100 acres of land, which will be a token of my equity, and your good will”.

those he ruled, storing up his authority.⁹ Again, temperance and mutuality seem to underpin the meaning Nepos applies to the term.

The historian Gaius Sallustius Crispus (86 BC – c. 35 BC) provides examples of what is meant by the term. In recounting the war with Catiline, Sallust uses *aequitas* to judge political good:¹⁰

Verum ubi pro labore desidia, pro continentia et aequitate lubido atque superbia invasere, fortuna simul cum moribus inmutatur.

But when hard work is replaced by laziness, self-restraint and even-handedness by willfulness and insolence, there is a change in fortune accompanying the change in character.

The juxtaposition between *aequitas* (or, as it is translated by Rolfe, “even-handedness”, which in itself gives an indication of the connotation of temperance in relation to the concept) and wilfulness and ignorance indicates the extent to which fairness and reasonable restraint are rooted in the term. The link to good government is also of importance, as *aequitas*, repeatedly in the Roman sources, is attributed to well-organised social structures which provide equitable remedy over harsh rule. The social nature of *aequitas* is stressed, yet again in Sallust, in its attachment to societies and peoples, as it is to the Romans:¹¹

In suppliciis deorum magnifici, domi parci, in amicos fideles erant. Duabus his artibus, audacia in bello, ubi pax evenerat aequitate seque remque publicam curabant.

They were lavish in acts of worshipping the gods, frugal in their homes, loyal to their friends. By these two practices, boldness in warfare and justice when peace came about, they watched over themselves and their country.

In this example, *aequitas* is seen as part of the grand register of good social behaviours, together with other concepts that fundamentally bind the Roman people to the state in a cohesive way. The interconnectedness between Roman virtues and the operation of good Roman society are continually presented by the Roman sources as necessary to the mutual continuation of the other. In this instance, equity, or justice, is framed as the correct behaviour to embark upon in the peaceful state, embracing even-mindedness, reason, and fairness.

Gaius Iulius Caesar (100 BC – 44 BC) uses the term *aequitas* repeatedly, often in reference to himself, which naturally begs the historian for caution in belief of the general’s personal merits, but is

⁹ Corn. Nep. *Mil.* 2.2. “nam cum virtute militum devicisset hostium exercitus, summa aequitate res constituit atque ipse ibidem manere decrevit”. Translated as: “For when, thanks to the valour of his soldiers, he had vanquished the enemy, he organized the colony with the utmost impartiality and decided to make his own home there”.

¹⁰ Sall. *Cat.* 2.5. Translated by Rolfe (1989) 23.

¹¹ Sall. *Cat.* 9.4. Translated by Rolfe (1989) 33-35.

even still helpful in attaching an understanding to the social meaning of the term. Caesar uses *aequitas* in reference to himself regarding his own hopes for peace on his “mild terms” during the Civil War:¹²

Is eo tempore erat Ravennae expectabatque suis lenissimis postulatis responsa, si qua hominum aequitate res ad otium deduci posset.

At the time, he was at Ravenna, awaiting response to his extremely mild demands, in case by some humane sense of equity the situation could be steered toward peace.

False-modesty aside, the use of *aequitas* here is illuminating, indicating that the concept, while containing a degree of fairness, has a tendency towards a humane charity, or allowance, for the poor behaviour of others, or misfortune of circumstance. Caesar uses the term in such a way again, relating to the forgiveness of debts resulting from his edict:¹³

Sed fiebat aequitate decreti et humanitate Treboni, qui <pro> temporibus clementer et moderate ius dicendum existimabat, ut reperiri non possent a quibus initium appellandi nasceretur.

But it turned out to be impossible to find anyone to initiate an appeal, thanks to the equity of Caesar’s decree and the decency of Trebonius, who thought that in the circumstances judicial rulings ought to be made with compassion and moderation.

Again, Caesar’s use of the term is to emphasise his compassion and humanity for political purposes.¹⁴ However, we can see an attachment to *aequitas* of an even-handedness and fairness which goes beyond pure equality, but rather has a restorative feature to a wronged or misfortunate party. In the Gallic War, Caesar uses *aequitas* in relation to his offer to Ariovistus on behalf of the Roman people, stressing duty and fairness as the essence of the term.¹⁵ Caesar’s use of *aequitas* is more overtly political than other sources, yet his use of the term reveals a consistent understanding of fairness and a link to well established social order.

Later sources, from the Principate, offer further explanation of the term. During the imperial period, however, the attachment of the term *aequitas* to particular strands of imperial propaganda must be

¹² Caes. BCiv. 1.1.5. Translated by Damon (2016) 11.

¹³ Caes. BCiv. 3.20.2. Translated by Damon (2016) 223.

¹⁴ Caes. BCiv. 1.32.8. Caesar uses *aequitas* to establish his own humanity for political purposes again. See: “se vero ut opibus anteire studuerit sic iustitia et aequitate velle superare”. Translated by Damon (2016) 51.

¹⁵ Caes. BGall. 1.40. “Sibi quidem persuaderi cognitis suis postulatis atque aequitate condicionum perspecta eum neque suam neque populi Romani gratiam repudiaturum”. Translated by Edwards (1989) 63: “For myself, I am persuaded that, when my demands are made known, and the fairness of my terms understood, Ariovistus will not reject the goodwill of myself or the Roman people”.

considered.¹⁶ Nevertheless, these later sources provide an informative appreciation of the nature and understanding of *aequitas* in Roman society.

Marcus Velleius Paterculus (c. 19 BC – c. AD 31), the historian of Rome from Troy to the death of Livia, uses the term in attachment to the values of the imperial regime in restoring order and justice to Rome after the collapse of the Republic and years of civil strife:¹⁷

Revocata in forum fides, summota e foro seditio, ambitio campo, discordia curia, sepultaeque ac situ obsitae iustitia, aequitas, industria civitati redditae; accessit magistratibus auctoritas, senatui maiestas, iudiciis gravitas; compressa theatralis seditio, recte faciendi omnibus aut incussa voluntas aut imposita necessitas.

Credit has been restored in the forum, strife has been banished from the forum, canvassing for office from the Campus Martius, discord from the senate-house; justice, equity, and industry, long buried in oblivion, have been restored to the state; the magistrates have regained their authority, the senate its majesty, the courts their dignity; rioting in the theatre has been suppressed; all citizens have either been impressed with the wish to do right, or have been forced to do so by necessity.

As a source, Velleius must be regarded as partial due to his imperial cheerleading.¹⁸ The use of the term *aequitas* in this context can still provide insight into the Roman definition afforded to it. Again, as with other sources, we see a strong link between *aequitas* and social institutions. The restoration of the virtue of *aequitas* coincides with the recovery of authoritative magistracies, good governance and just courts. This underpins the essential social dimension of *aequitas*, and its link to a socially understood notion of fair treatment. The concept of *aequitas* here shares with earlier sources a clear connotation to justice and fairness, but more starkly, here it is linked to the authority of the state to adjudge and regulate behaviour on reasonable terms. This is in part due to the emphasis placed on the political point of the return to social order at Rome under the Principate, but also reveals the link between *aequitas* and authority, and the means by which the delivery of reasonable, legitimate and fair justice is extant within the concept, as can be seen in earlier examples from Cornelius Nepos in his discussion of Greek statesmen. It is also seen in another example from Valeius where *aequitas* is used to give explicit meaning to fair dealing over corruption and cronyism, following Augustus's ascendancy over cities in Asia:¹⁹

¹⁶ See Powell (1992); Enenkel & Pfeijffer (2005); Lobor (2008).

¹⁷ Vell. Pat. CXXVI 2. Translated by Shipley (1924) 317.

¹⁸ Shipley (1924) xv-xvii discusses the tendency towards the use of superlatives in Valeius's discussion of imperial figures, and, indeed, historical characters in general.

¹⁹ Vell. Pat. CXXVI 4.

Restitutae urbes Asiae, vindicatae ab iniuriis magistratuum provinciae: honor dignis paratissimus, poena in malos sera, sed aliqua: superatur aequitate gratia, ambitio virtute; nam facere recte civis suos princeps optimus faciendo docet, cumque sit imperio maximus, exemplo maior est.

The cities of Asia have been restored, the provinces have been freed from the oppression of their magistrates. Honour ever awaits the worthy; for the wicked punishment is slow but sure; fair play has now precedence over influence, and merit over ambition, for the best of emperors teaches his citizens to do right by doing it, and though he is greatest among us in authority, he is still greater in the example which he sets.

Again, the praise heaped upon Augustus is clear and signals the high merit placed on *aequitas* as a virtue, but of more interest is the way in which it links to the essence of fairly and temperately dispensed justice, even over other forms of power relationships – *aequitas* has, through its own merit, a special and easily understood inherent worth, both morally and socially.

Further examination of the sources can provide more elucidation. Seneca the Younger (4 BC – AD 65) uses the term *aequitas* throughout his works. Seneca draws an immediate link between *aequitas* and reason, noting that a well-ordered state and happy populace find equitable solutions easier to grasp.²⁰

Nec rationem patitur nec aequitate mitigatur nec ulla prece flectitur populus esuriens.

A hungry people neither listens to reason, nor is appeased by justice, nor is bent by any entreaty.

The link between *aequitas* and good social ordering becomes a recurrent theme within the literature, as stressed again in another excerpt from Seneca the Younger:²¹

Quis queri potest in ea condicione se esse, in qua nemo non est? Prima autem pars est aequitatis aequalitas.

Who can complain when he is governed by terms which include everyone? The chief part of equity, however, is equality.

This interaction requires not only the fairness of the social institution which governs people, but also the mindset of the people who are governed, who are expected to appreciate the equitable relationship within the social order:²²

²⁰ Sen. *de brev. vit.* 18.5. Translated by Williams (2003) 349.

²¹ Sen. *Ep.* XXX.11. Translated by Gummere (1917) 217.

²² Sen. *Ep.* CVIII.6. Translated by Gummere (1917) 227.

Imperetur aequitas animo et sine querella mortalitatis tributa pendamus.

Be sure to prescribe for your mind this sense of equity; we should pay without complaint the tax of our mortality.

Here we can see that *aequitas* relates to a good understanding in the civic body not only for the duties owed to the state, but also to the state's fair treatment in return. The point to be stressed here is the social understanding of *aequitas*. It exists as a socially understood concept, in which the Roman people have a concrete understanding of the expectation of others in relation to *aequitas*, as well as a solid conception of its absolute qualities.

Valerius Maximus (wrote AD 14 – AD 37) provides several insights into the Roman understanding of *aequitas*, though, as a source, he at times recounts some dubious testimony.²³ First, of interest, is Valerius Maximus recounting an older tale:²⁴

Inserit se tantis viris mulier alienigeni sanguinis, quae a Philippo rege temulento immerens damnata, <provocare se iudicium vociferata est, eoque interrogante ad quem> provocaret, ‘ad Philippum’ inquit, ‘sed sobrium.’ excussit crapulam oscitanti, ac praesentia animi ebrium resipiscere causaque diligentius inspecta iustior sententiam ferre coegit. igitur aequitatem, quam impetrare non potuerat, extorsit, potius praesidium a libertate quam ab innocentia mutuata.

A woman of alien race inserts herself among these great men. Wrongfully condemned by King Philip when he was in liquor, she cried out that she appealed the judgment. When he asked whom she appealed to, “to Philip,” she said, “but to Philip sober.” She dissipated the fumes of wine as he yawned, and by her ready courage forced the drunkard to come to his senses and, after a more careful examination of the case, to render a juster verdict. Thus she extorted the equity which she could not get by asking, borrowing recourse from freedom rather than from innocence.

This amusing and witty story provides yet more insight into the meaning attached to *aequitas*. The necessary sobriety of Philip to provide equitable relief accounts for the level headedness implicit within *aequitas*, and this is attached to the provision of just law. Here, we see a case where bad law, or bad law making, can be overturned by an appeal to more equitable appreciation of the circumstances, appealing to the justice of fair-mindedness over reaction. In the same vein, Valerius Maximus provides more on his understanding of *aequitas* in relation to the state and leadership:²⁵

²³ Shackleton Bailley (2000) 1-8

²⁴ Val. Max. 6. Ext.1. Translated by Shakleton Bailey (2000) 27

²⁵ Val. Max. 9.5. Translated by Shakleton Bailey (2000) 395.

Multo fortius ille qui Cornelio Sulla rerum potente in domum Cn. Asinii Dionis irrupit, filiumque eius patris penetibus expulit, vociferando non illum sed se Dione esse procreatum. verum postquam a Sullana violentia Caesariana aequitas rem publicam reduxit, gubernacula Romani imperii iustiore principe obtinente, in publica custodia spiritum posuit.

Much more forceful was the action of the person who under the rule of Cornelius Sulla broke into the house of Cn. Asinius Dio and expelled his son from his father's house, vociferating that he, not that son, was Dio's child. But after Caesarian equity brought the commonwealth back from Sullan violence and a juster leader held the rudder of Roman empire, he surrendered his life in public custody.

Two points arise from this example: first, the link between *aequitas* and *pietas*, which will be discussed more fully in the next chapter; secondly, the interconnectedness between *aequitas* and good governance, a recurring theme throughout the sources. The juxtaposition between justice and equity on the one hand and violence on the other is of interest. The rôle of *aequitas* is not only the assurance of temperance and fairness, but also contains an element of enduring legitimacy, derived from good order in society, even against immediate rule. In this way, *aequitas* is attributed to favourable treatment and friendly dealing between governments and peoples, as Valerius Maximus outlines in the following example:²⁶

Liberalis populus Romanus magnitudine muneris, quod Attalo regi Asiam dono dedit. sed Attalus etiam testamenti aequitate gratus, qui eandem Asiam populo Romano legavit. itaque nec huius munificentia nec illius tam memor beneficii animus tot verbis laudari potest quot amplissimae civitates vel amice datae vel pie redditae sunt.

The Roman people was liberal in the magnitude of a gift in that it presented Asia to king Attalus; but Attalus too was grateful in the fair dealing of his will, leaving the same Asia to the Roman people. Neither the munificence of the one nor the other's mindfulness of the benefaction can be praised in words as many as the great communities either given in friendship or returned in gratitude.

This example further illustrates the relationship between *aequitas* and good governance, but also, more than most excerpts, stresses the impact of good interrelationship between the parties, as a feature of *aequitas*, or, rather, that equity, when applied, is an understood mutually recognised concept between the parties who exercise it. This reveals the social understanding required for equitable remedy to function effectively, without the need for grandiose reasoning, or violent imposition. Yet, while a social constituent

²⁶ Val. Max. 5. Ext.3. Translated by Shackleton Bailey (2000) 473.

to *aequitas* is clear, there still exists an absolute quality to Valerius Maximus's discussion of the term in relation to Rome's battle plans against Phyrus of Epirus:²⁷

Memor urbem a filio Martis conditam armis bella, non venenis gerere debere. Timocharis autem nomen suppressit, utroque modo aequitatem amplexus, quia nec hostem malo exemplo tollere neque eum qui bene mereri paratus fuerat prodere voluit.

They remembered that Rome was founded by a son of Mars and should wage war by arms, not poisons. But they suppressed Timochares' name, embracing justice (*aequitas*) in two ways: they were not willing to remove an enemy in a way that would leave a bad precedent nor yet to betray a man who had been ready to do them a service.

Here, *aequitas* has a more absolute quality, which in rhetorical terms, falls under a natural law topic/*locus*. The fair dealing and justice held in *aequitas* are concrete to its definition, but its application is nevertheless deeply social insofar as it relates to specific incidences. Further examples of Valerius Maximus deal specifically with *aequitas* in relation to the private law. The examples given here expound various examples in order to root a social definition to *aequitas* from his writing. The indication is that *aequitas* contains connotations of fair dealing, justice, temperance and good governance.

The historian Gaius Suetonius Tranquillus (c. AD 62 - AD 122), though later than the sources mentioned up to this point, uses the term in an interesting way, though with the continued caveat of its use in imperial circumstances. On the life of Titus, Suetonius applies the term to the emperor:²⁸

Quin et studium armaturae Thraecum prae se ferens saepe cum populo et voce et gestu ut fautor cavillatus est, verum maiestate salva nec minus aequitate. Ne quid popularitatis praetermitteret, nonnumquam in thermis suis admissa plebe lavit.

Furthermore, he openly displayed his partiality for Thracian gladiators and bantered the people about it by words and gestures, always however preserving his dignity, as well as observing justice. Not to omit any act of condescension, he sometimes bathed in the baths which he had built, in company with the common people.

The use of the term here presents a situation within social power relations, showing how the fairness and openness of the emperor Titus ensures his good relationship with the common people resulting from his ability to exercise his rôle of magistracy with an attentive eye to socially understood norms of equitability. A similar use of the case is presented involving a judgement of the emperor Claudius.²⁹

²⁷ Val. Max. 6.1. Translated by Shackleton Bailey (2000) 57.

²⁸ Suet. Tit. 8.2. Translated by Rolfe (1914) 317.

²⁹ Suet. Claud. 5.2.

Other sources from the Principate are also of some interest. Pliny the Elder (AD 23 – AD 79), amusingly, attributes *aequitas* to the noble character of the elephant.³⁰ The younger Pliny (AD 61 – AD 113) used it in his panegyric to praise Trajan’s expedient and fair distribution of justice.³¹ Another excerpt of Pliny the Younger, a letter, reveals the ability to argue successfully for the mitigation of a death sentence to banishment based on appeals to *aequitas*.³² The architect Sextus Iulius Frontinus (AD 40 – AD 103) praised the *aequitas* of the Roman ancestors for not seizing private land for public constructions, even where necessary.³³ Aulus Gellius (c. AD 125 – AD 180) adds to the discussion of *aequitas* in Latin literature. In discussion of the views of the third century BC Greek stoic Chrysippus, Aulus Gellius writes:

Ex imaginis autem istius significatione intellegi voluit, iudicem, qui Iustitiae antistes est, oportere esse gravem, sanctum, severum, incorruptum, inadulabilem contraque improbos nocentesque in misericordem atque inexorabilem erectumque et arduum ac potentem, vi et maiestate aequitatis veritatisque terrificum.

From the spirit of this representation he wished it to be understood that the judge, who is the priest of Justice, ought to be dignified, holy, austere, incorruptible, not susceptible to flattery, pitiless and inexorable towards the wicked and guilty, vigorous, lofty, and powerful, terrible by reason of the force and majesty of equity and truth.

Among a plethora of other attributes, *aequitas* is attributed to the “priest of Justice”, a judge seemingly akin to Dworkin’s Hercules in his ability to reason correctly on law and truth.³⁴ Aulus Gellius also uses *aequitas* to render a meaning of patient understanding in relation to Socrates and his attitude toward his trying wife.³⁵ It is used also in a discussion of mutual retaliation, or *lex talionis*, in cases of punitive recompense for physical injury.³⁶ Gellius’s use of *aequitas*, though separated from our period, and other sources, by some distance, shares in a basic meaning of fairness, justice and even-temperedness. Other Principate sources include Florus (possibly AD 74 – AD 130), who states that the populist Gracchan laws were enacted with the view of presenting a deceptive appearance of *aequitas*.³⁷ The poet Marcus Valerius Martialis (c. AD 38/40 – c. AD 102/104) uses the term, among a host of other Roman virtues in

³⁰ Plin. *H.N.* 8.1.

³¹ Plin. *Pan.* 77.4.

³² Plin. *Ep.* 24. “Quemadmodum obtinui? Qui ultimum supplicium sumendum esse censebat, nescio an iure, certe aequitate postulationis meae victus, ommissa sententia sua accessit releganti ...” Translated by Radice (1969) 45: “How did I manage this? The proposer of the death sentence was convinced by the justice of my request (whether or not it was legal), dropped his own proposal, and supported that of banishment”.

³³ Frontin. *Aq.* II. 128: “Multo magis autem maiores nostri admirabili aequitate ne ea quidem eripuerunt privatis quae ad modum publicum pertinebant”. Translated by Bennett (1925) 459: “but with much more admirable justice, our forefathers did not seize from private parties even those lands which were necessary for public purpose”.

³⁴ Dworkin (1985) 119.

³⁵ Aulus Gellius. Book 1 xvii

³⁶ Aulus Gellius Book XX 1. 35-36.

³⁷ Flor. II.1.13.2. “Inerat omnibus species aequitatis”. Translation: “All these actions had some appearance of equity.”

his praise of Aulus's attributes.³⁸ Quintus Curtius Rufus (first century AD) uses *aequitas* in the speech of the Persian Sisygambis, who praises the justice of Alexander above that of his own defeated king, Darius.³⁹ The historian Tacitus (c. AD54 – c. AD120) uses *aequitas* in the speech of the Parthian king Vologeses as the means by which he would rather be triumphant than through force or arms.⁴⁰

Some striking omissions have emerged from the sources used here – Cicero. These sources will be dealt with separately, as their value and worth in evaluating *aequitas* in relation to rhetoric and the law requires a more in-depth analysis than is afforded here. Later sources also contain reference to *aequitas*, but the distance in time from the period on which this thesis focuses, in combination with the social changes, which occurred from the growing centralisation of power in the Dominate and the growth of Christianity, renders later Latin sources of dubious worth in the current discussion.⁴¹

The purpose of drawing together the sources, which have been discussed here, is to provide a glimpse into what the Romans themselves meant by *aequitas*. While each source has particular nuance, and its own motives, there nevertheless emerges a shared theme of ideas, which are valuable to the historian. The main themes which dominate these Roman sources, over a period of nearly three hundred years are strikingly similar: the relationship between *aequitas* and good governance in the state (both in terms of a fair ruler and a peaceable people); even-temperedness, or reasonableness; and lastly, as fair-treatment or just dealings. Some of the sources, such as Caesar, push fairness to the extent of charitable treatment of a wronged party, amounting almost to mercy, yet most limit themselves to even handedness.

The conclusion drawn from these sources is that *aequitas* extends beyond a simple common or garden fairness; rather it is a feature of the Roman understanding of their society and their behaviour. The sources reveal such a commonality of understanding in the term and such similar contextualisation of its use that to dismiss *aequitas* merely as a vague assignation of fairness is inappropriate. Rather, it is proposed, that *aequitas* is a socially understood value commonly held by the Romans within their own social environment. It is this social understanding that provides value to the term in its application to the various examples given in the sources. It is also this deep social understanding which provides the concept with rhetorical potency, as the *locus*, or place from which the argument is rooted, of arguments. As *aequitas* is an understood social value, it is the postulate upon which arguments are built, as it serves as a recognisable first principle from which to elucidate an argument. As we shall see in our exploration of *aequitas* as a socially understood value in legal

³⁸ Mart. *Spect.* V 28.

³⁹ Curt. III. 24.

⁴⁰ Tac. *Ann.* 15.2.

⁴¹ See Garrison (1992) for a literary overview. Marlsbury (2001) offers a brief sketch of the semantics of *pietas* and derivative concepts throughout Western thought and culture.

arguments, this topical basis is of crucial importance in legal development.

6.1.2. *Aequitas*, Rhetoric and the Law in Roman Sources.

This section intends to examine *aequitas* as the basis of rhetorical arguments in law. The examination here is not intended, as the last section was, with providing a definition to *aequitas*, but rather to show its argumentative operation as the locus for arguments based upon its conceptualisation as a socially understood value. The previous section argued that *aequitas*, far from a simple claim of fairness, was rather a socially understood value in Roman society, which gave it a unique position in rhetorical terms, as a potential locus for arguments. This section will focus on four sources: Valerius Maximus; Seneca the Elder; Quintilian; and Tacitus. The next section will deal with Cicero in isolation, as his insightful treatment of the term in combination with his value in terms of periodization means that a full and extensive treatment of his writings on *aequitas* and law is required.

The first source we turn to is the first century AD collector of Roman anecdotes and sayings, Valerius Maximus. Valerius Maximus was used in the previous section to help provide an understanding of the meaning attached to *aequitas* by the Romans. This section will focus upon that use in its rhetorical and legal application. Valerius Maximus dedicates a section of his work on *Memorable Sayings and Doings* to private law suits, providing an opening analysis which mentions, foremost of all things, *aequitas*:⁴²

Publicis iudiciis adiciam privata, quorum magis aequitas quaestionum delectare quam immoderata turba offendere lectorem poterit.

To public trials I shall add private ones. They will perhaps more please the reader by the equity of their conduct than annoy him by their excessive number.

Valerius Maximus is keen to stress the extent to which *aequitas* plays a central rôle in his account of private law suits. Our earlier exploration of *aequitas* revealed the extent to which it formed an understood value within Roman society, yet, within the world of private law, the presupposition was that the civil law prescribed just treatment, not social mores. Here, however, Valerius Maximus outlines that *aequitas* is evident within his account of private law trials. This is perhaps fathomable, given that within our definition of *aequitas* we asserted a particular social relationship between fair justice afforded to a claimant and accepting reasonableness on the part of the ruled or adjudged. On a meta-level, therefore, well-dispensed justice is at all times equitable, whether rooted in legal science or not. However, as the examples provided make clear, the extent to which *aequitas* is applicable to Valerius Maximus's account of private law trials

⁴² Val. Max. 8.2. Translated by Shackleton Bailey (2000) 205.

goes beyond a simplistic notion of well-dispensed justice, but rather to the heart of the issue, where a socially understood meaning of *aequitas* forms the legal reasoning for particular decisions, informing the basis for justice in a way which appears to exclude strictly scientific reasoning.

6.1.3. *Aequitas*, Rhetoric and Law in Cicero.

Cicero provides a lengthy discussion of the uses of *aequitas*, which ought to be considered within the context of his general rhetorical theory, as discussed earlier in this thesis.⁴³ Cicero's most helpful categorisation of rhetoric is a three part summation of the *loci* from which *aequitas* is rooted. Cicero had, before providing this tripartition of his definition of *aequitas*, set out that in situations where the question to be decided is one of a question of right and wrong, in order to produce a deliberative proof, then a twofold distinction is made between equity in natural law and institutions:⁴⁴

This provides a helpful framework in which to view the topical roots of *aequitas* in relation to legal claims. Equitable solutions can be sought, according to Cicero, from two discreet places: natural law, which indicates an inherency to the understanding of the concept within an understood moral existence, and institutions, which indicates a social basis for the understanding of *aequitas*. The first of these two categories, that of natural law, is outwith the scope of the current discussion. The second of the distinctions, institutional equity, is of greater consideration here, as it outlines how claims to *aequitas* can be rooted in socially understood conceptualisations of the virtue, which is realised through socially constructed instruments: law, compact and custom. Cicero, in *Topica*, helpfully provides a tripartite definition for institutional *aequitas*.⁴⁵

Cicero's separation of *aequitas* into three parts is a useful measure for understanding how it is applied as a *locus* in argumentation. First, we see that *aequitas* is deeply tied to social institutions. The reason for this is that the basis for the understanding of *aequitas*, outwith the two claims of natural law outlined above, which take on a slightly different hue, is determined from within the construction of society itself – Roman conceptions of *aequitas* are interconnected to the institutions of Roman society which present them. There is, as a result, a deep correlation between Roman law, compact and custom and the socially understood virtues of piety, respect and equity. The correlation here does not necessarily imply causation, and it is outwith the scope of this thesis to tackle the remarkably complex question of tracking the developmental causation between the institution and the linked socially understood virtue, but, nevertheless, it is proposed, based on the Roman sources themselves, that an interrelated reliance

⁴³ See Sections 5.2.1. and 5.2.2. of this thesis for a discussion of the schematic of Cicero's rhetorical theory.

⁴⁴ Cic. *Top.* XXIII. 90 Hubbell 451.

⁴⁵ Cic. *Top.* XXIII 90.

was extant and understood between social virtues like equity and socially constructed institutions like law.

The division between *aequitas*, *sanctitas* and *pietas* seems to be purely situational, dependent upon the basis of the appellation from its *locus*, Cicero spends a great deal of time on the value of the *locus* to the argumentative structure, as discussed elsewhere in this thesis.⁴⁶ The fundamental point which is being stressed in this section is how the socially understood nature of these concepts corresponds to their utility in arguments. This will be stressed with further reference to Cicero's discussions of *aequitas*.

6.2. *Pietas*.

This section will examine *pietas*. First, it will examine the socially understood nature of *pietas* in Roman society. It will then examine *pietas* in law. Before turning to specific appraisals of the concept in the *Rhetorica ad Herennium*, Cicero and Quintilian.

6.2.1. The Concept of *Pietas* in Roman Society.

The *Oxford Classical Dictionary* defines *pietas* as, “the typical Roman attitude of dutiful respect towards gods, fatherland, and parents and other kinsmen”.⁴⁷ Wissowa provides a good encapsulation of its general meaning, by outlining that the man who possesses *pietas* “performed all his duties towards the deity and his fellow human beings fully and in every respect”.⁴⁸ In its broad sense, *pietas* was a pervasive, philosophical concept, entrenched in the mind-set of the Roman and more broadly in Roman society. The nature of the concept is fundamentally hierarchical, insofar as it was always a factor in a relative relationship, as Saller points out:⁴⁹

First, the emphasis is on duty rather than affection or compassion. Secondly, it is a virtue displayed primarily toward a high power, whether it be the gods, the fatherland, or parents.

⁴⁶ See Section 5.3.1.

⁴⁷ *OCD* 833.

⁴⁸ Wissowa, in Wagenvoort (1980) 7.

⁴⁹ Saller (1994) 105. This is reflected too in other analyses, for instance, see Néranda (1984) 121: “C’est une vertu fondamentale de la morale romaine ... c’est-à-dire qu’elle est reconnaissance d’une principe hiérarchie qu’il faut admettre et aimer”.

This is reflected in the cultural value attached to it in art and literature, particularly in Virgil.⁵⁰ There is also evidence in inscription which stresses the virtue of *pietas*.⁵¹ Moreover, it is made clear in the reverence shown to it within the law. The general virtue of *pietas* was in turn subdivided into three consequent forms: in regard to parents; in regard to fatherland; and concerning divinity.⁵² To these broader ideas are attached several dependent concepts: devotion; loyalty and duty. *Pietas* has a religious undertone, rooting itself in a natural order. Its realisation, as Wissowa alludes to, is all-encompassing, a complete fulfilment of what is expected in duty from the individual to his surrounding world. Specific types of *pietas* for other relationships were also acknowledged, such as fraternal *pietas*.⁵³ All forms were reliant upon the acknowledgement of an institutional status. That is, upon the realisation that the status of individuals in relation to each other changed their interaction on an institutional level. Therefore, the relationship between father and son, for instance, takes two forms, the true relationship of everyday life and the institutional relationship of status which is imposed in various social, moral and legal ways. To this end, Gardener makes the important distinction, “in real life the Romans lived in families ... *familia*, being a legal construct”.⁵⁴ The *familia* is a legal concept subject to institutional convention and in this way the *pietas* between parents and children was both real, insofar as it was based on natural affinity, but also social insofar as it was enforced by the relationship of social status. The duality of *pietas* between social order and familial affection is well accounted for in Dixon’s description of “a strong sentimental ideal of family feeling ... overlapped with and supplemented (by) the traditional sense of obligation.”⁵⁵

Key examples of *pietas* are related in Latin literature. Valerius Maximus, who is fundamentally concerned with parental *pietas*, provides seven examples of *pietas*, under the title *de pietate erga parentes et fratres et patriam*.⁵⁶ Most striking of these is the following account:⁵⁷

⁵⁰ The famous literary example of *pietas* is of course Aeneas. Virgil ascribes to him the stock epithet of *pius* and the character not only embodied the virtue as it stood at the time of writing but influenced the Roman view of *pietas* thereafter. For an overview on Virgil’s concept of *pietas* in the *Aeneid* see: Manson (1975); Lee (1979); Wagenvoort, ed. (1980); Johnson (1986); Garrison (1992); Farrell & Pultnam (eds.) (2010) – particularly therein, Reed. However, as is rightly observed at Saller (1994) 106: “the *Aeneid* should not overshadow other evidence for the meanings of *pietas*”. This study reflects more on *pietas* as attested to in reality, rather than fiction, but does not discount the cultural impact of Virgil.

⁵¹ A striking example is the *Laudatio Turiae* wherein the writer, a widower, perhaps not without some dark humour, praises the *pietas* of his departed wife. See, CIL 6. 1572. 10-12; 31-33. For a brief but informative sketch, see Dixon (1992) 27-28.

⁵² This classification is set out in reference to Cicero’s statement in *de Inv.* 2.22.66.

⁵³ For a full study on fraternal *pietas* see Bannon (1997).

⁵⁴ Gardener (1998) 1.

⁵⁵ Dixon (1992) 30.

⁵⁶ Val. Max. 5.4. (“Concerning *Pietas* with Regard to Parents, Brothers and the Fatherland”).

⁵⁷ Val. Max. 5.4.7. Translated by Shackleton Bailey (2000) 500-501.

Sanguinis ingenui mulierem praetor apud tribunal suum capitali crimine damnatam triumviro in carcere necandam tradidit. quo receptam is qui custodiae praeerat, misericordia motus, non protinus strangulavit: aditum quoque ad eam filiae, sed diligenter excussae, ne quid cibi inferret, dedit, existimans futurum ut inedia consumeretur. cum autem plures iam dies intercederent, secum ipse quaerens quidnam esset quo tam diu sustentaretur, curiosius observata filia animadvertit illam exerto ubere famem matris lactis sui subsidio lenientem. quae tam admirabilis spectaculi novitas ab ipso ad triumvirum, a triumviro ad praetorem, a praetore ad consilium iudicum perlata, remissionem poenae mulieri impetravit. quo non penetrat aut quid non excogitat Pietas, quae in carcere servandae genetricis novam rationem invenit? quid enim tam inusitatum, quid tam inauditum quam matrem uberibus natae alitam? putarit aliquis hoc contra rerum naturam factum, nisi diligere parentes prima Naturae lex esset.

A Praetor had handed over a woman of free birth found guilty at his tribunal of a capital crime to the Triumvir to be executed in prison. Received there, the head warder had pity on her and did not strangle her immediately. He even allowed her daughter to visit her, but only after she had been thoroughly searched to make sure she was not bringing in any food, in the expectation that the prisoner would die of starvation. But after a number of days had passed, he asked himself what could be sustaining her so long. Observing the daughter more closely, he noticed her putting out her breast and relieving her mother's hunger with the succour of her own milk. This novel and remarkable spectacle was reported by him to the Triumvir, by the Triumvir to the Praetor, by the Praetor to the board of judges; as a result the woman's sentence was remitted. Whither does Piety not penetrate, what does she not devise? In prison she found a new way to save a mother. For what so extraordinary, so unheard of, as for a mother to be nourished by her daughter's breasts? This might be thought to be against nature, if to love parents were not Nature's first law.

Valerius Maximus sets this up as the archetypal example of *pietas*, a notion evidently held in some consensus, by the fact the Romans raised a temple to *pietas* at the site the event took place. Three key points can be taken from this anecdote. First, we can see clearly that *pietas* is not strictly limited to fathers and sons but is dependent upon duty toward a kind of relationship, mother and daughter sufficing here.⁵⁸ Secondly, we can see that acknowledgement of duty resulting from a hierarchy is central to its function. The daughter exemplifies *pietas* through her loving devotion (*deligere*) to her mother, the

⁵⁸ In agreement with Saller (1994) 108: "*pietas* was not simply a virtue of social order applicable only to aristocratic males". This is seen in later cases of the *Codex Iustinianus*, where, after the *Senatus consultum Orphitianum* of AD 178, *pietas* is applied equally to challenges to the wills of mothers and daughters as of fathers and sons.

affection born out of devotional duty, more so than sentimental affection.⁵⁹ Thirdly, that *obsequium* (deference) is a significant characteristic of the duty owed as part of *pietas*.⁶⁰ The expression of this duty is provided by Valerius Maximus in a series of *exempla* which focus on paternal *pietas*: Coriolanus ceasing hostilities at his mother's behest;⁶¹ Scipio Africanus being driven by *pietas* towards his father's memory to defeat Hannibal;⁶² L. Manlius Torquatus's son threatening the tribune Pomponius to drop charges against his horrible father, despite the hardship he had endured in his father's power;⁶³ M. Cotta, who on taking the *toga virilis*, accused his father's prosecutor;⁶⁴ the tribune C. Flaminius, who came down from the rostra on his father's orders out of respect for *auctoritas patria*;⁶⁵ and the vestal virgin Claudia, who used her prestige to stop a tribune preventing her father's triumph.⁶⁶ These examples from Valerius Maximus are generally seen in terms of *exempla* of good moral behaviour, a form which is usually attributed to rhetoric. As Saller suggests, "in Roman society the expert at the invocation of the conventional values illustrated by Valerius Maximus were the rhetoricians, for whom *exempla* were the tools of persuasion."⁶⁷ This is certainly the established practice of rhetoricians in setting out moral goods with reference to social norms. Saller, however, takes these examples to be essentially fictionalised and detached from any purposive reality:⁶⁸

The rhetoricians' manipulation of virtues in debates over imaginary conflicts provides insights into the meanings and associations of moral values. The fact that these rhetorical exercises are fictitious and highly contrived does not diminish their value as evidence for the meanings of virtue and the logic of the Roman moral system.

Certainly some rhetorical debates were contrived and used explicitly for academic purposes, but Saller, in my view, underplays the important practical rôle of rhetorical *exempla*, and the very evident fact that Valerius Maximus takes his examples of *pietas* from reality, not imagination. The *exempla* provided reveal that *pietas* is not the construction of a manipulated virtue, but rather an extant, socially understood value which was widely acknowledged within Roman society.

⁵⁹ That duty is more important to *pietas* than affection or sentiment is a widely accepted tenet, see: Saller, P. (1994) 105: "the emphasis is on duty rather than affection"; Lee (1979) 17-23; Manson (1975) 21-80.

⁶⁰ Balsdon (1979) 18: "Roman society was built on the idea of deference (*obsequium*) in the family as in the State. Whatever their age, sons and daughters owed defence to their father, who had the sanction of power over them (*patria potestas*); their wholehearted and sincere submission was an exaltation of *obsequium*: it was *pietas*".

⁶¹ Val. Max. 5.4.1.

⁶² Val. Max. 5.4.2.

⁶³ Val. Max. 5.4.3. The stress of this story is that despite the harsh conditions imposed by his horrid father, he was nevertheless so bound by duty as to defend him out of *pietas*.

⁶⁴ Val. Max. 5.4.4.

⁶⁵ Val. Max. 5.4.5.

⁶⁶ Val. Max. 5.4.6.

⁶⁷ Saller (1994) 109.

⁶⁸ Saller (1994) 110.

The elder Pliny, writing in the first century AD, provides further examples of *pietas* from Roman Society. Pliny is in agreement with Valerius Maximus that the tale of the suckling mother provides a thorough encapsulation of the essence of what is understood by *pietas*, stating that this example surpasses all other *exempla* in its depiction of *pietas*. Pliny gives the account thus:⁶⁹

Pietatis exempla infinita quidem toto orbe extitere, sed Romae unum cui comparari cuncta non possint. humilis in plebe et ideo ignobilis puerpera, supplicii causa carcere inclusa matre cum impetrasset aditum, a ianitore semper excussa ante ne quid inferret cibi, deprehensa est uberibus suis alens eam. quo miraculo matris salus donata filiae pietati est ambaeque perpetuis alimentis, et locus ille eidem consecratus deae, C. Quinctio M. Acilio coss. templo Pietatis extracto in illius carceris sede, ubi nunc Marcelli theatrum est.

Of filial affection there have it is true been unlimited instances all over the world, but one at Rome with which the whole of the rest could not compare. A plebeian woman of low position and therefore unknown, who had just given birth to a child, had permission to visit her mother who had been shut up in prison as a punishment, and was always searched in advance by the doorkeeper to prevent her carrying in any food; she was detected giving her mother sustenance from her own breasts. In consequence of this marvel the daughter's pious affection was rewarded by the mother's release and both were awarded maintenance for life; and the place where it occurred was consecrated to the Goddess concerned, a temple dedicated to Filial Affection being built on the site of the prison, where the Theatre of Marcellus now stands, in the consulship of Gaius Quinctius and Manius Acilius.

Pliny gives a similar account of the scenario to Valerius Maximus. Again, we see the mother released from the imposed capital punishment as a result of her daughter's pious respect for her position as a mother. The interpersonal affection and duty bound nature of the daughter's actions become the defining feature of *pietas*. Pliny goes on to give three further *exempla* of *pietas*. He reveals the selfless quality of *pietas* in an *exemplum* involving the Gracchi, where the public interest is put before self-preservation:⁷⁰

Gracchorum pater anguibus prehensis in domo, cum responderetur ipsum victurum alterius sexus interempto: Immo vero, inquit, meum necate, Cornelia enim iuvenis est et

⁶⁹ Plin. *H.N.* 7.121. Translated by Rackham (1938) 587.

⁷⁰ Plin. *H.N.* 7.122. Translated by Rackham (1938) 587.

parere adhuc potest. hoc erat uxori parcere et re publicae consulere; idque mox consecutum est.

In the house of the father of the Gracchi two snakes were caught, and in reply to enquiry an oracle declared that he himself would live if the snake of the other sex were killed; “No,” said he, “kill my snake: Cornelia is young and still able to bear children”. This meant, to spare his wife and think of the public interest; and the result prophesied soon followed.

The ability to acknowledge the position of others out of duty and affection towards position is a central theme of the *exempla*. The self-sacrificing nature of *pietas* is made clear in the example of Marcus Lepidus who – presumably against his true feelings – divorced his wife and died lovelorn from care towards her:⁷¹

M. Lepidus Appuleiae uxoris caritate post repudium obiit.

Marcus Lepidus after divorcing his wife Appuleia died for love of her.

A similar *exemplum* is given in the death of Publius Rutilius, who was so upset at his brother’s electoral defeat that he expired:

P. Rutilius morbo levi impeditus nunciata fratris repulsa in consulatus petitione ilico expiravit.

Publius Rutilius when suffering from a slight illness received news of his brother’s defeat in his candidature for the consulship, and at once expired.

The depth of emotion here is clear. These strong reactions, resulting from an appreciation of the societal dimension of the interpersonal relationship between persons of a particular relationship to each other (brothers, for instance), alongside, undoubtedly, a more natural affection held between proximate people, is clearly at the centre of *pietas*. The combination of these factors – a duty towards socially understood relationships which regulates behaviour to adherence to a cultural norm; and genuine human affection – are epitomised in Pliny’s final, and most extreme, *exemplum*.⁷²

P. Catienus Philotimus patronum adeo dilexit ut heres omnibus bonis institutus in rogam eius se iaceret.

Publius Catienus Philotimus loved his patron so dearly that he threw himself upon his funeral pyre, although left heir to the whole of his property.

⁷¹ Plin. *H.N.* 7.122. Translated by Rackham (1938) 587.

⁷² Plin. *H.N.* 7.122. Translated by Rackham (1938) 587.

This final *exemplum* from Pliny stresses the social nature of the relationship. The relationship of patronage is not necessarily one of blood relation, but is rather a specifically social interaction whereby a socially understood series of behaviours and duties are understood. This understanding exists on a societal level and is ingrained in the culture of the society. In this *exemplum*, the act of self-immolation is brought about out of loving care or respect (*diligere*) for the patron, a rôle which ought to receive such affection out of social normativity. The extremity of the act is striking; however, the key point here is that the Roman cultural mind-set would understand the fundamental, basic behavioural precept which underpinned the motivation for such an action – the socially understood behaviour of respect for the patron. This social element to *pietas* as a concept understood within the society in general is important in understanding how it could be utilised as a concept in law which can be appealed to without direct definition. The definition is understood on the level of social relations, rather than legal prescriptions.

Literary sources also give an idea of the social understanding of *pietas* in Roman society. While the examples given by Valerius Maximus and Pliny offer a clearer practical understanding of *pietas* in relation to the law, references in plays, poems and other works give a further insight to the Roman understanding of the concept. A comparison of the meanings associated with *pietas* in Plautus – some time before the introduction of the *querela inofficiosi testamenti* – and those of Vergil – sometime after, or at least congruent, with the introduction of the *querela inofficiosi testamenti* – will provide a useful gauge of the social understanding of *pietas* around the inception of challenges for undutiful wills.

Early literary sources include the Roman playwright Titus Maccius Plautus. Plautus was writing over a century before the period at which the *querela inofficiosi testamenti* was introduced to the law, between c.205 and 184BC. While a keen attentiveness should be paid to the variation in meaning that period attributes to any understanding of socially understood terms, Plautus provides a glimpse into the meaning of *pietas* in Roman society in the second century BC, a period where more traditional, native Roman values were beginning to give way to Greek influence.⁷³ Plautus's plays are set usually with Greek styled characters, and their moral outlook is often ironic.⁷⁴ Nevertheless, considerable instruction as to the social understanding of particular values in Roman society can be derived from the plays. In Plautus's play *Trinummus*, for instance, the stock father character Philto lectures his son on the reverential duty of filial *pietas*:⁷⁵

⁷³ See 5.1.1.

⁷⁴ Caution ought to be taken with using Plautus as a source. The fundamental nature of his plays is comedic, and the pseudo-Greek environment in which they are set makes a face-value interpretation of the values of the characters (or a directly opposing ironic interpretation) problematic. However, with this consideration in mind, a serious message can be found in Plautus's plays, which, with considerate reading, can reveal much about Roman society. For more on this, see: Wiles (1988); Beacham (1991); Anderson (1996) among others.

⁷⁵ Plaut. *Trin.* 2.2.1-7. Translated by De Melo (2013) 147.

PHILTO:

Quo illíc homo foras se pénétravit ex
aedíbus?

LYSITELES:

Pater, adsum, imperá quidvis,
neque tíbi ero in mora neque látebrose
me abs tuó conspectu occúltabo.

PHILTO:

Féceris pár tuis ceteris fáctis,
patrem tuom si pércoles per pietatem.

PHILTO:

Where out of the house has he made his way to?

LYSITELES:

Father, I'm here, command me anything you like, I won't delay you or secretly hide from your sight.

PHILTO:

You'll act in accordance with your other deeds, if you honour your father with respect.

Pholto goes on to extol the virtues of reverence to the father to Lysiteles, warning him away from falling in with dangerous and degenerate men. The fundamental message conveyed in the interaction between the two men is the goodness of abiding by the father and adhering to the socially normative views ascribed by filial devotion. The nature of *pietas* is socially understood, and forms a social concept, which Romans understand inherently from the structure of the interactions within the context of their society. The juxtaposition presented between *pietas* and falling in with a bad crowd underpins the social nature of the concept and emphasises its social force within Roman interaction. Other examples from Plautus reveal a similar operation of *pietas* to the examples presented in later texts. In the play *Asinaria*,

Argyrippus, son of Demaenetus, relents to the authority of his father who wished to be placed beside his beloved Philaenium at dinner:⁷⁶

DEMAENETUS:

Numquidnam tibi molestumst, agnate mí, si haec nunc mecum accubat?

ARGYRIPPUS:

Pietas, pater, oculis dolorem prohibet, quamquam ego istanc amo,
possum equidem inducere animum, ne aegre patiar quia tecum accubat.

DEMAENETUS:

Decet verecundum esse adulescentem, Argyrippe.

ARGYRIPPUS:

Edepol, pater, merito tuo facere possum.

DEMAENETUS:

Is it at all displeasing to you, son, if she takes her place by me?

ARGYRIPPUS:

Duty, father, keeps sorrow from my eyes; although I love her, still I can control my feelings, not to
take it to heart because she takes her place by you.

DEMAENETUS:

It becomes a young man to be respectful, Argyrippus.

ARGYRIPPUS:

Troth, father, through proper regard for you, I can be so.

This exchange is instructive. It reveals that *pietas* towards a father is adopted as a duty represented through an affectionate and dutiful interpersonal relationship. Argyrippus, though displeased by his father's actions is nevertheless deferent to him, not out of fearfulness, but rather reverence and affection. This results from his desire to behave as a proper son ought to behave and adhere to the social normativity of Roman culture.

⁷⁶ Pautl. As. 5.1.

The social dimension of *pietas* is outlined repeatedly in Plautus.⁷⁷ The fundamental quality of *pietas* as a concept is social, insofar as it is dependent upon a social understanding among members of the community in order to function. Pious acts are not, therefore, defined in casuistic isolation, but are rather framed against the backdrop of an understood conception that exists in fact, if not in writing, within the social etiquette of the community. This is crucial in understanding how a consistent approach can be taken in the conceptualisation of what counts as *pietas*, and how a consistent judgement can be therefrom derived.

In the Augustan Period, the period directly after the origin of the *querela inofficiosi testamenti*, the sources reveal an on-going socially understood conception of *pietas* within Roman society. Not least in Vergil's *Aeneid*, in which the eponymous hero is presented as an embodiment of Roman *pietas*, in line with the Augustan programme of moral reinvigoration of the Roman state following the collapse of the Republic.⁷⁸

6.2.2. *Pietas* as a Rhetorical Argument in Law

General attitudes toward the use of *pietas* in the law have followed a similar trend to any attempt at rhetorical infringement upon legal autonomy. This limitation of *pietas* in the law was predicated on its supposed inability to be rendered as a legal obligation, but rather as a general concept which is ultimately untranslatable into legal language. For this reason, as we see with the *querela inofficiosi testamenti*, we see the silence of the Roman jurists on the decision-making process. This section aims to show that the limitation of the concept of *pietas* offered by more dogmatic approaches is not reflective of the sources. From there it hopes to establish that there is evidence to suggest that a rhetorical argument from *pietas* was extant in Roman law, in order to establish a legal obligation from *pietas* itself.

The limitation of *pietas* in the law is connected to a limitation of the concept itself to a simpler and less sophisticated notion of filial obedience. Schulz provides a good example of this limitation, where he only discusses *pietas* in relation to children obeying parents. For Schulz, the only legal impact

⁷⁷ Plaut. *Am.* 5.1.35. Where Bromia seeks to prove the “dutiful” (*piam*) nature of Amphitryon’s wife Alcmena; Plaut. *Cas.* 2.6. The slave Olimpio, with great irony, on escaping rough treatment thanks the *pietas* of his forefathers; Plaut. *Poen.* 5.3.18. Giddeus praises the *pietas* of the Carthaginian Hanno; Plaut. *Ps.* 1.1.121. The lovelorn Calidorus says that he has no truck in disrespecting filial affection (*pietas*) for his father or even his mother to the cunning slave Pseudolus.; Plaut. *Rud.* 1.3.6. The slave girl Palaestra bemoans her situation despite her exemplary piety (*pietas*); Plaut. *Cur.* 5.2.41. The mistaken slave girl Planesium appeals in apostrophe to *pietas*, on the discovery that she is the freeborn sister of Therapontigonus, see Plaut. *St.* 1.1.7-8. The wives reveal their conjugal loyalty to their husbands on the ground of duty (*pietas*). Each of these is referential to a broader social understanding of the concept of *pietas* and uses the socially understood to draw laughter from the Roman audience.

⁷⁸ For a brief overview of Augustus’s reforms and their context, see: Abbot (1901) 102-138; Scullard (1982) 163-164; Eck (2003).

of *pietas* was that it imposed a duty towards parental authority and therefore *pietatis ratio* was simply *obsequium* toward parents.⁷⁹ In legal practice, this did not impose or create any obligations, but rather meant that there was an obligation not to abuse parents. This is manifest in following what Schulz labels “three legal rules”: a child must not summon a parent to court without the permission of the praetor; a child must not bring *actiones famosae* against parents; and a child must not effect execution against his parents.⁸⁰ Schulz’s view places the stress of parental relationships on the *auctoritas* of the father as a signifier of the creation of certain legal effects: that is, the effects of coming under the *patria potestas*.⁸¹ The focus is very legalistic and does not examine the relationship of parents and children in closer detail, with scant regard to the operation of relationships within both the actual family and the legal *familia*. In this understanding, *pietas* is reduced to a broad notion of filial obedience, rather than the more nuanced interpretation that we derived from Valerius Maximus and Pliny.

The narrowing of *pietas* to filial obedience and the legal effect of filial obedience to a proscription on the abuse of parents is not displayed in the juristic sources. In social terms, the central theme of the *patria potestas* was its characterisation by *pietas*. Rather than strict adherence to *obsequium* as an imposition upon the child to the whims of the father, the *patria potestas* of the *paterfamilias* was underpinned by an aversion to *atrocitas*, or the harsh and rigid imposition of authority.⁸² It is my view that to understand *pietas* simply as *obsequium* and to conflate *obsequium* with obligatory filial obligation is to misstep. This is certainly shown in the literary source, where, although the duty of *obsequium* is outlined as a defining theme, the affection of a real family bond is also present in *pietas* as a concept. Schulz’s narrowing of the concept is not in keeping with these sources. Nor is it in keeping with the legal sources, for instance, in the digest we find the following:⁸³

Diuus Hadrianus fertur, cum in uenatione filium suum quidam necauerat, qui nuocam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.

It is said that when a certain man killed in the course of a hunt his son, who had been committing adultery with his stepmother, the deified Hadrian deported him to an island [because he acted] more [like] a brigand in killing him than as [one] with a father’s right; for paternal power ought to depend on compassion, not cruelty.

⁷⁹ Schulz’s argument is founded on the digest title D.37.15. “*De obsequiis parentibus et patronis praestandis*”. This narrow approach is also adopted by Reiner, who saw *pietas* as a reciprocal relationship between family members within a broader concept of filial obedience: (1942) 75. Reiner is appreciative, however, that positive legal obligations could derive from these relationships: (1942) 39-76.

⁸⁰ Schulz (1951) 160. This limited view is taken elsewhere: see, for instance, Rabel (1930) 269; Voci (1980) 78.

⁸¹ Schulz (1951) 140 – 161.

⁸² The emperor Hadrian stressed *pietas* over *atrocitas* as the central theme of paternal relations based on the Digest as discussed forthwith, see Dixon (1992) 47.

⁸³ Dig. 48.9.5. (Marcianus). Translated by Watson. (1985) 822b.

Here we are provided with a clear example of the law, albeit the criminal law, recognising that *pietas* constitutes simply more than the recognition of an obligation to filial obedience through *obsequium*, but extends to the point that the father is best placed not to carry out his rights to the letter of the law, lest he behave in such a way as to endanger the reciprocal feeling of *pietas* that ought to exist between father and son. This shows that Schulz's narrow interpretation does not represent the whole understanding of *pietas* in the Roman mind, as *pietas*, rather than simply setting out three restrictions on the basis of parental deference, can, in fact, be provided as the reasoning for a father not to act in the way proscribed by law to his *patria potestas*. The law in its strictest, literal interpretation is circumvented by an appeal to a conceptual idea, which outranks it, an unwritten obligation to behave with *pietas* which is enshrined here legally by imperial proclamation. This section is sufficient to show the narrowness of the limitation, but does not reveal to us the means by which the emperor Hadrian felt it incumbent upon himself to rule as he did. For this, other examples of *pietas* in the legal sources are illuminating.

In the private law, the jurists were more than happy to modify or circumvent the law in such a way as to consider *pietas* as a directly and implementable factor in constructing legal rules. An example is found in the case where relatives provide *alimenta* for a fatherless child (*pupillus*) out of *pietas*. This personally bars them from recovery of that cost from the child's estate under the normal rules of unauthorised administration.⁸⁴

Titum, si pietatis respectus sororis aluit filiam, actionem hoc nomine contra eam non habere respondi.

I replied that if Titus supported his sister's daughter from a sense of duty (*pietatis*), he did not have an action against her on this account.

Here we can clearly see that *pietas* is given as a direct effect in juristic argument. Nevertheless, we are left without much of an explanation as to what Modestinus means when he employs the term. What can be seen, however, is that Schulz's limited view that in legal terms is synonymous to filial obedience through *obsequium* is insufficient. The circumvention of the usual rules of unauthorised administration is not done in relation to the kind of relationships about which Schulz discusses, but rather appears to be based upon an appeal to the kind of *pietas* that is seen in Valerius Maximus and Pliny. Indeed, supporting a sister's daughter out of pious duty is more akin to the actions in Valerius Maximus 5.6.7. than it is to the prescriptive obligations outlined by Schulz. This is not seen in isolation. Other passages from the Digest show the jurists circumventing the standard legal rules with reference to the kind of broader "social" *pietas* of the exempla in Pliny and Valerius Maximus, rather than Schulz's narrower

⁸⁴ Dig. 3.5.26.1. (Modestinus). Translated by Watson (1985) 105b.

“legal” *pietas*. For instance, the general rules of law applied to dowry can again be disregarded in favour of an appeal to *pietas*:⁸⁵

Mulier si in ea opinione sit, ut credit se pro dote obligatam, quidquid dotis nomine dederit, non repetit: sublata enim falsa opinione relinquitur pietatis causa, ex qua solutum repeti non potest.

If a woman who labours under the belief that she is bound to provide a dowry, she cannot recover anything given on that account; for beneath there remains the moral bond (*pietatis*), and a payment grounded on that reason cannot be reclaimed.

Again, this is not obviously limited to filial obedience. In fact, it has little to do with *obsequium* to parents. Rather, the stress here is on the fulfilment of due obligation morally bound to the object of her due relationship, in this case, her husband. Again, I would suggest, this is akin to the *pietas* of Aemilius Lepidus to his divorced wife in Pliny, more than it is toward pure deference to authority. The *pietas* of *exempla* circumvents or modifies the law, not a narrow legalistic interpretation of the term. Further examples abound, *pietas* is central to modifying the rules on untrustworthy tutors and curators:⁸⁶

Quin immo et mulieres admittuntur, sed hae solae, quae pietate necessitudinis ductae ad hoc procedunt, ut puta mater. Nutrix quoque et auia possunt. Potest et sorror, nam in sorore et rescriptum exstat diui Seueri: et si qua alia mulier fuerit, cuius praetor perpensam pietatem intellexerit non sexus uerecundiam egredientis, sed pietate productam non continere iniuriam pupillorum, admittere eam ad accusationem.

Furthermore, even women are admitted, but only those who take this step under the compulsion of duty (*pietate*) and necessity, as for example, a mother. A nurse also and a grandmother can bring a charge. So can a sister; for in a case of a sister, there even exists a rescript of the deified Severus; and if there is any other woman whose deliberate sense of duty (*pietatem*) is perceived by the praetor although she does not go beyond the modesty of her sex, but was induced by her sense of duty (*pietate*) not to conceal the wrong beyond the *pupilli*, the praetor should allow her to make an accusation.

Once more, the *pietas* in question here is not based on simple filial deference, but rather on an appreciation of the broader notion of the term. It is analogous to several of the examples provided in Valerius Maximus. Once more, the jurists commit to modification of the law based on arguments rooted

⁸⁵ Dig. 12.6.322. (Julian). Translated by Watson (1985) 384b.

⁸⁶ Dig. 26.10.1.7. (Ulpian) Translated by Watson (1985) 777b.

in the broad “social” understanding of *pietas*, and not a limited “legalistic” one. A similar example to this concretes the point:⁸⁷

Sed et cum mater filii rem sententia euersam animaduertet, prouocauerit, pietati dandum est et hanc audiri debere: et si litem praeparandam curare maluerit, intercedere non uidetur, licet ab initio defendere non potest.

But also when a mother appeals as one who is concerned that her son’s property was ruined by a judgement, she ought to be granted a hearing as a concession to family piety (*pietati*); and if she prefers to undertake the preparation of a lawsuit, she is not regarded as bringing an obstructive action, even though initially she cannot defend [the case].

The concession made by law to *pietas* has ostensibly no link to authority here, but rather to a mutual relationship of affection and duty. This mutuality is a symmetrical appreciation of the rôle of duty regarding *pietas*, but it is not truly synallagmatic in a contractual sense, there is no obligatory reciprocity, nor *quid pro quo*, but a unilateral moral obligation which is mirrored but non-dependent on particular action. Nor is there a determined obligation in the form of a legal imposition of particular action, as we see from our example here. A mother can, and indeed *ought*, to protect her son’s property through raising an action based on the social practice of *pietas*. The interesting thing for the purposes of this thesis is that the law gives way to this social demand and the civil law is modified in favour of this social – not legal - reasoning. One more example shows this social understanding of *pietas* being used directly to modify law:⁸⁸

Sed si libertus filiam dotauit, hoc ipso, quod dotauit, non uidetur fraudare patronum, quia pietas patris non est reprehendenda.

But if the freedman has given his daughter a dowry, he does not appear to have defrauded his patron in respect of the amount of the dowry, because [the exercise of] a father’s duty (*pietas*) is not to be the object of censure.

We can again return to Justinian’s Institutes and recall from where Roman law originates:⁸⁹

Constat autem ius nostrum aut ex scripto, et apud Graecos: τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι. Scriptum ius est lex, plebi scita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium.

⁸⁷ Dig. 49.5.1.1. Translated by Watson (1985) 871b.

⁸⁸ Dig. 36.5.1.10. (Ulpian) Translated by Watson (1985) 341b.

⁸⁹ *Iust. Inst.* 1.2.3.

Moreover, our law consists out of either written sources or out of non-written sources, like the Greeks: ‘some laws are written, other laws are unwritten.’ Written law includes statutes, plebiscites, resolutions of the senate, imperial pronouncements, magistrates’ edicts, and juristic responses.

Contained within the very fabric of the law is an appreciation of the unwritten nature of determinative socially understood values as important sources of law. The silence of the text on the nature of these unwritten laws goes beyond a mere tradition of customary acceptance of particular modes of behaviour, extending to the cultural appreciation of the underlying values which cause that behaviour. It is in this way that *pietas*, as a socially understood value, operates as the basis for law.

6.2.3. *Pietas and Law in the Rhetorica ad Herennium.*

We find further discussion of *pietas* in the *Rhetorica ad Herennium*. Here the Auctor brings up *pietas* in his discussion of the division (*partes*) of law (*ius*). Of the six divisions of law - nature; statute; custom; precedent; equity; and agreement⁹⁰ - which the Auctor sets out, he provides a specific example for each, except for nature, where he raises *pietas*.⁹¹ The provision given by the Auctor of natural law is the bond of children and parents:⁹²

Natura ius est quod cognationis aut pietatis causa observatur, quo iure parentes a liberis et a parentibus liberi coluntur.

Natural law is observed in relationships formed from the cause of *pietas*, it is by this law that parents are nurtured by children and children by parents.

Pietas is presented to us by the Auctor as a principle which is directly related to natural law, not only as a result of natural law but rather as an integral part of it, as a concept which is inherent to natural law. The ascription of *pietas* to natural law is done with little explanation, other than a simple assertion that it is an observable inference. The sentiment replicates that of Valerius Maximus in his assessment of the virtue of *pietas*. The difficulty lies here in our understanding of law, because it is certainly the case that the nurturing of children is not a law in the same sense as adherence to property rights or delictual liability. Rather, natural law provides an overarching superstructure to which man-made law is often referential and sometimes inextricably bound. That said, natural law is not enforceable in the same

⁹⁰ *Rhet. Her.* 2.13.19: *natura, lex, consuetudo, iudicatum, aequis et bona pactum.*

⁹¹ The treatment of nature as a legal division by the Auctor of the *Rhetorica ad Herennium* is very different from that provided by Cicero in *de Inventione*, where it is given thorough explanation: *Cic. Inv. Rhet.* 2.21.62-68.

⁹² *Rhet. Her.* 2.13.19.

direct sense as man-made law. Therefore, its enforceability takes the form of social normativity and not from legal obligation. Ill-treatment of children by parents then, the failure to nourish, is a social and moral breach rather than a legal one in terms of how society enforces its standards.

The effect, however, as has been discussed, of legal forms reliant upon natural law, is the transformation of this social normativity into legal obligation. The basis for the transformation is reliance upon a notional precept of natural law, which is justified, self-authoritatively, and to use this as a basis from which actually enforceable legal forms can be effected. That is, there is an appeal to an overarching understanding of concepts to which there is a fundamental recourse in our social understanding of the operation of broader themes. These are an essential and formative part to what the Romans understood as natural law. So for instance, here we are presented with the concept of *pietas*. Despite a lack of formal definition this concept is intrinsically tied to the notion of natural law as correlative. As the Auctor points out, parents nourish their children due to observable natural law and the concept which predisposes parents to do so is *pietas*, in this instance in the form of *pietas erga parentes*. *Pietas* therefore is both a concept of natural law and an indicator of the presence of natural law, the observation of social bonds created through the concept point us towards the whole legal form. Much in the same way that an offer, followed by an acceptance, forming the concept of *consensus in idem* is a signifier to the whole legal form, the law of consensual contract. So, *pietas* is a form of natural law as consensual contract is a form of civil law, yet, though the latter is clear and easily enforceable, the former is more vague and less easily enforced. This enforceability issue is a fundamental distinction between the direct enforcement of *regulae iuris* of the *libri regularum*, and *praecepta iuris*, indirect, yet harkened to legal principles of Roman law, *honeste vivere*, *alterum non laedere*, *suum cuique tribuere*, which encompass as concepts, alongside *pietas*, *bona fides*, *aequitas*, *utilitas*, *humanitas* and *benignitas*.⁹³ The purpose we find in rhetorical argumentation around the *querela inofficiosi testamenti* is the metamorphosis of unenforceable precepts into enforceable rules and the Auctor's attribution of *pietas* to Natural law gives an insight into this mind-set.

Honoré's distinction between appeals to particular types of arguments put forward by the Romans in providing reasons for decision-making is of use here in formulating this thought, between what he calls "appeals to rules of law", "open arguments". (*topoi* or principle), "the facts", and "argumenta ex auctoritate" (specifically juristic authority).⁹⁴ In the instance where *pietas* governs the relationship between parents and children in order to give not only a social-moral but also a legal dimension to that relationship based on natural law, the argument is principled or open, it is *topoi*.

⁹³ A very thorough analysis of these distinctions can be found at Winkel (1988) 669-679. See fn. 4 at 669 for an overview of literature specifically on Dig. 1.1.10.

⁹⁴ Honoré (1974) 84-94. The idea that Roman legal decision-making involved a plethora of approaches is worthwhile, for more on this see: Viehweg (1973).

Winkel argues that the lack of a coherent hierarchy of sources was the cause of the need for open, topical arguments in decision-making:⁹⁵

A clearly defined theory on legal sources hardly exists in Roman law. This explains the important distinction between genera and species is incorporated into the early legal science. The same applies for rules of interpretation, partially derived from rhetorical treatises. A theory about the sources of law, however, had hardly been developed in Roman law. This is why topical arguments play a much more important rôle than we can imagine. For the continental jurist nowadays, a hierarchy of juridical norms is quite self-evident. Fixed rules of interpretation were unknown in Roman jurisprudence. The juridical system is a very open one, much more so than in modern times.

Winkel's classification is correct insofar as the diversity of rationality for decision-making is less well defined than it is in modern civilian legal systems. Yet, although it diagnoses a loose and broad interpretation in decision-making, it does not provide us with an answer on how this open reasoning behind decisions in a case could exist within a system which purportedly had developed a nascent scientific tendency. What is of more interest in the example with which we are presented here is rather how the open-argumentation (that is, topical rhetoric) is a cornerstone of legal argumentation, necessary for the creation of legal obligations.

6.2.4. *Pietas* and Law in Cicero.

Cicero refers to *pietas* within the scope of his rhetorical theory. From the examples that he provides, the way in which *pietas* operated as a fundamentally rhetorical concept comes to light.

In *de Oratore*, as mentioned before, Cicero, in the voice of his interlocutor Crassus, acknowledges the needs of the orator to make pronouncements on a variety of subjects.⁹⁶ Among these topics with which the orator must deal is *pietas*.⁹⁷ Cicero points out that the orator's dabbling in more specialised topics results in some disgruntlement among the specialists:⁹⁸

⁹⁵ Winkel (1996) 105.

⁹⁶ Cic. *de or.* I.55. It is worth reiterating that the nature of the dialogue means that neither Crassus nor Antonius can be conclusively regarded as the "mouthpiece" of Cicero and some caveat must be given to claims made by either interlocutor as definitively the opinion of Cicero himself, see Steel, C. (2006) 73.

⁹⁷ Cic. *De or.* I.56.

⁹⁸ Cic. *De or.* I.56. Translated by Sutton & Rackham (1989) 43.

Credo, omnia gymnasia, atque omnes philosophorum scholae, sua haec esse omnia propria; nihil omnino ad oratorem pertinere.

All the academies and schools of philosophy will, I do believe, raise the cry that all these matters are their exclusive province, and in no way whatever the concern of the orator.

On issues of philosophy and law the technical specialisation of these topics makes knowledge of the subject an essential for informed speech. Other than these more discreet topics, Cicero also includes friendship, harmony, equity, and virtue. These subjects are less obviously accounted for than law and philosophy, which have easily understood parameters. The answer to their inclusion comes from the alter contention – made by Crassus later in the same interaction with Scaevola – that the expertise of the orator lies in the broader theme of “human life and conduct”:⁹⁹

Sed si me audierit, quoniam philosophia in tres partes est tributa, in naturae obscuritatem, in disserendi subtilitatem, in vitam atque mores; duo illa relinquamus, idque largiamur inertiae nostrae: tertium vero, quod semper oratoris fuit, nisi tenebimus, nihil oratori, in quo magnus esse possit, relinquemus.

Nevertheless, if he will listen to me, since philosophy is divided into three branches, which respectively deal with the mysteries of nature, with the subtleties of dialectic, and with human life and conduct, let us quit claim to the first two, by way of concession to our indolence, but unless we keep our hold on the third, which has ever been the orator’s province, we shall leave the orator no sphere wherein to attain greatness.

This statement that the true province of the orator lies in human life and conduct is revealing – and is contested, in its fundamental terms, by neither Scaevola nor Antonius in Cicero’s text. The implication is that the orator – through the technical process by which he acquires his argument, rhetoric – is properly to be understood as first and foremost an expert in human social interaction – human life and conduct. The orator therefore, in making his pleadings, has a particular social expertise, upon which he can root the *loci* of his arguments.

Turning to the issue of the *loci* of arguments for the conclusion of equitable remedies, Cicero, in his *Topica*, points out the need to distinguish among three types of speech in constructing an argument from particular places. Judicial speeches, which appeal to equity, take on different rhetorical origins to deliberative or encomiastic speeches, which deal in advantage and honour. Cicero explains the *locus* for arguments in judicial speeches:¹⁰⁰

⁹⁹ Cic. *De or.* I.68. Translated by Sutton & Rackham (1989) 51.

¹⁰⁰ Cic. *Top.* XXIII 91 Translated by Hubbell (1949) 453.

Tria sunt igitur genera causarum: iudici, deliberationis, laudationis. Quarum fines ipsi declarant quibus utendum locis sit. Nam iudici finis est ius, ex quo etiam nomen. Iuris autem partes tum expositae, cum aequitatis.

There are three kinds of speeches on special subjects: the judicial, the deliberative, and the encomiastic; and the “ends “of these three show what topics are to be used. The end of the judicial speech is justice, from which it also derives its name. But the parts of justice were enumerated when we discussed equity.

Cicero argues that each of these three forms of argumentation have, through the practice and theory of oratory and rhetoric, developed stylistic differences. In judicial argumentation (*iuridicalis*), the purpose of equitable remedy is to distinguish right from wrong.

The actual application of this kind of argumentation is outlined in the case of the will of a soldier in *de Oratore*. At first instance, it appears that the decision made here is made on legal grounds, specifically on a question of the civil law: does a son have a right to a legitimate share of his father’s estate by virtue of being a son not explicitly named as disinherited? However, in reality, Cicero attributes the award of the estate on the basis of the rhetorical arguments of *pietas* used by Lucius Licinius Crassus in the course of the argument.¹⁰¹ Cicero’s attribution reveals how the socially understood value of *pietas* has an actual application in legal decision-making.

6.2.5. *Pietas* and Law in Quintilian

The rhetorician and orator Quintilian provides an account of the uses of *pietas* in the defence of clients. Quintilian, who wrote, and practised, in the mid to late first century AD, is writing about rhetorical arguments on inheritance law using *pietas* during the period in which juristic sources refer challenges for undutiful wills to the consideration of rhetoric, but nevertheless some decades after the original institution of the *querela inofficiosi testamenti*. In the course of defences regarding *pietas*, Quintilian outlines that the question is one fundamentally relating to quality. The fundamental treatment is considerations as to the quality of the nature and form of a thing in ascribing to it a more desirable *locus* than its alternative. Quintilian explains in general terms:¹⁰²

Eidem qualitati succedunt facienda ac non facienda, adpetenda vitanda: quae in suasorias quidem maxime cadunt, sed in controversiis quoque sunt frequentia, hac sola

¹⁰¹ Cic. *De or.* I.245.

¹⁰² Quint. *Inst. Orat.* 7.4.3. Translated by Butler (1989) 237-239.

differentia, quod illic de futuris, hic de factis agitur. Item demonstrativae partis omnia sunt in hoc statu: factum esse constat, quale sit factum quaeritur.

To Quality in this sense also belongs what should or should not be done, or should be sought or avoided. These topics occur mainly of course in deliberative exercises, but they are common also in forensic, with the one difference that the former deals with the future and the latter with the past. Again, all the themes of Epideictic come under this Issue: the fact is admitted, the question turns on the Quality of the fact.

The exact way in which this quality is established is done through strength of argumentation. Quintilian is keen to point out the epideictic nature of establishing quality. The essence of the persuasive element was the commendatory quality of finding in favour of one's client; this was juxtaposed with the condemnatory quality of the opposing view. Quintilian's treatment of epideictic oratory is limited.¹⁰³ However, in this instance its necessity is stressed.¹⁰⁴ Quintilian states how the counter-balance of opposing claims is the basis upon which Quality is decided.¹⁰⁵

Genus causae aut simplex aut comparativum: illic quid aequum, hic quid aequius aut quid aequissimum sit excutitur.

Causes may be simple or comparative. In the former case, the question is what is fair; in the latter, what is fairer or fairest.

The difference between simple and comparative causes is the requirement for comparative claims. In cases revolving around decisions regarding *pietas* the cause is simple insofar as the quality of the *pietas* is not a comparative exercise but rather an exercise in the ascription of equity, or fairness, to an absolute quality, the quality of *pietas*.¹⁰⁶ There is no question of a comparison between the absolute quality of an equitable solution in *pietas* to another concept, as opposed to comparative pleadings where, for instance, mercy and justice can create a competing claim. Rather, in simple causes, the question is whether the appeal to *pietas* is fair from one side or the other and the epideictic nature of the pleadings

¹⁰³ Steel (2006) 22-23.

¹⁰⁴ Quint. *Inst. Orat.* 7.4.3: "*Lis est omnis aut <de aequo et iniquo aut> de praemio aut de poena aut de quantitate eorum*". In translation: "Every dispute involves <equity and its opposite,> reward, penalty, or the amount of these". This line of reasoning follows the earlier outline of quality by Cicero at *de Inv.* 2.69. Cicero discusses the nature of quality in terms of socially understood concepts, in his case, he relates it to *aequitas*, or equity. This indicates the lasting similarity of the definition and form of argument throughout the period of the formation of the challenge for undutiful wills.

¹⁰⁵ Quint. *Inst. Orat.* 7.4.3.

¹⁰⁶ It is worth noting that Quintilian's second form of the judgement of quality, assumptive quality, deals with countercharge and antithesis and is of more suitable application to the criminal law than the private law within the scope of this thesis – see, Quint. *Inst. Orat.* 7.4.7.

is related to pleading that the facts of one side commend an absolute quality of fairness. Quintilian uses the example of a disinherited son challenging a will to outline his point: ¹⁰⁷

Abdicatur aliquis quod invito patre militarit, honores petierit, uxorem duxerit: tuemur quod fecimus. Hanc partem vocant Hermagorei κατ' ἀντίληψιν, <alii vero κατά διάνοιαν> ad intellectum id nomen referentes: Latine ad verbum tralatam non invenio, absoluta appellatur. Est enim de re sola quaestio, iusta sit ea necne. Iustum omne continetur natura vel constitutione.

A son is disinherited because he has served as a soldier, sought office, or married, against his father's wishes. We defend what we did. The school of Hermagoras call this defence kat' antilēpsin; <others call it kata dianoiān,> referring the word to understanding the action; I find no literal Latin translation of this: the defence is called "Absolute". The only question concerns the act: is it just or not? All justice rests either (1) on nature or (2) on convention.

This presents us with the scenario precisely relevant to a challenge under the *querela inofficiosi testamenti*. Quintilian is interested in establishing through *inventio*, following the system of the School of Hermagoras, the *locus* of an argument for the absolute quality of *pietas* in relation to the actions of his client, in order to assert the fairness (*aequitas*) of deciding a law suit in that way. ¹⁰⁸ The just remedy requires arguments constructed from either nature or convention. Quintilian provides an explanation of each in turn, but our focus is principally on nature:¹⁰⁹

Natura, quod fit secundum cuiusque rei dignitatem. Hinc sunt pietas fides continentia et alia. Adiciunt et id quod sit par. Verum id non temere intuendum est: nam et vis contra vim et talio nihil habent adversum eum qui prior fecit iniusti, et non, quoniam res pares sunt, etiam id est iustum quod antecessit. Illa utrimque iusta: eadem lex, eadem condicio; ac forsitan ne sint quidem paria quae ulla parte sunt dissimilia.

"Nature" includes whatever is done because of the intrinsic value of the particular action.

Under this head come piety, good faith, self-control, and the like. Some add "parity," but

¹⁰⁷ Quint. *Inst. Orat.* 7.4.4.

¹⁰⁸ Hermagoras was a Greek rhetorician of the early 1st Century BC whose reference indicates further the influence of Greek rhetorical thought on Rome in the later Republic and early Principate. The Roman advocate Titus Accius was a pupil and follower of Hermagoras, and employed his teacher's techniques against Cicero in the case of Cluentius in 66 BC. Cicero praised Accius for his fluency – see Cic. *pro Cluent.* 23.31.57. and Cic. *Brut.* 23. Cicero was not convinced by the system of rhetoric proposed by Hermagoras – see, Cic. *de Inv.* 1.6. - though he is not completely averse to it – see Cic. *de Inv.* 1.11. Quintilian is favourable to the system and defends it – see Quint. *Inst. Orat.* 2.1.16. Though not the most orthodox system of invention, by relying on Hermagoras in outlining how to construct a defence for disinherited sons, Quintilian reveals the tradition of rhetoric in the use of legal defences for undutiful wills throughout the 1st Century BC.

¹⁰⁹ Quint. *Inst. Orat.* 7.4.36. The definition of the second form, convention, is given as follows: "*Constitutio est in lege more iudicato pacto*". In translation: "Convention consists of law, custom, legal precedent, and contract".

this is not a point to consider without careful thought, because the use of force against force and the “eye for an eye” principle involve no injustice towards the aggressor, while parity of actions does not imply that the first action was just. There is justice on both sides only when the law and the circumstances are the same. Perhaps indeed there is no “parity” either where there is dissimilarity in any respect.

The “intrinsic value of an action” has, on first reading, an abstract connotation. In actuality, within the context of the rôle of the orator in pleading, the point is social. The concept is fundamentally understood on an immediately identifiable level within the culture it is expressed. In this way, the social understanding contained within pronouncements act as their topical postulate.

6.3. Summary of Findings.

This section has examined the socially understood concepts of *aequitas* and *pietas* as topical postulates for arguments towards legal change in inheritance law during the Roman republic, at the time when the dogmatic narrative of legal science asserts Roman law became an isolated and autonomous science after a singular but stymied injection of Greek categorical thought.

This Chapter focuses on two concepts that formed a socially understood and recognised *mores* in Roman society. It examines these concepts, each in turn, and explores how these concepts exist within the parameters of a social understanding of thought and action. The chapter asserts that these socially understood concepts are presented in rhetorical arguments as topical postulates in order to create general types into which definitional subtypes may be assigned, along the lines of the argumentation outlined in Cicero’s *Topica*. The chapter concludes that these socially understood concepts contain such social potency that within the framework of rhetorical arguments the rhetorical proof they form has a highly persuasive effect on lawmakers and legal decision-makers. The chapter concludes that arguments constructed from the application of socially understood topics to legal argumentation formed a basis for legal change and development during the Republican period.

The use of rhetorical argumentation to affect law ought not to be possible during the Republican period, as according to the dogmatic narrative, the isolation of the jurists to eternal influence and the autonomous nature of the law precluded this kind of extra-legal thinking from penetrating legal thought. Nonetheless, this chapter demonstrates that rhetorical legal reasoning, of the type proposed by Cicero, through the actual practice of law, did have an impact on legal development, and the law changed as a direct result of this.

The following chapter will outline and contextualise the procedures affecting legal change in the later Republic. From there, this thesis takes the argument of rhetorical influence begun here further

and reveals how *pietas* and *aequitas* in turn had a direct impact on legal change in the creation of the legal instruments of *bonorum possessio* and the *querela inofficiosi testamenti*.

7. Legal Change in the Late Republic.

This Chapter concerns itself with legal change in the late second and early first centuries BC. During this time, the praetor became more prominent in his involvement in legal development, resulting both from his increased use of the edict in the development of the *ius honorarium*, and through the development of the formulary system of litigation.

The Chapter will begin by setting out the earlier, more formal system of litigation, the *legis actiones*. It will then discuss the impact of the juridical shift to the formulary procedure in the context of Roman law-making. In particular, the law-making of the praetor, both through edict and formula will be discussed. It will then be proposed that the praetor, during the *in iure* stage of litigation, informed by topical, rhetorical arguments which appealed to socially understood values in Roman society, modified the law according to how persuaded he was by the value in these arguments. This negates the dogmatic stance that during this period law had become an autonomous science which rejected rhetorical argumentation.

7.1. Formalism and the *Legis Actio*.

The mechanisms by which the law developed throughout the second century BC were less refined than those which emerged at the century's turn. The law during this period was largely dependent upon the utilisation of various standard yet flexible forms which could be applied to a wide range of specific issues. The procedural aspect of the law, the *legis actio* system, which bounded the application of forms to legal uses, remained staunchly formal. The rigidity of procedure and the reliance upon the extrapolation of extant forms for varied use – alongside the application of more specific legislative provisions, not least in the XII Tables themselves – limited the scope of creativity in this period. Gaius tells us of the nature of legal interpretation during this period:¹

The actions which our forefathers used were called *legis actiones* either from the fact that they were created by statutes – inasmuch as at that time the edicts of the praetor, whereby a large number of actions were introduced, were not yet in use – or from the fact that they were adapted to the words of the statutes themselves and so were as inflexibly observed as statutes.

¹ G. Inst.4.10-12. The translation is provided in Schiller (1977) 188.

The inflexibility of the *legis actio* system as a procedural framework in which the law operated limited the mechanisms by which the law was able to develop.² Scholarship has appreciated that the *legis actio* system maintained in the law a stringency to particular forms which resulted in a limited pool of methodological techniques for the creation of new rules and that the development of the law in this period was dependent upon the modification or earlier forms, rather than original creativity.³ The rigidity of the system, that is to say its most formal aspect, and the aspect to which the ascription of inflexibility is most pointedly exemplified, is found in what Karlowa terms *legis actio*'s requirement for "verbal congruence".⁴ The law of the second century BC was, in its basic sense, a law of adherence to prescribed forms.⁵ The way that the law changed and adapted during this period was therefore also dependent upon these forms as a means for revision and amendment.

The growth in the types of forms available for the creation of legal institutions, alongside the growth in available actions for remedies under the *legis actio*, reveals, however, that procedure did not constrain the legal system to the perpetual *status quo*. Aside from legislative modification, the maintenance of legal consistency was upheld by the College of Priests.⁶ This interpretative rôle, which would later be assumed by the jurists, who had not yet emerged fully as a force in the law, was presided over with a formal conservatism by the priests, who held together the essential form of the legal system. The magistrates, particularly the judicial magistrate, the praetor, whose rôle had formed a separate office from 367 BC,⁷ is generally held to have had little direct input to legal creativity up to the later Republic.⁸ There is certainly no evidence that the praetor asserted the kind of influence in the law that he did after

² *Legis actio* was governed by a stringency which led to potentially lost legal provisions due to its demands for formal adherence as pointed out at Buckland (1939) 7: "In the *legis actio* system this preliminary stage involved and mainly consisted of the performance of ritual acts and the recital of ritual words elaborated for each kind of claim by the *Pontifices*, such importance being attached to the ritual that any error in the words used involved the loss of the action or the invalidity of the proceedings."

³ Frezza (1974) 273-279 argues that the basic foundations of the *legis actio* system lay in the customary traditions and practices of Roman society, the *mores*. Modification was brought forward by positive law in the form of legislation and any necessary creativity required to solve new social problems was manifested in the creation of new legal forms born out of the slight modification of earlier forms. Arangio-Ruiz and Gioffredi are generally in agreement that the roots of the available actions in the *legis actio* lay in earlier forms which were either customary or resulted from the XII Tables, see: Gioffredi (1948) 60; Arangio-Ruiz (1934) 107. The view that the modification of older forms, rather than original creativity *ex nihil*, was the basis of the development of substantive law during the second century BC also finds favour with Kaser (1949) 72.

⁴ Karlowa (1901) 1-5. This requirement for verbal congruence can be seen as not only restricted to the suit of litigation in process itself but as pervasive into the forms of substantive law during this period, most obviously in *stipulatio*, which formally required correspondence of verb in order to be valid.

⁵ Schmidlin argues that the term *legis actio* is itself derived from *certis verbis agere*, or the performance of a formal legal act, stressing the centrality of the formal adherence to set action at the heart of the law – see: Schmidlin (1970) 367-387.

⁶ Lenel (1909) 329-354 (especially at 340-343); Paoli (1950) 281.

⁷ Livy tells us that the praetor came to be a separate office in 336 BC as a result of a compromise between patrician and plebeian interests by the dictator Camillus, see Livy. *Ab Urbe Condita* 6.42., 7.1.

⁸ This view of what Schiller terms as the praetor in a "merely formal, passive role". See (1978) 217. This is upheld by Jolowicz & Nicholas (1972) 238 and Girard (1912) 74.

the Social War.⁹ It was not until the last two decades of the second century that the praetorian edict began to have a persistent substantive effect upon the law.¹⁰ Rather the law changed through positive legislation from the *comitia centuriata* under the interpretive auspices of the *pontifices*. The lawyerly task of giving effect to this legislation was the expansion of forms to meet the needs of this legislative agenda. It did not expand to the creation of distinctively new forms or a radical departure from form until the second century came to its close.

The procedure by which Roman civil law operated in the mid-republic was called *legis actio*.¹¹ The origins of this procedure date back to at least the Twelve Tables, arising from actions brought through statute, some even predating the Tables.¹² The procedure was formal, rigid and only available to citizens. It required the use of strict forms in the course of litigation and required adherence to stringent linguistic and performative requirements. The system did not afford decision-makers the consideration of the facts of particular cases, but rather offered a set of five actions, one of which was to be applied in the relevant cases – or, where the facts presented an irrelevant scenario, none of the actions would apply and the case could not be litigated. In practice, the system granted the litigant an unspecific remedy to his case, which he could then pursue in one of the set five ways. Metzger summarises the limitations of such generality:

The specific grievance was unacknowledged, the litigant receiving instead an off-the-peg statement that he had been aggrieved in one of the permissible ways, along with the state’s approval to seek redress, whether by trial or execution.¹³

⁹The praetor is not recorded as providing the kind of *exceptions* which he granted in the first century BC – see G. Inst. 4.11 and G. Inst. 4.108. Watson points out that though the praetor’s edict was issued as early as the third century BC, “changes in substantive private law were not yet made,” rather it was not until the closing two decades of the second century BC that the praetor began to assert edicts which “profoundly modified the *ius civile*”. See Watson (1974) a 35; Wlassak (1924) 159-62 argues that the praetor, nevertheless, held a position of power in law throughout the second century and that he was more active than often credited. His ability to control aspects of the civil process in the assignation of a judge is certainly not the sign of a role which is entirely passive, as argued by Kaser (1966) 43. The view put forward by de Zalueta (1953) 231 that the praetor’s eventual assertion of greater control over procedural issues following the *Lex Aebutia de formulis* at a point in the mid-second century was the catalyst for the decline of the *legis actio* system and the introduction of new mechanisms for legal change which had been previously restricted. This view seems to me to be convincing.

¹⁰ The law had not been unchanged in the second century by praetorian innovation. An *actio Serviana* has been introduced by the praetor prior to 160BC, albeit not through the edict – see Cato *agr.* 2.1. The praetor had changed the substantive law through the use of *actio in factum* through the course of the second century BC, but only on rare occasions. The only actions which we can say for certainty were granted in the period are *the actio in factum adversus nautas, cauponas, stabularios* and the *actio si mensot falsam modum dixerit* as outlined by Lenel, O. (1927) 219.

¹¹ An overview of *legis actio* follows. For further broad reading on the subject, see: Metzger (2015); 281-283; du Plessis (2015) 66-72; Leage (1964); 435-443; Nicholas (1962); 20; Buckland (1953); 7-8; Jolowicz & Nicholas (1932); 175-199; Greenidge (1903) 49-78. See Dig. 1.2.2.6. (Pomponius, *Manual, sole book*).

¹² Dig. 1.2.2.6. (Pomp., *Manual, sole book*). See also, G. Inst. 4.10-12. At least two actions predated the Twelve Tables, see Kelly (1966) 81-84.

¹³ Metzger (2015) 281.

These five “off-the-peg” forms were as follows: *legis actio per sacramentum*; *per conditionem*; *per iudicis postulationem*; *per manus iniunctionem*; *per pignoris capionem*. The former three gave a pursuer a right to trial before a judge or judges; the latter two forms gave the litigant the right to direct action against a debtor.

The course of the procedure was separated into two distinct phases of litigation: first, *in iure*, oral proceedings to obtain redress to a judge or judges under a particular action; next, *apud iudicem*, pleadings before a judge or judges who decided on the rightness of the claim.¹⁴

In order to enact these proceedings a private summons, *in ius vocatio*, was issued by the pursuer to the defender, providing the pursuer with the right to force the defender to appear in court.¹⁵ The natural delays in the legal process, alongside certain *legis actiones* which prescribed delay, required the giving of sureties, *vades*, by the two parties for the continuation of the suit. The final act of the *in iure* stage, should the praetor be convinced that the pursuer had demonstrated that he had a permissible action under *legis actio*, was the *litis contestatio*, the joinder of issues.¹⁶ This legalised the claim insofar as it granted for remedy to those issues which the praetor felt legally actionable and precluded any claims which were not.

After this, procedure would move to the second phase, *apud iudicem*. This would in most cases have been a trial before an *arbiter* or *iudex*¹⁷; however, in some cases, the trial would go before the centumviral or decemviral courts.¹⁸ The judge, or judges, would then make a decision on the case in reference to the provision of the joinder of issues set forward by the praetor.

The limitations of *legis actio* are clear. The narrowness in the utility of the system, restricted by five actions which were often inadequate in providing redress to the complex reality of the disputes of everyday life, prevented the *legis actiones* from expanding in their scope. The inflexibility of the *legis actio* system as a procedural framework in which the law operated limited the mechanisms by which the law was able to develop.

¹⁴ The bifurcation of Roman legal procedure is a central feature of its operation. Several theories exist as to the reason for this split. The “democratic theory” that the stages of litigation provided a check and balance to power, favoured by Jehring (1895). A theory of historical development which roots the split in the demarcation arising from the delegation of magisterial power to various offices, favoured by Wenger, (1944). A theory which emphasises the “privatistic” nature of Roman law in conflict to its public execution, expounded by Wlassak (1921). These theories are described in depth by Kaser (1967) 129-143. Kaser himself, most convincingly of all the theorists, concludes that the split owed itself to a sense of justice.

¹⁵ The extent to which the state enforced *in ius vocatio* was minimal and it was for the main part a private affair between the litigants, see: Metzger (2015) 282.

¹⁶ See Watson (1974)b 10-19; Metzger (2015) 282-283.

¹⁷ The distinction between the *arbiter* and the *iudex* lost relevance. Initially the *arbiter* heard cases where the case was essentially resolved, save for a few moot points which required a decision. See Kelly (1976) 125-129.

¹⁸ See 9.3.

The constraints of use under *legis actiones* required by the formality of the system made it unpractical for wide-ranging litigation and also ineffective in allowing the law to change, either procedurally or substantively. This methodological formalism is tied to a heavily textual basis for legal interpretation and a failure to examine scenarios outwith a categorical framework: a framework provided procedurally by the *legis actiones* and substantively by the Twelve Tables and by older, customary forms of law like *mancipatio*.¹⁹ The formalism of Roman law in the middle republic is evident in its forms and structure. Its ability to innovate to new social challenges and deviate from the rigidity of its own prescriptions was problematic, particularly given Rome's growing commercial power.

7.2. Legal Change: The Formulary Procedure and the Edict.

The office of the praetor had existed since 366 BC, created in order to relieve the consuls of their judicial duties.²⁰ By the end of the First Punic War another office of praetor, the *praetor qui inter peregrinos ius dicit*, was created in order to officiate among foreigners – and foreigners and citizens - in Rome's increasingly large and multi-ethnic territory.²¹ Corey Brennan argues that the peregrine praetorship emerged in the 240s BC and held command over provincial administration among peregrines, whereas the urban praetor (the holder of the original post) remained in the city overseeing judicial control and hearing the cases of Roman citizens.²²

At the time of its introduction in 366 BC the rôle of the praetor was greatly restricted compared to the freedom the post had gained by the first century BC. The praetor held the power to grant edicts

¹⁹ Schiavone argues that this early period of Roman law signals an immature rationality in Roman law-making, which prized the formality and rigidity of written rules. This formalism became the building block for the maturity of operative, legal rationality – that is, the legal science which purportedly grew out of philosophical influence in the later republic. Despite the utility of the forms available in this period, the *legis actio* nevertheless remained unable to obtain the legal sophistication and wide-ranging utility of later law-making due to its rigidity and inability to develop the mechanisms for legal change which became available under the later juristic law-making period. Despite Schiavone's praise of the formalism which underpinned the law in the middle republic, *legis actio* precluded Roman law from the methodological scientificity of categorisation, which, for him, signalled the birth of legal science. This sophistication was dependent upon the flexible innovations to procedure which could be implemented in the formulary system. See Schiavone (2012), particularly at 185-361.

²⁰ Livy, *Ab Urbe Condita* 6.42., 7.1. Cicero also provides some background, noting that the praetor's authority, like that of the consul deprived from the king's *imperium*, see Cic. *de Leg.* 3.8. Livy also tells us that the praetor came to be no longer the reserve of the patrician class in 336 BC because of a compromise between patrician and plebeian interests by the dictator Camillus, see Livy, *Ab Urbe Condita*, 8.2.

²¹ Dig. 1.2.2.28. According to Pomponius the majority of his dealings were in cases between peregrines. For a more complex discussion of the cases dealt with by the peregrine praetor and the intricacy of his post, see Daube (1951) 66-70.

²² Brennan (2000) 604. Daube is largely in agreement with this Brennan's reasoning and dating, see (1951) 67. Nicholas places the date more specifically at around 242 BC, the end of the First Punic War, see (1962) 4.

from the initiation of the office.²³ He appears to have utilised this power to an insignificant extent from as early as the third century BC.²⁴ However, his usage of the edict as a tool substantively to alter the law was by no means pronounced and praetorian influence on the law was minimal.²⁵

The courts of the peregrine praetor, however, and the emergence of the formulary system had begun to change the praetor's involvement and influence in legal procedure. The peregrine praetor had established *formulae* as a means for providing remedy to a large number of cases within his court, foreigners, of course, being outwith the jurisdiction of the Roman civil law.²⁶ The utility of the formulary procedure as a process by which remedies could be sought more easily than in the *legis actiones* made the formulary system particularly appealing to litigants. As a result it gradually came into use in the court of the urban praetor, in cases between citizens, even where the *legis actio* ought, in the strictest sense, to have been used. The use of *formulae* by the praetor continued in frequency, until, as discussed above, the *lex Aebutia* of the latter half of the second century BC, provided a validation of his use of *formulae*. This validation naturally increased the use of the formulary procedure, but also changed the character and rôle of the praetor more broadly, increasing his impact upon law-making.

Before examining how the praetor's rôle increased, it is worth revising the changes made to procedure by the formulary system, in contrast to the earlier *legis actiones*.²⁷ As with a *legis actio* suit, the formulary system was separated into two distinct stages: *in iure* and *apud iudicem*. Despite this initial similarity, the involvement of the praetor had increased greatly. No longer were litigants forced to plead in the strict verbal congruence of the *legis actio* but were now free to express the conditions which had led them to their claim before the praetor directly.

This freedom of expression of both the facts of the case and the available remedy was possible as a result of the way in which the praetor communicated the remedy *in iure*, through the use of a formula. The formula was a short statement outlining a summons before a judge, instructions to that

²³ The case that Roman magistrates held the power of *edicere* from the earliest times in Rome is strongly set out. See: Mommsen (1903) 202. See also Livy's discussion of the right succeeding to magistrates' authority from the former kingship – Livy, 1.29.6. Corey Brennan also discusses the inheritance of these kingly powers and relates his account to Mommsen's understanding: see Brennan (2000) 34-57.

²⁴ Livy, *Ab Urbe Condita* 1.12: Dernburg (1873) 95 puts the date of these praetorian edicts at 215BC.

²⁵ Watson (1974) 45 discusses the "doubtful" significance of early forays by the praetor into the use of the edict as a serviceable tool to alter the law.

²⁶ Though this statement is by and large true, it is not absolute. Daube points to the case, in 171 BC, of Spaniards complaining to the senate of gubernatorial malfeasance under the *legis actiones*. This, Mommsen argued, was a reasonable position as, in his time of writing, it was thought that *legis actio* was open to foreigners, not only citizens, and that the *lex Calpurnia* merely validated an on-going practice – see Mommsen, (1899) 722, n.4: "Dass mit *legis actio sacramento* auch bei dem Peregrinenprätor geklagt werden konnte". Daube clarifies the position by suggesting that the view of modern scholarship, that the *legis actio* was available only to citizens is correct, but that the *fictio* of *civitas* was granted by the urban praetor, as one of the earliest known fictions, in order to override the peregrine praetor's jurisdiction and hear the case in his court under the *legis actio*. See Daube (1951) 66-70.

²⁷ Broad discussions of the formulary procedure can be found in the following: Johnston (1999) 112-119; Metzger (2015) 2; du Plessis (2015) 71-79; Lintott. (2004) 64-68.

judge of under what circumstances he should award to the pursuer or the defender, and the appropriate remedy the judge ought to award should he find in a particular way. The formula offered pecuniary damages.²⁸ Praetorian enforcement for the recovery of these debts had expanded from the time of the *legis actio* and Roman magistrates had begun to exert more pressing measures of enforcement on debtors. Any debt recovery was conducted in a separate proceeding.

The course of the proceedings remained very similar to those of *legis actio*. The pursuer privately summoned the defender *in ius vocatio*. He could now, however, provide an *editio*, a statement describing the nature of the suit. This had become available due to the praetor's granting of the edict. The litigants, or their representatives, came before the praetor in order to receive a formula and to select the judge (or judges). If the praetor could not attend to the day's business in one sitting, a promise (*vadimonium*) was made between the litigants to return the next day.²⁹ Where the pursuer was able to choose an appropriate action and the defender appropriate defences the magistrate then offered a formula as an expression of the claims in the action, binding the parties to the joinder of issues (*litis contestatio*) and ending the *in iure* phase.

The trial, before a single judge, was conducted in much the same way as under *legis actiones*. The major difference, of course, is that the trial was conducted with reference to the provided formula. The facts of the case would have been argued by the opposing parties, or their representatives, and a judgement given accordingly. The method by which the judgement was given is not attested, however, it seems unavoidable that it was issued in written form. Certainly, with developing regularity, attendant jurists would not have made use of various decisions and *formulae* in order to make comment on the law, these *responsa* in turn forming a source of law. Upon issuing a verdict the judge's responsibilities would be resolved, though, in some instances, he risked liability for inappropriate dealings.³⁰ Some trials, such as succession cases, were conducted in front of more than one judge and the procedure was amended in order to accommodate this difference.

The use of *formulae* changed the scope of Roman legal claims, extending the praetor's ability to create new legal rules. At first, despite some creativity, praetorian intervention in the law was limited. There is certainly no evidence that the praetor asserted the kind of influence in the law in the second

²⁸ Metzger (2015) 284 outlines that this was not because the law "lacked the imagination to do otherwise" and suggests that the award of monetary damages resulted from the understanding that injuries created debts which ought to be repaid in money - following G. Inst. 3.180.

²⁹ There has been a great deal of recent scholarship on the procedural impacts of *vadimonium* and delays in procedure, particularly since the of the discovery of *lex Irmitana* and the light it has shone upon procedure in the classical period. Though this discussion relates to later procedure in the Principate, the discussion is of interest and much of it relates to our period. See especially: Metzger (1999); (2005); (2012); Johnston, (2001) 119-120.

³⁰ Action could be taken against an erring judge as a quasi-delict, holding him responsible not for his reasoning but for inappropriate procedural actions. The standard legal maxim *si litem suam fecerit* covered the most obvious shortcomings and the judge was liable to repay a wronged pursuer any loss incurred due to the erring judgement - in early law this covered only deliberate error but expanded to include negligence - see Dig. 44.7.5.4. For further discussion, see: MacCormack (1982) 3-28; Birks (1984) 373-387; Robinson (1999) 195-100.

century BC that he did after the Social War.³¹ However, praetorian edicts with specific effect in law had existed from as early as the third century BC.³² This instance however seems to have had little impact in bringing about a tradition of continuous praetorian intercession.³³ Certainly the *edictum generale* on *iniuria* was issued early – Watson puts its origin at earlier than 200BC from references to it in Plautus’s *Asinaria*.³⁴ The edict did not, however, mark a change to substantive law.³⁵ It was not until the last two decades of the second century that the praetorian edict began to have a persistent substantive effect upon the law.³⁶ The praetor’s innovative tendencies developed as he provided remedies in procedure, in penalties, in the system of oaths (*iusiurandum in iure*) used during litigation, and in praetorian stipulations. By the 80s BC, the praetor had become a major source of law. At the forefront of the praetor’s increase in legal creativity was his use of the power of edict to expand and change the law.

The praetor’s innovation was not solely rooted in the use of *formulae per se* but also in the way he used his power of edict, in conjunction with the new procedure, in order to change the law substantively. As noted, the praetorian power of edict had existed since the inception of the office; however, his use of the right had been exercised cautiously. His growing courage in using the edict however came to mark a period of praetorian law-making marked by the praetor’s appreciation of the practical consequences of the law.

That the first truly substantive impact of the praetor was non-edictal, the *actio serviana*,³⁷ which provided for an *actio in factum*, is of note. Watson points out that the praetor began to innovate in fact and made “significant modifications to the substance of private law” and “gave the action without issuing an edict”.³⁸ Kaser explains this away by pointing out that the *interdictum servianum* also acted

³¹The praetor is not recorded as providing the kind of exceptions which he granted in the first century BC – see G. Inst. 4.11 and G. Inst. 4.108. Watson points out that though the praetor’s edict was issued as early as the third century BC, “changes in substantive private law were not yet made,” rather it was not until the closing two decades of the second century BC that the praetor began to assert edicts which “profoundly modified the *ius civile*.” See Watson (1974)a 35. Wlassak (1924) 159-62 argues that the praetor, nevertheless, held a position of power in law throughout the second century and that he was more active than often credited. His ability to control aspects of the civil process in the assignation of a judge is certainly not the sign of a role which is entirely passive, as argued by Kaser (1966) 43. The view put forward by de Zalueta (1953) 231 that the praetor’s eventual assertion of greater control over procedural issues following the *Lex Aebutia de formulis* at a point in the mid-to-late-second century was the catalyst for the decline of the *legis actio* system and the introduction of new mechanisms for legal change which had been previously restricted. This view seems to me to be convincing.

³²Livy, *Ab Urbe Condita*. 25.1.12. Dernburg (1873) 95 puts the date of these praetorian edicts at 215BC.

³³ Watson (1974)a 45 discusses its “doubtful” significance.

³⁴ Watson (1974)a 45-48. He concludes that the edict in its complete form as a work from between 215BC and 198BC. Further discussion of the historical development of *iniuria* can be found at Birks (1969) 163, where he dates the edict to the third century. A date of the turn of the third century seems to be favoured, if the specifics remain uncertain.

³⁵ Birks (1969) 196; Watson (1965) 248; (1974)a 48-49.

³⁶ See footnote 10.

³⁷ This is reconstructed by Lenel (1926) 493.

³⁸ Watson (1974) 54.

as an edict for the formula.³⁹ However, this seems initially unconvincing and conjectural. Kelly's stance that the edict was used in this period as a means by which the civil law can be enforced seems to be reflective of its early period and that the "history of the praetorian edict reveals itself as a progress from adjective to substantive law".⁴⁰ For Kelly, the edict replaces *leges* as the fundamental means by which the private law was substantively changed after 125BC.⁴¹ This is borne out by the lack of statutes substantively affecting private law in the later Republic and the high number of edicts. The edict had certainly become the main method of praetorian innovation in law by the 80s BC.

Dernburg traces the development of the edict from a textual study, attempting to date edicts from linguistic interpretation.⁴² Despite criticism of his methods by Kelly,⁴³ Dernburg classified edicts by age from older edicts of two statements, to a later period of single, direct pronouncement.⁴⁴ The edicts increased use is reflected in its linguistic change, as it developed into a resource of legal remedy, produced annually by the praetor as a compendium of for what the praetor would provide actions.

The decline in use of the *legis actiones* procedure is often linked to the mysterious *lex Aebutia*.⁴⁵ Modern scholarship tends to favour a view of a gradual development of the use of formulary procedure in the urban praetor's court, initiated by the *lex Aebutia* which "legalised" the formulae for use by Romans in civil actions. This position is advocated compellingly by Talamanca,⁴⁶ who argues that the praetor provided for "honorary actions" to be pursued in his court in civil cases side by side with the *legis actiones*, these were used by Roman citizens but were not given legal effect until they were lawfully enforced by the *lex Aebutia* and given civil effect in law, rather than relying for enforcement through the praetor's *imperium*.⁴⁷ Talamanca's theory is much in line with Crook's views that the act limited the ability of suits made under formulae to be pursued again.⁴⁸ Birks had argued in a similar vein that the act limited the ability to choose between procedural forms to the pursuer's advantage.⁴⁹ The view of a later date, to which most scholars subscribe, is convincing. The continuation of *legis actio* into the first century points to a less severe cessation of the older procedure but rather a co-

³⁹ Kaser (1971) 300.

⁴⁰ Kelly (1966) 348.

⁴¹ Kelly (1966) 344.

⁴² Dernburg (1873) 91-132.

⁴³ Kelly (1966) 348-354. Kelly points out that Dernburg fails to have paid sufficient care to linguistic change over time.

⁴⁴ Dernburg (1873) 91-132.

⁴⁵ Only two Latin references are made to this *lex*, neither of which offers a specific account of its implication, but which both link its effect to the decline of *legis actio*. See: G. Inst. 4.30; Gell. H.N. 16.10.

⁴⁶ Talamanca (1999) 63-260.

⁴⁷ See Kaser (1953) 25-59 for a discussion of the *lex Aebutia* as the instrument for the introduction of formulary procedure from the *legis actio per conductionem*.

⁴⁸ Crook (1967) 146; (1994) 544-546. Birks (1969) 356-367 had argued in a similar vein that the act limited the ability to choose between procedural forms to the pursuer's advantage.

⁴⁹ Birks (1969) 356-67.

existence leading to the gradual assertion of the more practicable formulary system, with the act freeing the praetor to act more definitively with *formulae*, than he had already been doing in practice, a stance adhered to by Jolowicz and Nicholas.⁵⁰ Radin argues for later, but a date for the *lex Aebutia* of the later half of the second century BC is the most credible.⁵¹ Though the act did not elevate the praetor directly to a more involved post, nor first allow him to use *formulae*, nor end the *legis actiones* procedure, which carried on until its termination by the *leges Iuliae*, it nevertheless granted the praetor the validation in the continued use of formula.⁵² A theory of gradual formulary development remains the more compelling and the more popular stance.⁵³ It certainly appears that the use of *legis actiones* as a method was seen, by the time of Cicero, as an antiquated and obscure means of initiating a suit.⁵⁴

The praetor's utility of the edict as a device for legal creation coincides with the development of the formulary system as a valid means for pleading in civil cases. This is by no means pure serendipity. The formulary procedure enhanced the praetor's direct involvement with law and the increase in his practical function, insofar as he actually had to provide for factual scenarios in which he would give remedies, led to a natural utilisation of his right to provide edict as a means for the communication of what he would provide for at law. The association of edictal innovation to the formulary procedure is inescapable.

7.3. Praetorian Innovation in the late Republic.

Having established legal change in the period of the late Republic, it is now the claim of this thesis that the praetor, influenced by the rhetorical arguments which came before him *in iure*, made modification to the civil law through the use of formula and the edict.

It is often set out that the praetor, during this period, accepting the edict of his predecessor, had access to a series of formulas, from which he could provide remedy through actions.⁵⁵ This description suggests that these actions existed in some sort of bank, from which they could be withdrawn and

⁵⁰ Jolowicz & Nicholas (1972) 100.

⁵¹ Radin (1948)

⁵² Metzger (2015) 282: "though the forms of actions eventually gave way to formulae, the underlying procedure proved to be more lasting". The date given for the *lex iulia de iudiciis privatis* is 17BC. See: G. Inst. 4.30. This abolished the use of the *legis actio* in most suits.

⁵³ Wlassak (1907) 114-129 presents a classic defence of this stance. A period of co-existence is acknowledged by Jolowicz; Nicholas (1972) 100; Metzger (2015); Talamanca (1976) 74-76; and Kaser (1953) 25-59.

⁵⁴ In *pro Murena* 29, Cicero mocks Servius's use of *legis actio* as the action of a scholar out of touch with the realities of law, rather than a suitable method of pursuing a case. Whereas Cicero's rebuke must be taken with a pinch of salt – he is after all concerned with winning his case above all else – it is nevertheless indicative that *legis actio* was outdated, or at least, ill-used, by the time of his defence of Lucius Licinius Murena in 62BC.

⁵⁵ Dernburg (1873) 95; Watson (1974)a 45-48; Schiavone (2012) 357-361.

offered to forth-coming claimants, their origin rooted in the edict itself, which was presumably the creation of scientific, lawyerly opinion.⁵⁶

It is the contention here that this view is incorrect. While the edict, as it grew and expanded, offered a plethora of remedies from which the praetor could offer recourse to claimants, the origin of these remedies developed from the claimants themselves. There is some debate as to the *apud iudicem* stage and its position in this creativity, but this thesis focuses on the praetor.⁵⁷

It is proposed that when a claimant came before the praetor *in iure*, stating the facts of the case in which he felt wronged, he was not necessarily appealing to a known action in the set out edict, but could also simply by displaying a general sense of injustice for which he hoped to find remedy.⁵⁸ At this stage, *in iure*, the praetor, where no action had been provided in his edict as set out *ab initio*, was not limited by his own pronouncement on the assumption of office, but could innovate creatively. The praetor at this stage could create actions and offer them, through formula to the pursuer, based upon the facts and arguments presented *in iure*. These could then be included in later edict. There was no guarantee that these actions would be successful, and often they proved insufficient and died away.⁵⁹ Those which survived offered a solution to legal problems that arose in practical law cases. As a result, they fulfilled the needs of society, as they came from society itself, not from an issue of the state through the institution of the praetor.

While there is some scholarship to indicate that the judge might have had to consider some rhetorical argumentation over the law, it is supposed that the praetor *in iure* was concerned only with the establishment of a legal action from a set edict. I think this is unlikely. Given that the praetor was

⁵⁶ Schulz (1946) states the praetor is free to accept any formula proposed to him, but only supposes the jurisconsults, as legal professionals, are making the proposal. The view that actions came as a result of the jurisconsults' creativity and not legal practice is upheld by, among others: Wlassak (1924) I. 6, 64; Wenger (1926) 19.

⁵⁷ As to whether the judge had a rôle in affecting the law through acting upon rhetorical arguments put before him rather than on the strict interpretation of the law. See: Tellegen-Couperus (2001) 1-13. This argument finds short shrift, see: Metzger (2004) 10. The judge was certainly non-professional, see: Dawson (1960) 3. And this has informed the bulk of scholarship in discounting him from lasting impact on legal opinion, see: ⁵⁷ Buckland (1963) 608. This characterisation of the judge as a layman who acts as a simple arbiter is widespread, for example see: Jones (1960) 70: the judge is "an arbiter to whom the litigants had submitted their dispute"; Nicholas (1962) 72: the judge is "an arbiter"; Buckland & McNair (1952) 402: the judge is "a private citizen, not an officer in the hierarchy." As a result, Kaser states (1978) 127: "Denoch bleibt die Rechtskennerschaft das Reservt der nubmeh freien Juristenzunft, weil die Gerichtsmagistrate ebenso wie den Urteilsrichter nach wie vor der juristischen Fachbildung entbehren". Puchta (1881) 835 points out to the contrary however "there could be occasion for legal questions to arise in the trial." While I am not in complete agreement with discounting the judge, the scope of this thesis is focussed solely on the praetor, as the effects of the argument made to him are demonstrable.

⁵⁸ Schulz (1946) 51-52 would have jurisconsults appear *in iure* "as advocates", but only to offer weight to the drafting of their proposed *formula*. He discounts the notion that advocates and jurists asserted any power in the other's "sphere". The facts of the case, in this understanding, are utterly discounted to a mere intellectual battle between a jurist establishing a formula and an advocate applying rhetoric to win the case. To discount the actual case itself appears, to me at least, unconvincing.

⁵⁹ Birks (1969) on *iniuria*, for instance.

offering formula, often arising from the facts and arguments presented before him, it seems self-evident that arguments would be made to him that encouraged favourable legal development.

Therefore, it seems likely that rhetorical arguments were made before the praetor, specifically in order to convince him to create legal forms to the benefit of a claimant. It is my contention, as I express in the next Chapter, that *bonorum possessio* arose as a result of this kind of rhetorical argument before the praetor *in iure*.

The arguments made to the praetor hinged upon convincing him as to the justice of the provision of a new action. This was achieved through appeals to socially understood values within Roman society, to which there was a socially recognised value, such as *aequitas* and *pietas*. In order to convince the praetor that any new action would be just based upon these socially understood values, it is necessary to build an argument upon these values as a topical postulate. To this end, rhetorical theory, of the kind outlined by Cicero in his *Topica* became a key to unlocking new actions in the later Republic. Rhetoric provided the underlying argumentative basis for new law.

The following Chapter attempts to prove this thesis with reference to *bonorum possessio*.

7.4. Summary of Findings.

This section has examined legal change in the late Republic and offered an explanation of how that change brought about increased legal activity, particularly from the praetor. First, it set out the older procedure of *legis actio* and charted its decline. Secondly, it examined the new formulary procedure. Thirdly, it examined the rôle of the praetor, asserting that praetorian legal change resulted from cases which appeared before him. In particular, it proposed that rhetorical argumentation during the *in iure* stage, appealing to socially understood values linked to justice, was responsible for legal development through formula and the edict.

8. Rhetoric and *Bonorum possessio*.

In the previous Chapter, this thesis set out the institutional and substantive legal change in the later Roman Republic, with a particular emphasis on the rôle of the formulary procedure and the praetor on the innovation of new law from an appreciation of actual cases which came before the courts. The Chapter concludes that the formulary procedure provided the scope for the praetor to offer new legal instruments to remedy problems which occurred in real life. The reasoning applied to the creation of these new legal instruments derives, it is argued, from rhetorical arguments made before the praetor appealing to socially understood concepts, such as *aequitas* and *pietas*, as the *loci* on which the argumentative basis for legal-decision, and thus the new legal instrument, is based. It is therefore proposed that rhetorical argumentation is the legal reasoning which provides a *ratio decidendi* based upon a topical understanding of socially understood values, not derivative from an internalised logic of law, but rather from an acute practical awareness of society, and from an understanding of topical argumentative theory.

This Chapter attempts to justify this proposition by revealing how the development and operation of the praetorian action of *bonorum possessio* emerged from the legal changes in the late Roman Republic. The argument put forward is that *bonorum possessio*, which clearly developed under the praetorian formulation, was instituted as a result of the rhetorical arguments put forward in real cases, and that the reasoning behind its use is as a result of a topical conceptualisation of social norms which provide an argumentative weight to its application, even to the extent that the normal course of succession law, under the *ius civile*, is superseded by praetorian interdiction.

In order to establish this, we will first examine the operation and development of *bonorum possessio*, as an indication of its origin provides an insight to the argumentation which led to its use. Cases before the praetorian court will then be discussed, with a view to establishing the rôle of argument in forming praetorian decisions. From there, the Roman socially understood value of *pietas* will be examined in its application to law, as the *ratio decidendi* for awarding interdict based on rhetorical arguments put forward in favour of a claimant. The chapter will then conclude, summarising its arguments for the position that rhetorical argumentation for law to be enacted from the topic/*locus* of socially understood Roman values derived from case law was responsible for the development of *bonorum possessio* in the late Republic, superceding the *ius civile* and revealing an ‘extra-legal’, ‘non-dogmatic’ approach undertaken by Romans towards their law during the height of the supposed legal scientific revolution.

8.1. The Development and Operation of *Bonorum possessio* in Roman Law.

This section will examine how *bonorum possessio* developed and how it operated in the law.

8.1.1. The Operation of *Bonorum possessio*.

Bonorum Possessio is dealt with at length in Book Thirty-Seven of Justinian's *Digest*, as well as in Gaius and the *Codex Justinianus*.

The basic operation of *bonorum possessio* was that in cases where a *prima facie* claim could be made before the praetor by a party seeking, on the grounds of equity, the ability to hold an estate, or part of an estate, the praetor would make an *ex parte* grant to that entitlement.¹ This, in turn, allowed the party granted the ability to hold that estate the right to claim for the interdict of *quorum bonorum*, to prevent divestment from that property.

Gaius outlines that a claim to *bonorum possessio* is available to those who retain possession of the estate after a will which was invalid or nullified or frustrated, provided they have effective possession of the estate.² While those with statutory title on intestacy or those appointed as heirs can deprive those who make a claim to retain the estate under *bonorum possessio* of the estate,³ it is the case that the claimants to *bonorum possessio* may be preferred and granted interdictal protection even against appointed heirs, or those who stand to inherit on intestacy due to invalidity of a will.⁴ A *ius civile* heir may nonetheless attempt to recover the estate through his principal remedy of *hereditas petitio* against a praetorian possessory interdict.

A distinction existed in the type of grant given by the praetor, arising from whether or not a *ius civile* heir was present. If an heir was present, then a grant was made *cum re*, the grant was not subject to change, and an *exceptio doli* could be deployed as a defence to an attempt to use the *hereditas petitio*. A grant *sine re* was subject to any future claim by a civil law heir, and provided provisional protection against an heir, who could remove the property from the grantee were he to prove his entitlement to the estate, with the grantee unable to offer any defence to his claim. The benefit to a *sine re* grant was that

¹ For overviews, see: du Plessis (2015) 216-217;

² G.Inst. 2.148.

³ G.Inst. 2.148. While the property can be held, it is not a grant of legal possession. Dig. 37.1.3.1. (Ulpian, Edict. Book 39)

⁴ G.Inst. 2.149.

it provided for entitlement to property against the world at large except from any potential heir, who might not come forward, offering the chance of becoming owner through *usucapio*.

The basis for the decision of the praetor to make grants was upon an equitable appreciation of the claimant's entitlement to hold the estate. This included cases in which such a grant, based on *aequitas*, was contrary to the explicit terms of a will.⁵

8.1.2. The Development of *Bonorum possessio*.

The development of *bonorum possessio* resulted from praetorian intervention in the civil law, as described earlier in this thesis.⁶ The fact that *bonorum possessio* has its origin in praetorian creativity is important, as it makes it clear that the instrument arose as a revision to the restrictive limitations of formalism within the prescribed succession law.

The claim of *bonorum possessio* is in essence one of acquisition by prescription through *usucapio* of all or part of an *hereditas* supported by the granting of praetorian interdict.

A claim for *bonorum possessio* was made – either by *heredes* or not - before the Praetor, who may grant the claimant the protection of a possessory interdict. This provided the claimant with a means to retain property to which, upon the analysis of the Praetor, he was deemed *prima facie* to be entitled. Nevertheless, the original grant by the Praetor did not amount to bestowing legal possession (*possessio*) on the claimant, but rather amounted to an acknowledgement by the Praetor that he would, if the physical possession of the property was challenged by another party, allow for the original claimant to seek interdictory possession and retain the property, usually by means of *quorum bonorum*. The Praetor could grant the claimant protection against claims by an *heres*, *bonorum possessio cum re*, or could provide no such protection, *bonorum possessio sine re*. In instances where the claimant to the *hereditas* is *prima facie* entitled to the inheritance under the order of intestate succession, then *bonorum possessio* effectively provided a remedy through interdict by which the Praetor could protect possession of the inheritance from the claims of others. Therefore, when *bonorum possessio* is granted to an *heres* the granting of possession by the Praetor is *iuris civilis confirmandi gratia*. In contrast, where *bonorum possessio* is granted to one who is not an *heres* then it is *supplendi iuris civilis gratia*. When *bonorum possessio* is granted to a claimant against the order of intestacy prescribed by civil law it is *corrigeni iuris civilis gratia*. Lenel's reconstruction of the formulation of the interdict runs thus:⁷

⁵ Dig. 37.4.1. (Ulpian. Edict, book 39)

⁶ 7.3.

⁷ Lenel, EP 452, Tit. XLIII, § 227. Translated by Schiller (1977) 438.

At praetor: quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut per possessore possides possideresue si nihi usucaptum esset, quodque dolo malo facesiti, uti desineres possidere, id illi restitutas.

Whenever possession of an estate has been granted to anyone according to my edict, you shall restore to that person property you hold or would hold, if not acquired (as yet) by usucaption, either as heir or merely as possessor, and that with respect to which you have acted fraudulently in order that you would cease to possess it.

Watson points out that *bonorum possessio* does not appear to have arisen as an edictal grant by the praetor but rather as “an *ad hoc* decision”.⁸ That is, that the conditions of the case were taken into account by the praetor on a situational basis rather than outlining a series of scenarios in which he will grant interdictory protection. The reformulation of the edict provided in Lenel does however make note that possession is granted from the edict. How then can we reconcile the prescription of edictal law with the casuistry of case by case decision making?

It would appear most likely that the praetor made clear in his edict that he would offer the *quorum bonorum* to those whom he adjudged as deserving of such protection. The edict provided the scope for the granting of this remedy but was scant in offering a prescription for the reasoning behind the decision to grant possessory protection. It would seem unlikely that the decision was left entirely to unwritten praetorian arbitrariness. This would undermine the consistent validity of the law and is out of kilter with the written formalism of the period. Rather, it would be more likely to suggest that the grounds on which the praetor granted possessory protection was on the ground of an appeal to *aequitas*. As a result, the decision is ultimately one emerging from an appeal by the claimant possessor to the justice of his having taken possession of the *hereditas*. As no strictly legal criteria were set out for the granting of the interdict, other than the assumed physical possession of the *hereditas*, the notion of an appeal to *aequitas* as the sole requirement for the granting of an edict in favour of continued and protected possession appears to be *prima facie* haphazard and outwith the boundaries of legal reasoning. Moreover, the scope which the praetor seems to have been given to grant such actions, or to exclude the civil law against a claim, appears at first reading to be an untidy legal fault whereby the praetor asserted an apparently extra-legal arbitrariness *ex officio*.⁹ It appears that the praetor could in fact rule in favour of a petitioner contrary to the civil law in cases where he felt that the law was unfair or in some other way deficient in providing a just outcome to the case. The authority upon which these

⁸ Watson (1971)b 80.

⁹ Watson outlines that the extent to which the praetor was able to adjust the law extended greatly during the 70s BC, Watson (1974) 93: “Just as the praetor could grant *ad hoc* actions, so he could refuse established remedies. By 74, 73, or 72 BC we have evidence that he could refuse to grant a *bonorum possessio* under the term of his own Edict. And there is proof that as early as 70 BC the praetor might refuse to allow an action on a claim which was valid at civil law.”

remedies seem to have resulted solely from the office of the praetor itself. However, the assertion that the praetor's deviation from the civil law in the provision of these remedies necessarily resulted in a departure from the spirit of the law is not necessarily the correct understanding of the operation of praetorian remedies in the late Republic. That is to say, what can at first appear to be *ad hoc* decision-making from the praetor – whether that be legitimately ordained from the power of his office or illegitimately imposed by praetors attempting to ameliorate the power of their office, or abuse their power – is not ineludibly a move away from the methodological approach taken more generally by lawyers working within the more recognised auspices of the civil law. That praetorian creativity was not limited to the prescriptions of edictal change, but to decisions which arose from the granting of formulae which arose from definite cases changes the complexion of how the period of praetorian creativity ought to be viewed.

It is uncontroversial to state that the praetor changed the civil law by edict in order to provide remedies for developing institution of Roman law. His implementation of remedies was fundamentally constructive in the development of institutions of private law. The edict became a centrepiece of legal development. However, this understanding is in no way inconsistent with the rise of legal science and juristic law. The edict does not sit outside the system of the law itself. The *ius honorarium*, which developed as a result of edictal transformation of *ius civile*, was seen as a correction and enhancement to the original law and its transformational qualities were undertaken as steps toward the fulfilment of necessary amendments and are generally viewed as subject to the watchful eye of the knowing jurists, through the means of a *concilium* of jurists whose appointment ensured the quality of the praetor's legal innovation.¹⁰ Schulz is clear that the extent to which the jurists were involved in edictal re-formulation of the law often led to the wording of their *responsa* being directly used in the praetorian edict.¹¹ To this end, the narrative of the autonomy of the law from the influence of practical considerations was assured, alongside the primacy of the jurists as a class of legal experts upon whom the praetor was reliant in his understanding of lofty legal concepts. This understanding, to some extent, remains uncontroversial. It is certainly the case that direct edictal change to the law by the praetor operated within a legal framework.¹² It is rather in the decisions of the praetor which are often excluded as being enduringly influential that the influence of rhetoric on the law of the late Republic can be seen: specifically in the kind of decisions made by the praetor which are regarded as *ad hoc* and which are

¹⁰ Dig. 1.1.7.1. (Papinian): "Praetorian law (*jus praetorium*) is that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile*. This is also called honorary law (*jus honorarium*), being so named for the high office (*honos*) of the praetor."

¹¹ Schulz (1946) 53.

¹² This stood out as a novelty in a Roman legal system which had adhered so stringently to form. Mousourakis (2015) 50: "The idea that legal obligations could materialize from anything other than a strict form was strange to the original structure of Roman law established in the Law of the Twelve Tables."

often described as being symptomatic of a power grab by bad praetors in the disruption following the Social War.

The contention here is that these are not necessarily the arbitrary decisions of praetors, but are rather reflective of the influence of rhetorical pleading on the development of the law. That is to say, that the reasoning presented to the praetor for the granting of *formulae* by those representing petitioners was the basis of a direct change on the law.

8.2. *Aequitas* as Applied in Respect to *Bonorum possessio*.

Having established the development and operation of *bonorum possessio*, this section will now look beyond the juristic sources and examine the way in which a rhetorical understanding of *aequitas* was central to the development of the law. First, this section will look at Cicero on *bonorum possessio*, tying in the rhetorical arguments of his *Topica*. Secondly, it will look at Valerius Maximus's texts on the same issue.

8.2.1. Cicero on *Aequitas* and *Bonorum possessio*.

Cicero raises the issue of the edictal development of succession in his speech against Gaius Verres in 70BC. Verres had been on trial for corruption during his governorship of Sicily and was praetor in 74 BC.¹³ Cicero, in a speech which holds back on no available means of attack, lambasts him for the remedies he provided in his Sicilian edict, during his governorship, and during his praetorship at Rome. In his speech, Cicero's primary consideration is to discredit Verres in order to substantiate the charges of extortion and corruption. Only the first of Cicero's speeches was delivered; Verres opted for exile in Massilia as a more favourable option than trial. The second, undelivered speech is of more interest to lawyers as Cicero reduces his vitriolic, personal attack in favour of a more thorough catalogue of Verres's malfeasance in office. Among examples of Verres's wrongdoings, one is of particular interest to us with regards to its relationship to rhetoric and the law in light of praetorian or gubernatorial authority and innovation in the late republic. The instance is of the granting of an inheritance by Verres against the terms of a will under edictal and praetorian actions with regards to inheritance at Rome. We are presented with situations in which magisterial power is deployed in order to make a substantive change on the operation of the civil law. Cicero, in his charges against Verres, argues that these changes are indecent and unlawful. The point of interest to us is why Cicero thinks that Verres's actions were

¹³ Frier (1983) 229.

unjust and what this tells us about the argumentation and reasoning underpinning magisterial power. My contention is that the criticisms which Cicero launches against Verres are in keeping with an understanding of the law which relies upon underpinning principles of equity rooted in practical rhetorical reasoning and that the failure of Verres to act in accordance with the equitable underpinning of his powers the crucial factor in his malpractice.

First, we must establish the context of Verres's pronouncement on inheritance. Verres in his first edict as praetor made provision for the extension of those who could not inherit to women. The circumstances, under which this edictal provision was made, according to Cicero, were dubious at best, Verres having been appealed to in relation to a specific case by a potential inheritor, looking to make gain.¹⁴ This case was the inheritance of Publius Annius who had named as his heir his daughter. The extension of the status of *incensi* to women by Verres was implemented by him retrospectively against the will of Publius Annius in order to grant the *bonorum possessio* of the *hereditas* to Lucius Annius, the fellow of dubious character whom Cicero claims had the praetor's ear, against Publius's daughter, the named heir.¹⁵ Cicero attacks Verres's actions on several bases: his collusion with Lucius Annius; his scant regard for the custom of edict; the retroactivity of his action against the terms of Annius's will; and, above all, his lack of equity in granting possession.

Interestingly, Cicero does not attack Verres on his ability to change the law *ex officio*. Cicero seems content to grant that the praetor has the power to innovate against the civil law as a result of the magisterial power of his office. He grants Verres the benefit of the doubt in bringing forward legal change. Cicero's fundamental objection is the methodology by which Verres utilises his magisterial power:¹⁶

pater dat filiae, prohibes; leges sinunt, tamen te interponis! de suis bonis ita dat ut ab iure non abeat; quid habes quod reprehendas? nihil, opinor. at ego concedo; prohibe, si potes, si habes qui te audiat, sipotest tibi dicto audiens esse quisquam. eripias tu voluntatem mortuis, bona vivis, ius omnibus? Hoc populus Romanus non manu vindicasset, nisi te huic tempori atque huic iudicio reservasset?

The father gives to his daughter: you forbid it. The laws allow it: yet you interpose your authority. He gives to her of his own property in such a manner as not to infringe any law. What do you find to blame in that? Nothing, I think. But I allow you to do so. Forbid it if you can; if you can find anyone to listen to you; if anyone can possibly obey your order. Will you take away their will from the dead,—their property from the

¹⁴ Cic. *Verr.* 2.1.105.

¹⁵ Cic. *Verr.* 2.1.103 – 2.1.120.

¹⁶Cic. *Verr.* 2.1.114. Translated by Greenwood (1928) 243 – 254.

living,—their rights from all men? Would not the Roman people have avenged itself by force if it had not reserved you for this occasion and for this trial?

Verres's proscription on women heirs as an extension of the *incensi* is challenged by Cicero with vehemence. However something about the law-making power of the praetor is clear; the extent to which praetorian power had grown enabled Verres, through his authority, to institute a definitive and substantial change to the law by edict. Nevertheless, the extent to which he extended his changes to the law, and the manner in which he had done it, had amounted to conduct which Cicero regards unjust and unlawful. Here, the established order of intestate succession was dispensed with by Verres and replaced by his own imposition. The authority of the governor *per se* to grant against an heir is not challenged by Cicero, he is appreciative of the authority of the governor to grant *bonorum possessio* to a *prima facie* more justified claimant. Cicero's claim is that the substantive changes made in this case by Verres, in granting against the daughter of Annius, breach a fundamental understanding of the operation of the law in principle:¹⁷

posteaquam ius praetorium constitutum est, semper hoc iure usi sumus: si tabulae testamenti non proferrentur, tum ut uti quemque potissimum heredem esse oporteret, si is intestatus mortuus esset, ita secundum eum possessio daretur

Since the establishment of the praetorian power, we have always adopted this principle,—that if no will was produced, then possession was given to that person who would have had the best right to be the heir, if the deceased had died intestate.

The principle to which Cicero appeals seems to have, in his mind, an unassailable quality to it, a quality which underpins and justifies the substance of the law. It is not merely adopted and adhered to out of generality. Rather, that the law is substantively adherent to the legal principle seems to be authoritative on the power of the principle itself. That is, not adherent to the legal principle, but the underpinning, conceptual principle. In this instance, that principle appears to be that of *aequitas*. To dispossess that person to whom had befallen the best right in intestacy on the basis of a praetorian action to the contrary based on either magisterial arbitrariness or bias presents a circumstance which is glaringly unfair. This unfairness is unjustifiable, even though, in fact and in practice the praetor has the power to grant *bonorum possessio* to whomsoever he chooses as a result of his *imperium*. Cicero's argument therefore runs that, even where the praetor has the authority to enact legal change, he is restricted in the legitimacy of that change by fundamental principles which underpin the law, one such principle is *aequitas*, and therefore the inequitable granting by the praetor of possession to an unfair claimant is unjustifiable and unlawful.

¹⁷ Cic. *Verr.* 2.1.114. Translated by Greenwood (1928) 243:

What then is the significance of this formulation? First, we can say that in this case the civil law is not the prime authority for the decision, because the praetor has the right to change the civil law. His malpractice in this instance is not because he changes the law to offer *bonorum possessio*, because the whole purpose of *bonorum possessio* is to override the civil law. His fault is in the way he changes the law, more specifically in his reasoning. The second point we can see is that the praetor's grant is also not the principal authority for the law, because, even though he can provide for remedy against the civil law on account of his power *ex officio*, the legitimacy of that action is still dependent upon his adherence to fundamental principle. So, is the conclusion that the law here is dependent upon a vague claim to innate ideas which rule the law as a "heaven of concepts?" This seems far too philosophical for the practical Romans; certainly, it seems far too abstract for the utilitarianism of law. Rather it seems that these principles, far from being elusive doctrinal abstractions were rather living, practical sources of law. The means by which their existence within law, as a tool for creation and argument, were concretised were in the practical pursuit of litigation. The arguments presented before the magistrate and the judge, which underpinned the reasoning of his decision, and which appealed to his understanding of these principles, as a result directly informed his interpretation of the law and thus his innovation to the law was based upon the construction of these principles in the formulation of an argument that was rhetorical in its nature, and which used topical methodology as its theoretical substantiation.

The principle of *aequitas* is the *locus* from which the entire argument towards the granting of *bonorum possessio* is postulated. The argument made as to the granting of possession is the only basis by which the decision-maker can gauge the equity of the situation, not in vague terms, but from the consistency of the argumentation. The argument is therefore deeply topical in its methodology; its purpose is to underpin the strength of the claim in facts with an appeal to the topical postulate, the unstated principle of *aequitas*. Unstated not insofar as it was unknown to the Roman legal mind-set as a source of law, but insofar as it is the hidden *topos* upon which the argument is postulated. Yet this still seems somewhat unclear, in definitional terms, as to how *aequitas* can be applied in any meaningfully universal way.

The answer to this itself lies in topical theory. Definition forms the essential discovery which forms the basis for the location from which the discussion unfolds. Definition either results from external objective or internal subjective characteristics.¹⁸ The purpose of definition is to provide for a keystone of understandable concepts, setting the foundation upon which the edifice of argument can be constructed.¹⁹ Argument, in rhetorical terms, is somewhat different from this and rather "is a reason

¹⁸ Cic. *Top.* I.2.

¹⁹ Cic. *Top.* I.2: "But a definition is employed with reference to the entire matter under discussion which unfolds the matter which is the subject of inquiry as if it had been previously enveloped in mystery."

which causes men to believe a thing which would otherwise be doubtful”.²⁰ Argument develops out of the understanding of the concept provided for in its locus and is ultimately referential to its topical postulate. Cicero helpfully uses the Civil law as his example for explaining how such a construction of definitional *topos* and argument are formulate.²¹

The definition is therefore tied referentially to the matter as a whole. The parts of the argument which follow, as subsequent to the definition, are reliant upon their basis in the definition as an accepted *a posteriori* statement. The arguments which result are specific, relating to species which derive from the general definition. Their efficacy is determined by their ability to create an interconnected coherence relating to the general definition. This interconnectedness to the generality of the definition means that the trajectory of arguments relates to the fundamental assertion of the definition as the starting point for their reasoning. Cicero outlines the modes in which arguments use the general definition to move towards a specific conclusion.

Arguments are also derived from things which bear some kind of relation to that which is the object of discussion. But this kind is distributed under many heads; for we call some connected with one another either by nature, or by their form, or by their resemblance to one another, or by their differences, or by their contrariety to one another, or by adjuncts, or by their antecedents, or by their consequents, or by what is opposed to each of them, or by causes, or by effects, or by a comparison with what is greater, or equal, or less.²²

The notion that Cicero’s *Topica* can offer an insight into the methodology applied to legal creativity is roundly rejected, not least by Watson who notes that Cicero’s non-legal style makes “the contrast between the approach of Cicero and that of the Roman jurists so revealing of the spirit of Roman law”.²³ Watson’s staunch acceptance of legal isolationism and his rejection of societal pressures as formative conditions for the development of legal institutions cause him to characterise Cicero necessarily as an “outsider” for whom, “in almost every particular his attitude is the reverse of that of the jurists”.²⁴ Despite even his training in law under the esteemed jurist Quintus Mucius Scaevola *pontifex*, Cicero’s trumpeted rôle as an advocate and engagement in philosophical discourse mark him out for Watson as someone alien to juristic thought and consequently to the task of law-making.²⁵

²⁰ Cic. *Top.* I.2.

²¹ Cic. *Top.* I.2.

²² Cic. *Top.* I.3.

²³ Watson (1995) 195.

²⁴ Watson (1995) 195.

²⁵ Watson (1995) 195-200.

Noticeably, however, when it comes to a direct rebuttal of Cicero's input to the law, the framing of his alienation is presented in relation to his own dissociation from jurists.²⁶ Cicero's refutations of the need for orators to have an in-depth understanding of the law, his portrayal of a seeming distinction between jurists and orators and his supposed contempt for juristic work are used variously to evidence his fundamental separation from legal creativity. That comments exist in Cicero which indicate a diverse application of skills by different people in relation to their interaction with the law is undeniable, but the conclusion that this means that Cicero, and orators, are at all times methodologically and professionally isolated from law and legal creation seems to me to be unsubstantiated by the sources themselves.

8.2.2. Valerius Maximus on *Aequitas* and *Bonorum possessio*.

Valerius Maximus recounts the granting by the praetor C. Calpurnius Piso²⁷ of *bonorum possessio* to a certain Terentius of the estate of a son whom he had given up for adoption, by whom he had been disinherited. Furthermore, Piso refused to allow the heirs to pursue Terentius for the possession of the estate contrary to the rules of the civil law. Valerius Maximus goes on to give consideration for the motivation in Piso asserting his authority to grant such a decision:²⁸

Egregia C. quoque Calpurnii Pisonis praetoris urbani constitutio: cum enim ad eum Terentius ex octo filiis, quos in adulescentiam perduxerat, ab uno in adoptionem dato exheredatum se querellam detulisset, bonorum adulescentis possessionem ei dedit, heredesque lege agere passus non est. movit profecto Pisonem patria maiestas, donum vitae, beneficium educationis, sed aliquid etiam flexit circumstantium liberorum numerus, quia cum patre septem fratres impie exheredatos videbat.

Excellent too was the ruling of City Praetor C. Calpurnius Piso. Terentius made complaint to him that of eight sons whom he had raised to young manhood one, whom

²⁶ Watson (1995) 195-200.

²⁷ The praetorship of C. Calpurnius Piso was held in one of the three years between 70 and 72 BC. The exact date, however, is by no means certain. Watson favours 70 BC, see: Watson (1971) 80; Broughton is less convinced of such exactness but places him in the period of 71 B.C or earlier – see Broughton (1952) 127. Frier places the praetorship of Piso in 72 BC and agrees with Broughton that the post was rather held by M. Mummius in 70 BC. Frier argues that 72 BC is the likeliest date of the three available years as, having acted as defence advocate in Caecina's lawsuit (Cic. Caec. 34), it would be unlikely that he would thereafter have taken up the position of praetor. Moreover, in comparison to Sumner's argument – see Sumner (1973) 128 – which situates M. Mummius as certainly the praetor of 70 BC and L. Caecilius Metellus in 71 BC, it seems not unreasonable to suppose 72 BC as the most likely year for this ruling – see Frier (1983) 224-229. The period of the late 70s BC is nonetheless consistent, regardless of the precision of the year, with the supposed period of particular praetorian legal innovation.

²⁸ Val. Max. 7.7.5. Translated by Shackleton Bailey

he had given in adoption, had disinherited him. Piso gave him possession of the estate and would not allow the heirs to go to law. No doubt Piso was influenced by paternal majesty, the gift of life, the benefaction of an upbringing, but also the number of the surrounding children swayed him to some extent, the seven brothers whom he saw impiously disinherited along with their father

These motivations are not those which we would consider as being legalistic – there is no claim *in rem* upon which Terentius's seizure of the property is based. Rather the reasoning which Valerius Maximus supposes precipitated the decision of the praetor to extend to Terentius possession of the estate was something quite different: paternal majesty; the gift of life; the benefaction of an upbringing; and the sway of Terentius's other seven children who viewed the disinheritance as an act of impiety. As these arguments are not in and of themselves legal, insofar as they are not arguments which rest upon the direct assertion of the acquisition of legal property resulting from a claim in rights, they must be rooted elsewhere. Yet, although rooted elsewhere, they must, as a result of the granting of possession, provide for the granting of legal rights as a result of either their individual or collective strength. So where do these arguments arise? What *kind* of arguments are they? And to what do they appeal in order to move the praetor to order a legal resolution against the prescription of the civil law?

In direct answer to the first of these questions, it is evident that the arguments presented in the case of Terentius were brought forward in the court of the praetor. Terentius had come before the praetor requesting that Piso give consideration to his possession of part of an estate which had been bequeathed to heirs under the rules of testate succession. Though not explicitly stated, it is clear that the form of will by which Terentius had been disinherited was the *testamentum per aes et libram*.²⁹

Let us consider in turn then what *kinds* of arguments were made on behalf of Terentius in order to secure possession of the *hereditas*. By the consideration of the *kind* of argument I mean from what category of argumentation it derives. This is not necessarily an attempt to locate these arguments solely within rhetorical *τόποι* but rather to examine in what way these arguments were able to be regarded as authoritative by the praetor. Nevertheless, it remains my contention that by and large these arguments are in fact the utilisation of topical argumentation and rely heavily upon advocacy in order to be successfully submitted.

Any attempt to fully reconstruct the arguments presented to the praetor in this instance from the little historical evidence provided would be erroneous. We have too little information beyond the

²⁹ The inheritance is not intestate as we are told that there is a clear case of positive disinheritance by the intent of the son, or else no argument for impiety and injustice could be submitted. Of the three forms of will available to Romans in this period, the *testamentum per aes et libram* is the only one which makes sense. The *comitia calata* and *testamentum in princtu* had fallen out of use by this period, certainly by the late 70s BC, discounting them as viable options for Terentius's adopted son – see G Inst. 2.103 and also, Watson (1971) 8-11.

general framing and theme of the arguments used. This does not impede us from using the information provided to examine whether the arguments used were what can be termed strictly legalistic.

The first of these arguments used to convince Piso is that of paternal majesty. This argument has a tone of an appeal to natural order. Consideration must be given to its origin. In law paternal power does not supersede specific testament to disinherit a father. The authority upon which the praetor acts in this instance is the granting of a formula in what Watson terms an “*ad hoc* decision”.³⁰ This phraseology captures the timing of the process of reasoning, but gives away little of its consideration and seems to detract from it any sense of abiding worth. As opposed to the decision being viewed as *ad hoc*, it would seem more likely against the backdrop of praetorian intervention that the decision was made from an understanding of *aequitas* as a source of law with consideration to the arguments made from the facts of a particular case. This distinction seems at first *de minimis*, yet its implications are important. The decisions rather than being primarily *ad hoc* and made by the praetor on a whim of persuasion were rather situated within a complex legal sphere. The praetorian granting of possession was not solely as a result of the power of his position but was tied to the concept of equity as a source of legitimate legal authority. The appellation to this authority was made in court on the basis of the facts of the case presented before the praetor. These arguments took the form of rhetorical appeals to the praetor’s understanding of equity and the use of rhetoric as an argumentative technique as a means for establishing the precepts of legal fairness was crucial in establishing the provisions offered by the praetor in law.

The extent of the rhetorical techniques utilised by an advocate to persuade the praetor as to the equity of a grant of *bonorum possessio* would have extended to those styles which he had developed through his training. Bablitz sets out the various methods of persuasion an advocate employed in court, altering his approach to maximise his appeal:³¹

While the advocate attempted to integrate all these elements of his tone, glance, emotions and diverse gestures and movements to best fit with the content of his speech, two additional factors affected his choices: the court hearing the case, and the seriousness of the case.

These techniques would all have been used as standard rhetorical techniques in order to gain the leniency of the praetor. Nevertheless the emotional movement of the praetor to an unjust decision was not the fundamental hinge upon which the case was decided. But these techniques were utilised in tandem with arguments rooted in the topics. The influence over a judge or praetor in litigation was not limited to purely stylistic affectations, but also to the way in which the argument was reasoned.

³⁰ Watson (1971)a 80.

³¹ Bablitz (1997) 192.

The civil law was not detached from rhetorical theory, and *vice versa*. Cicero makes note that his rhetorical theory reflected legal aspects of the *ius civile*.³² The advocate, in taking on a case, is placed in the position where he has to argue either for or against a legal point in the natural course of a civil trial.³³ The need for legal knowledge for the advocate is therefore an essential foundation in putting forward a coherent argument. This is probably the reason why many jurists took on the rôle of advocacy themselves.³⁴ The jurist, in reality fulfilled a number of different rôles besides his three primary functions of *cavere*, *agere* and *respondere*.³⁵ This is a testament to the versatility of the Roman education which provided for the application of wide-ranging skills alongside specialist study in law. The jurist, as discussed,³⁶ though certainly specialised in the knowledge and application of the substantive law, was not unversed in rhetoric and philosophy. As a result, when the need to orate was demanded in the submission of a civil law case, the distinction between the jurists and rhetoricians as specialisms gave way to polymathy borne out of efficacy. The use of rhetorical argumentation in the proposition of legal arguments was pervasive, court cases were not a mere exchange of points of black-letter law.

Cicero's *Topica*, written precisely with the intention of educating the lawyer as to the formation of argumentation,³⁷ provides an interesting comparator against which we can examine the arguments used in the case presented by Valerius Maximus. Cicero's instruction is to bring forward "the discovery of those things which are hidden" in argumentation.³⁸ The 'hidden' in the argument, the unstated, is the reasoning which underpins the argumentative structure, the place, or τόπος³⁹ from which the essence of the subject itself is derived. In the case of Terentius, we are presented with a series of arguments put before the praetor which could be derived from various τόποι. The τόπος of each particular argument, the appeal to authority of the father, the benefaction of an upbringing, the justice of distribution among children is striking insofar as it seems to be rooted in equity, rather than in an appeal to the authority of the civil law in and of itself. The argument is not a stringent reliance upon an ἄτεχνος appeal to the simplicity of authority, of the kind mentioned by Cicero in his demonstration in the *Topica*. Rather it derives from a series of formulations which rely upon interconnected methodological principles to construct a cohesive argument. These formulations can derive from the subject of the discussion itself,

³² Cic. *Inv. Rhet.* 2.21.62.

³³ Cic. *Inv. Rhet.* 1.11.14; 2.22.68.

³⁴ Cic. *Mur.* 9.19, 22.

³⁵ The variety of roles taken up by so-called jurists of the period was widespread. From politics to teaching instruction, Romans of the upper classes engaged in these pursuits with elasticity. For a discussion of jurists in roles other than their principal legal duties see Frier (1985) 139 - 196; Harries (2006) 27-50.

³⁶ See Chapter Three.

³⁷ In particular Cicero's *Topica* was written to instruct the young, up-coming jurist Trebatius Testa, whom Cicero had mentored – see Cic. *Top.* I.1.

³⁸ Cic. *Top.* I.2. This follows Aristotle's fundamental distinction in *Rhetorica* between discovery and decision as the two methodological divisions upon which argumentation is postulated.

³⁹ Latin: *locus*.

or from external appeals away from the subject, but the commonality among these arguments of varying postulates is their methodological underpinning in topics and dialectics. Topics is concerned with the discovery of the locus as the fundamental postulate from which an argumentative principle can be abstracted toward a persuasive argument; dialectics is a discourse of reasoned arguments formed from these postulates towards the establishment of a conclusion. These methods can be utilised to construct arguments from a rhetorical basis in relation to the law. The application of this methodology in litigation, by representatives who, as we have discussed,⁴⁰ had an acute awareness of and education in rhetoric, implies that submissions in court were rooted in these methods.

This is seen here in the arguments presented in the representation of Terentius. The appeal to the authority of the father which forms the first submission in favour of providing Terentius possession is an appeal to equity. Cicero provides the threefold composition of arguments rooted in appeals to equitable solutions.⁴¹

Here we are presented with various principles to appeal to as categories in which to postulate an argument – that is, *loci*. These often present dialectical and counter-posing positions. This is certainly the case here. We are given two genera from which an argument can be founded toward equity – in nature and in institutions. In our case, the natural order of paternal authority is in conflict with institutional testate succession. Yet, given the power of the praetor in law to provide for *bonorum possessio* the institutional credibility of the maintenance of institutional equity in favour of the will is undermined. Thus, the argument for paternal majesty to overcome the will forms a compelling case, based upon the foundational *locus* of equity. The character of the argument is definitive in creating a compelling case. Of the three characteristics of equity provided by Cicero we can see a clear link to the arguments proposed in the persuasion of Piso. The most evident is the establishment of the case on the authority of antiquity of custom. This forms the fundamental underpinning thesis of the argument presented and is not strictly legalistic in the sense that it appeals outwith the scope of legal *genera* to a topical foundation.

The adversarial style of the court case sets up a dialectical scheme in which the judge or praetor must decide on the side of righteousness. Cicero describes how argumentation in the court plays out:

But inquiries which are definite are all of them furnished with appropriate topics, as if they belonged to themselves, being divided into accusation and defence. And in them there are these kinds of argumentation. The accuser accuses a person of an act; the advocate for the defence opposes one of these excuses: either that the thing imputed

⁴⁰ See Chapter Three.

⁴¹ Cic. *Top.* IV. 23.

has not been done; or that, if it has been done, it deserves to be called by a different name; or that it was done lawfully and rightly.⁴²

The trajectory of the argument in court forms this dialectical opposition towards a persuasive “truth”. This truth, of course, in a civil case in court, is the judgement by the *iudex* to one side or the other. The oppositional argumentation forms the bulk of the advocate’s submission.

In this way, the advocate can use topical argumentation to achieve a rhetorical proof to the claim of his client by applying the oppositional arguments set out in *Topica*. This ultimately relies upon the praetor, judge, or jurymen, whichever he hopes to convince, understanding the value of a certain claim which the advocate proposes. The value of this claim is not understood in isolation, but rather against the backdrop of the social and cultural stresses which affect the mindset of the person being persuaded. It is for this reason that socially understood values, such as *pietas* and *aequitas*, came to form the topical postulate in the arguments of Roman courts, as Chapter Nine will examine.

8.3. Summary of Findings.

This chapter has examined the development and application of the legal instrument of *bonorum possessio*, which emerged from praetorian creation in the late Republican period.

The Chapter argues that the creation of *bonorum possessio* resulted from the practice of the courts before the praetor, and in particular the rhetorical arguments made before him, which influenced his reasoning in instituting the right to interdict.

The Chapter focuses on the socially understood Roman value of *aequitas*, the nature of which is discussed at Chapter Six. In this Chapter, it is applied to the law in relation to the development of *bonorum possessio*. It is argued that *aequitas* as a topical postulate is used in order to circumvent the civil law of succession, setting out an argument that the understood social condition of *aequitas* demands of the law an alternative remedy of possessory interdict to specific persons whom the praetor was convinced were *prima facie* entitled to the continued possession of an estate, or part of an estate. *Bonorum possessio* grew out of appeals before the praetor on the grounds of *aequitas*, and the law was instituted specifically in response to these claims, derived from the kind of topical argumentation set out in Chapter Six. The Chapter concludes that these topical arguments were central to the development of *bonorum possessio*.

The broader argument is that the influence of rhetoric at this point calls into question the relationship of rhetoric to the law during a period at which the dogmatic narrative maintains law had

⁴² Cic. *Top.* IV. 24.

become isolated and scientific. In practice, however, as *bonorum possessio* shows, during that very period the practicalities of case law had the impact of providing a rhetorical basis for the discounting of the civil law in favour of new legal remedies, remedies based on socially understood values such as *aequitas*.

The next chapter continues this line of inquiry, providing the further example of the *querela inofficiosi testamenti*.

9. Rhetoric and the *Querela inofficiosi testamenti*.

The use of rhetorical argumentation as a determinative factor in succession disputes in the later Republic is not limited to *bonorum possessio*. The degree to which the *ius civile* was superseded by alternative remedies and actions exceeded praetorian interdict. The *querela inofficiosi testamenti* made provision for an action against an undutious will: that is, a will which was regarded as overlooking those to whom a moral duty of inheritance was owed, even when there had been an explicit disinheritance of such persons. The *querela inofficiosi testamenti* provided grounds for complaint against an expressly made will and provided a basis by which descendants and ascendants of a testator could make claims on the basis of a legitimate expectation to receive, rather than through the legal instrument of testament. As with the praetor's interdict of *bonorum possessio*, the *querela inofficiosi testamenti* places a restriction upon the general succession rule of the freedom of the testator (within the bounds of formal legal requirements) to dispose of his property at his own discretion without challenge or restriction. Of importance to our discussion is not only the use of the *querela inofficiosi testamenti* as a means by which to circumvent the narrower prescriptions of the *ius civile*, but also the manner in which such cases were decided. Unlike *bonorum possessio*, the *querela inofficiosi testamenti* was heard before the court of the *centumviri*, the large jury court which offered a platform for noted orators to speak on behalf of clients. The arguments used were mostly rhetorical, not legal. Juristic writing seems to leave aside strictly prescribed legal requirements in favour of a simple principle: the success of a claim in the *querela inofficiosi testamenti* is determined by whether or not a jury views it as just, having heard the speeches of advocates representing clients. We see once more that rhetoric and law come together, not only as the main methodological apparatuses in the decision-making, but also as twin sources for the development of new legal actions and remedies. The development of the *querela inofficiosi testamenti* and the result of its use provide us with an example of the power of rhetorical argumentation as an important influence on the law. This chapter, therefore, will focus on three points: first, the substance of the *querela inofficiosi testamenti* - that is, its function in law; secondly, the operation of the *querela inofficiosi testamenti*, with reference to the means by which rhetoric - specifically the importance of *pietas* in decision-making - and the law combined to provide remedy to practical legal problems which arose in succession cases; and, conclusively, the impact of these findings within the broader schema of rhetorical influence on Roman succession law in the late Republic, revealing a determinative impact of rhetorical argumentation upon legal decision-making.

9.1. The Operation of the *Querela inofficiosi testamenti* in Roman Succession Law.

The *querela inofficiosi testamenti* came into use in the mid-first century BC, a later addition to Roman law than *bonorum possessio*. It nonetheless arose at the end of the period of the supposed scientific revolution of Roman law, shortly after the time of Cicero. The *querela inofficiosi testamenti* provided a protection to expectant heirs against a testator who, for reasons beholden unto himself, had disinherited them through a will. Reasons for disinheriting expectant heirs are several and various, some more reasonable than others. Roman law had been satisfied in general principle to afford to a testator the broad discretion to disinherit almost whomsoever he pleased: prodigal sons, wayward daughters, and inattentive spouses could all be simply and effectively disinherited by testament. Some restriction existed – not least the formal requirements in law to adhere to the valid testamentary form.¹ *Bonorum possessio* came to form a post-death restriction upon the realisation of the will of the testator, but, as the operation of a claim was necessarily *post-mortem*, its relationship to the writing of a testament takes on a different hue to forms designed to offer protection to expectant heirs during a testator's lifetime. Some protection was provided through the principle of *praeteritio*.² This rule set out that a testator had a duty by which he ought to either expressly institute as heirs those to whom in intestacy the property would pass, or, conversely, ought to expressly disinherit them. If a testator made no mention of such people in his testament they took on the title of *praeteriti* and the whole will could be undermined and property passed on under the civil law rules of intestacy.³ The protection afforded by *praeteritio*, according, very plausibly, to Leage, is the lingering trace of the ancient idea that property was vested in the family and not the individual *paterfamilias*.⁴ Gaius lends support to this view by attesting that *sui heredes* were regarded in their parent's lifetime as, as it were, something approaching owners of family property, if not legally so. The result was that, for instance, in the *ius civile*, a son in *potestas* could either be disinherited by being named in the testament as disinherited or by an expression that makes it clear by identification that the will of the testator is to disinherit him,⁵ a failure to do so could result in

¹ A famous example of the need to provide the formal, valid requirements of the testament are provided by the second century AD jurist Q. Cervidius Scaevola at Dig.31.88.17. The Digest provides a will written out as following: *Lucius Titius hoc meum testamentum scripsi ullo iuris perito, rationem animi mei potius secutus quam nimiam et miseram diligentiam: et si minus aliquid legitime minusue perite fecero, pro iure legitimo habere debet hominis sani uoluntas deinde heredes instituit*. In translation: "I, Lucius Tertius, have made this will without any legal experts observing the reason of my own mind rather than excessive and miserable pedantry; if I have done anything without due legality and skill, let the wishes of a sane man be treated as valid law". Unfortunately for Tertius, his plea was rejected in law, which determined the need for a valid form in the testament lest the will be held as void and intestacy applied.

² Leage (1964) 46.

³ Exceptions existed to this principle: women were under no obligation to disinherit as they had no *sui heredes*.

⁴ Leage (1964) 246.

⁵ E.g., "my youngest son is to be disinherited". It is worth noting that female heirs did not need to be disinherited by identification but simply by a general clause of disherison.

the will becoming void on challenge and falling into intestacy. *Praeteritio* therefore offered some protection to the family of the testator insofar as the disinheritance of *sui heredes* must be explicitly expressed and formally enshrined in order to be free from challenge. *Praeteritio*, though providing some solace to a child fearful of the intentions of a disgruntled parent, was far from a perfect protection of his expected birth right. A testator with the determination to disinherit his disaffected kin need only, with perhaps some legal advice, construct a formally valid testament which identified those potential *praeteriti* whom he wished to divest. The ancient *ius civile*, in this respect, very much favoured the testator over the dispossessed potential heir and allowed for disinheritances so long as explicitly expressed.

The *querela inofficiosi testamenti* developed as an attempted perfection of the protection afforded by *praeteritio*. It exceeded its antecedent in the protection it afforded to expectant heirs and instituted a nascent philosophical change as to whom the law favoured – the expectant heir could now truly expect the ability to challenge if disinherited unduly. As Johnston outlines:⁶

Only with the evolution of the *querela inofficiosi testamenti* did Roman law arrive toward the end of the Republic at the principle that descendants (or ascendants) of a testator actually had a legitimate expectation of acquiring a share of his estate, by virtue of law rather than the testator's own fancy.

The reasoning behind the evolution of this change on the principle of protection to expectant heirs remains obscure. The most convincing explanation for its development is that it was rooted in the idea that a *paterfamilias* owed a duty to those in his power to provide for them after his death, particular to those with ties of close kinship.⁷ While the *querela inofficiosi testamenti* certainly offered an improved protection against the total arbitrariness of a testator, it was nevertheless far from a complete revision of the general principle of the freedom to testate which underpinned Roman succession law. The kind of expectation that a modern heir may have in certain jurisdictions of *legitim* or *Pflichtteilsrecht* was but a dim horizon to the protection offered by the *querela inofficiosi testamenti* in the late Republic and

⁶ Johnston (1988) 3.

⁷ The Roman organisation of family ties and patronage created a system of interconnected reliance. Proponents of the development of the *querela inofficiosi testamenti* on the basis of a duty to family bonds point to this patronage system, see: Leage (1964) 252. For further reading on Roman patronage see: Saller (1982).

Principate.⁸ Roman law only moved towards this concept in the later Empire.⁹ The reality of the law during the classical period and the early republican development of the *querela inofficiosi testamenti* was rather that the testator was only restricted over one-third of his total estate – the amount to which an expectant heir could reasonably expect a share of from the estate falling into intestacy.

9.2. The Development of the *Querela inofficiosi testamenti*.

The development of the *querela inofficiosi testamenti* is in itself of significance. Unlike *bonorum possessio* the origin of the *querela inofficiosi testamenti* was not a praetorian development which arose obviously out of the practice of law courts. Rather, the development of the action was before the court of the *centumviri* and from juristic writing. This was unusual within the law of succession where the majority of innovations resulted through praetorian edict. Johnston outlines the exceptionality of this development:¹⁰

⁸ Medieval French law is the main bridge for the transportation of rights to the protection of expectant heirs against disinheritance to the modern civilian world. The example Scots law provides is a selection of protections to an expectant heir: the *jus relictiae/jus relicti* makes allowance for a protected right for the value to a fixed proportion of the estate for widows and widowers. The right of terce on the land of a deceased spouse had also existed in Scotland until its abolition under s.10 (1) Succession (Scotland) Act 1964. *Jus relictiae/jus relicti* also operates as a protection on *legitima portio* for widows/widowers in Louisiana. For an interesting comparison of similarities in succession law between Scotland and Louisiana from their shared Roman law heritage see: Scalise Jr. (2009), particularly at 112. Scots law also provides for a right of *legitim*, or *bairn's pairt*, to one half (if no relict) or one third (if a relict) of the share of a parent testator's moveable estate. The Scots *conditio si testator liberis decesserit* also protects the rights of children born after the execution of the will if no provision has been made for that child: *Greenham v Courtney* 2007 S.L.T. 355. For the Roman origins of the Scots *conditio*, see Paisley (2015). Louisiana law also provides protection of this kind to children of testators under the age of 24 or those regarded as interdicted (i.e., unable to care for themselves) under Article XII s.5 of the Louisiana Constitution. The German (BGB s.2305), Swiss (ZGB Art.471) and Austrian (ABGB s.757.) right of *Pflichtteilsrecht* also provides expectant heirs with protection from disinheritance, following directly from Justinian's innovations to the Roman law.

⁹ The extension of *legitim* to expectant heirs only began to take shape in the late 4th Century AD before the reign of Theodosius II. By this period a new action *ad supplendam legitimam* was being used to assert an heir's right to a legal portion of an estate to the exclusion of the *querela inofficiosi testamenti*. Justinian revised the law to limit the use of the *querela inofficiosi testamenti* to only cases where the heir had been completely disinherited, the *actio ad supplendum legitimam* replacing it in general use as a method of challenge to a legal portion without undermining the total will to intestacy but enabling the claimant to attain the one-fourth share that would have been available to him had the deceased been intestate. Justinian's 18th Novel set out that testators with fewer than four children must leave at least one-third of his estate to be shared among them equally, one half for those with more than four children; the 115th Novel set out that an ascendant was bound to institute as heirs those descendants who would have received a share on intestacy, unless specific legal grounds could be attested to justify the dishersion. Failure to comply with these prescription led to a void will, intestacy, and the inheritance of the *praeteritus* – with the exception of legacies, *fideicommissa* and appointments of guardians which remained valid. In cases where the will remained valid but a person to whom a share was owed did not receive that share in full, the *actio ad supplendum legitimam* was used to recover the full share. Brothers and sisters interests remained unaltered by the Novels but if they received nothing and the heir was *turpis*, they could use the *querela inofficiosi testamenti* to recover an intestate share. In its broader form, however, the *querela inofficiosi testamenti* was superfluous in the law of Justinian, superseded by a more rigorous right of *legitim* and the reassertion of a modified *praeteritio* as a more workable protection to disinherited heirs.

¹⁰ Johnston (2015) 210.

One remarkable feature of the *querela* is that unlike almost all other innovations in the law of succession, it owed nothing to the work of the praetor. Indeed litigation took place not in the praetor's jurisdiction but before the *centumviri*, a large 'lay' jury much frequented by aspiring and established orators.

The origin of the *querela inofficiosi testamenti* is of note as the forum from which it emerged is distinctly rhetorical in nature. The lay-jury at court was deeply responsible for the progression of the claim and the decision-making. Their judgement was swayed by oratorical speeches more than procedural prescriptions. Of special note is that the challenge of the pursuer was heard at the discretion of the court of the *centumviri*, and even the reasons behind this were not set out in law.

The court of the *centumviri* is in itself worth consideration. The origin of the court is certainly ancient, with its foundations at least in the mid-late-Republic. Its age presents particular problems in providing a detailed assessment of its origin and competence.¹¹ Certainly we know that it was a large lay-jury court, though perhaps not strictly of the one hundred members that the name suggests.¹² The exact size is less important than the general concept: a large jury of lay members who decided on certain points of law which were assigned to the jurisdiction of this particular method of decision-making body. Its existence raises some issues: what legal decisions were within its competence; by what procedure did it operate; why did the Roman judicature stray from the *unus iudex* as a method of dispute resolution in these cases; and, of most importance in relevance to our study, how did it make decisions?

The first of these questions has been the subject of much discussion, with opinion as to the range of competence polarised between a broad outlook and a more narrow confinement. Bozza argues, at one extreme, that the *centumviri* was limited in its competence strictly to issues of succession. She argues that this is based upon the supposed emergence of testamentary freedom in the later Republic which required a new, specialised court jurisdiction to oversee these claims.¹³ Wlassak, at the opposite pole, takes exception to this limitation on the court's competence. He argues that the competence of the *centumviri* stretched to cover all cases involving *vindicatioes*.¹⁴ Greenidge also states the competence extends very widely to property rights, burdens, inheritance and status issues.¹⁵ Wlassak's claim that the limitation imposed by Bozza does not have a basis in the source material, and furthers his claim of

¹¹ Kelly (1976) 2: "The jurisdiction (the *centumviri*) has been for many years the subject of controversy, partly an account of the difficulty in delineating its competence, partly on a question of its antiquity".

¹² Kelly (1976) 3. Festus argues that the court was in fact 105 members based on three members each from the thirty-five *tribus*, Paul, ex Fest. 54. Kunkel thinks that the number is certainly distorted and possibly an abbreviation of an original name: (1962) n.118. La Rosa holds an opposing argument that the exact 100 members is a sensible postulation based on *centuria* as a term used in voting, the military and trade guilds: (1952) 3.

¹³ Bozza (1928) 24.

¹⁴ Wlassak, RE.3 (1940)

¹⁵ Greenidge (1901) 182-183.

a broad competence upon Cicero's description of the court in *de Oratore* as given through the interlocutor Crassus:¹⁶

Nam volitare in foro, haerere in iure ac praetorum tribunalibus, iudicia privata magnarum rerum obire, in quibus saepe non de facto, sed de aequitate ac iure certetur, iactare se in causis centumviralibus, in quibus usucapionum, tutelarum, gentilitatum, agnationum, alluvionum, circumluvionum, nexorum, mancipiorum, parietum, luminum, stillicidiorum, testamentorum ruptorum aut ratorum, ceterarumque rerum innumerabilium iura versentur, cum omnino, quid suum, quid alienum, quare denique civis aut peregrinus, servus aut liber quispiam sit, ignoret, insignis est impudentiae.

“For to flit around the forum, to hang about the courts and the praetors’ platforms, to take on important civil suits before a single judge, where the dispute is often not about facts, but about equity and law, to make a show of oneself before the Council of One Hundred (*centumviri*) (which revolve around legal issues concerning acquisitions of property by possession, guardianship, kinship by clan or paternal descent, additions to land by alluvial deposits or island formation, transfers of property and sales, easements regarding shared wills, and all the other matters, which are innumerable), and to do all of this when one doesn’t have an inkling of what is another’s property or one’s own, or even what is the difference between a citizen and a foreigner or between a slave and a free man – that is pure shamelessness.

Bozza argued that this did not necessarily lead to inconsistency with her position and that Wlassak was overstating the point, and Kelly agreed.¹⁷ Nonetheless, Wlassak continues to argue for a wide competence for the court based on two passages from the Digest.¹⁸ This argument seems unfounded. Koschaker points to its weakness in establishing any solid proof as to a wide competence.¹⁹ Kelly points to the Digest and a section by Pomponius to offer further dismantling of Wlassak’s point, on the basis of the *recupatores* taking jurisdiction in one of the areas, *liberalis causa*, Wlassak assigned to the *centumviri*.²⁰ Kaser offers a more trepidatious version of Wlassak’s broad competence approach. Kaser argues that the court had competence over disputes on status, extending to *hereditas petitio*, *querela inofficiosi testamenti*, *vindicationes* and *causae liberales*.²¹ As Kelly points out, Kaser’s argument suffers in much the same way as Wlassak’s, where direct mention of the *centumviri* seems to be lacking,

¹⁶ Cic. *De or.* I.173. Translated by May & Wisse (2001) 97.

¹⁷ Kelly (1976) 10.

¹⁸ Dig. 42.1.38 (Paul) and Dig. 40.1.24.pr. (Hermogenianus). These passages, Wlassak argues, shows that the court has competence over *causae liberales*. Bozza objects to this reading on the grounds that it fails to link the idea sufficiently to the evidence: (1928) 63.

¹⁹ Koschaker (1940) 685-686. 50 ZSS

²⁰ Kelly (1976) 12. Dig. 42.1.36.

²¹ Kaser (1971) 39. He also argued that it resolved ownership of land disputes based on Dig. 44.1.16.18.

and undermines the probability of the argument.²² Kelly settles that the *centumviri* was primarily concerned with succession issues.²³

For my part, it seems clear to me that succession issues were the fundamental questions dealt with by the *centumviri*. Whilst the restrictive approach taken by Bozza seems highly probable, the lack of evidence does not limit the possibility that the court was competent in other matters. Certainly all of the areas of law mentioned by Cicero in *de Oratore* relate to succession. Moreover, the areas over which competence was held were *hereditas petitiones* and the *querela inofficiosi testamenti*, both integrally part of succession law.²⁴

The second question is also technical insofar as it is procedural. This in many ways falls into the third question of why the *centumviri* was favoured over the *unus iudex* for the resolution of these disputes. The reason why there was a need for a different court is conjectural. We have no sources which explicitly state the reason. Kelly argues that the reason was one of importance, that the court offered a prestige in its grand format which was lacking from a single judge.²⁵ Bozza urges that there was a need for specialisation due to a growth in testamentary freedom in the later Republic.²⁶ Other arguments are also put forward: Kunkel argues that the court was so archaic that it predated the *unus iudex*;²⁷ whereas Behrends argues it came later as part of a movement toward democratisation.²⁸ Each of these is valid and possible. It certainly seems that in the Republican and early Principate period pre-eminence was given to the claims made before the court so as to bring the decision before such a logistically difficult setting.²⁹ Given that both types of instance before the court we know for sure were with regards to claims against testate succession and that, as mentioned elsewhere,³⁰ testate succession would have been usually a reserve of the rich, both specialisation and pre-eminence would give rise to the need for a more elaborate decision making body than the *unus iudex*. There is some evidence against this view. Pliny complains of being “kept busy” by centumviral cases not involving large estates.³¹ Moreover, Tacitus talks about the subsidiary nature of the *centumviri*.³² These sources, however, come from a later imperial period, and while it may be the case that the reputation of the centumviral court

²² Kelly (1976) 14.

²³ Kelly (1976) 14.

²⁴ The textual evidence for the courts competence in these areas is overwhelming: Cic. *Brut* 144; 197; Cic. *de Leg. Agr.* 2.44; Cic. *De or.* I.173; Val. Max. 7.7.1 ; 7.7.2 ; Quint. *Inst. Or.* 3.10.3; 4.2.5; 7.4.2; Plin *Ep.* 5.1.7.; Dig. 5.2.13; Dig. 5.2.17.pr.

²⁵ Kelly (1976) 19-20.

²⁶ Bozza (1928) 24.

²⁷ Kunkel (1962) 115.

²⁸ Behrends. (1970) 106.

²⁹ The number of great orators who attended the court is testament to this. To underpin the importance of the court there is further evidence, such as the raising of a statue for the orator C. Sullustius Crispus Passienus for his speeches before the centumviri, see frg. Suetonius in Roth 290.

³⁰ Daube (1965).

³¹ Pliny *Ep.* 2.14.

³² Tacitus. *Dial.* 38.

fell from grace, certainly around the time of Cicero it was held in esteem, particularly for its oratory.³³ This would indicate a decline in stature and thus perhaps the reasons for its initiation on the grounds of pre-eminence are separated by time and distance from the mundanity of its later function.

9.3. The Centumviral Court.

The specialist nature of the centumviral court meant that its summons, the procedure by which it was accessed and its organisation differed from the process by which legal redress was sought under the formulary procedure before the *unus iudex*. Greenidge states that the centumviral court operated as a “standing panel” of ancient Roman heritage.³⁴ During the bulk of the Republican period, he suggests that the panel – of a number around, though not definitely one hundred *iudices* – was appointed in association to the appointment of the *praetor urbanus* for a fixed period of time.³⁵ The practical considerations of summoning this large court led Greenidge to the conclusion that “its spheres must have been accurately defined”.³⁶ This is in keeping with the conclusion reached from the legal sources about the limitation of its competence to specialist issues, mainly around succession.

The procedure by which a claimant found himself before the centumviral court followed a similar separation of phases to the standard civil procedure in Roman law: a legal phase before the praetor *in iure* followed by a secondary phase of determination before judges.³⁷ The older *legis actio* system, which had all but disappeared by the time of the *querela inofficiosi testamenti* for cases before the *unus iudex*, continued to function as the procedural typeset for centumviral cases.³⁸ The *legis actio sacramento* was the only means by which the court could be initiated in Cicero’s period.³⁹ The standard suit would follow this model: the claimant would appear for the vindication of an object claimed to be owned before the praetor, alongside the possessor-defender, and claim under the *legis actio sacramento*. The praetor would hear the pleas, essentially taking the form of claim and counter-claim, the praetor would then offer interim possession before the claim *sacramentum* before the centumviral court (or decemvirs if appropriate).⁴⁰ The centumviral court would then come to session on the given date and

³³ Cic. *De or.* II.98.

³⁴ Greenidge (1901) 38. Its age is assumed from the symbolism associated with the *hasta*, or spear, which is placed before the judges as an indication of ownership, see G. Inst. 4.16. Bablitz agrees that the Centumviral court was formed of “panels” of judges: Bablitz (2007) 34.

³⁵ Greenidge (1901) 43-44.

³⁶ Greenidge (1901) 44.

³⁷ See 7.1 – 7.2.

³⁸ Lintott (2004) 65-66.

³⁹ Lintott (2004) 65; Greenidge (1901) 49;

⁴⁰ Greenidge (1901) 49-75 provides a lengthier description of the procedure. For trials which were deemed to be heard before a singular judge, the parties would return to the praetor for assignment of a judge.

arguments in law (and fact) would be heard before it. During the time of Cicero, the period in which the *querela inofficiosi testamenti* emerged as a legal challenge, the operation of Roman litigation had changed, as the formulary system became pre-eminent. Gaius makes reference to the courts which held legitimate authority under the law, including an extension of legal legitimacy to courts outside the prescribed actions of the *legis actiones*.⁴¹ Confusingly, he makes no reference to the *centumviri* (nor the *decemviri*) in his explanation of legitimate courts. Greenidge offers a convincing explanation that as the move to the formulary procedure was only affected by formulary claims and as the procedural basis for claims before the centumviral court remained under the *legis actiones* and therefore was not relevant to Gaius's discussion.⁴² The court remained legitimate and in use using the procedure outlined above.⁴³

The organisation of the court is of importance to how it came to its decisions. The significance of the court has an effect upon the reverence afforded to it by the judges, advocates, litigants and on-looking audience. Lintott calls the *centumviri* "the most grand and solemn court".⁴⁴ The high status affairs which came before the court underpinned this solemnity. The cases before the centumviral court attracted high interest. Bablitz offers a thorough reconstruction of the court, which although only theoretical, suggests that the panels of judges would meet in four sub-groupings which could run concurrently or as a single, full court with all judges present.⁴⁵ The number of the judges, though implied by the name of the court to be one-hundred, Greenidge puts it at one-hundred-and-five.⁴⁶ Kelly agrees with this numerical assessment, following a claim in Festus.⁴⁷ La Rosa puts the number at one-hundred as the original *centuria* of the Roman Senate, but this argument relies largely on her own conjecture.⁴⁸ Bablitz puts the number at a higher one-hundred-and-eighty, which split into four panels of forty five or sat as one.⁴⁹ As this number is arrived at through a complete reconstruction of the lay out of the court, it is compelling. The point regardless of the exact number is that the jury-panel of judges was large. The judges would be appealed to as a group, or as an individual within the group, and were free to discuss the case among themselves. Each judge held a vote and a majority carried victory.⁵⁰ In the period

⁴¹ G. Inst.4.103-104.

⁴² Greenidge. 173.

⁴³ We know the court continued as we have clear testament to that fact, not least by Cicero himself among several others, see: Cic. *Caec.* 96-97. See also G.Inst.4.31 and G. Inst. 4.96 where the Centumviral court is enacted by oath in relation to the Crepereian Act.

⁴⁴ Lintott (2004) 66.

⁴⁵ Bablitz (2007) 62. Bablitz relies primarily on Quintilian for this conclusion, particularly his mention of a "*primus tribunali*" Quint. *Inst.* 12. 5. 6. But also the account in the letters of Pliny regarding the advocate Domitius Afer being interrupted in his speech by another court "*ex proximo*", see: Plin. *Ep.* 2.14.11. For Bablitz full reconstruction of the courtroom see (2007) 61-70.

⁴⁶ Greenidge (1901) 43.

⁴⁷ Kelly (1976) 3. See also at note 1 of that page his reference to Paul ex Fest. 54 in Mueller.

⁴⁸ LaRosa (1952) 29.

⁴⁹ Bablitz. (2007) 62.

⁵⁰ In cases of undutiful wills Marcellus is of the opinion that the more "humane" approach is to side with the will in cases where the judge's vote is split see Dig. 5.2.10 (Marcellus, Digest, Book 3).

directly after the *querela inofficiosi testamenti* came into being, at some point in the early first century AD, the centumviral court took up residence in the Basilica Iulia.⁵¹ During the inception of the *querela inofficiosi testamenti* the location where the court was held is not explicitly attested to, but some public building capable of holding such meeting in the *forum Romanum* is the most likely venue for the court. The public nature of the court is important, as a large audience of non-judges would have been able to attend the court and listen to the proceedings. This affects the dynamics of the court profoundly. The advocate, in making his case, is concerned not only with moving the judges, but also with appealing to the popular mood surrounding the trial. The physical arrangement of the court, as we can glean from later sources, particularly Pliny, describing the arrangements in the Basilica Iulia, reveal the extent to which oratory played a vital rôle in the advocate's attempts to win over the judges to his side of the case.⁵²

The practical operation of the *querela inofficiosi testamenti* reveals to us a clearer understanding of the reasoning behind its development, its effect and the extent to which rhetoric became a decisive factor in its application. A series of legal criteria had to be necessarily met in order for a challenge to be launched under the *querela inofficiosi testamenti*.

The first legal criterion to be satisfied is the need for an heir against whom an action can be brought, after the acceptance of the *hereditas* by that heir, *aditio*. Generally one must claim on one's own merits – for instance, a father cannot claim on behalf of a son without consent.⁵³ An action which has been raised and then dropped cannot be resumed.⁵⁴ From this basis, the pursuer must establish that under the will he does not receive the share to which he would be entitled had the testator died intestate.⁵⁵ Furthermore, the pursuer must not be able to acquire his share in another way, for example, through a claim of *bonorum possessio* before the praetor.⁵⁶ The pursuer cannot have acquiesced to any of the terms of the testament without personally barring himself from a *querela inofficiosi testamenti*. For example, accepting legacies, trusts or a *transactio* between the testator and the pursuer would

⁵¹ Bablitz. (2007) 62. Richardson argues that the *centumviri* did not take up residence in the Basilica Iulia until the end of the first Century AD, see Richardson (1992) 52-53. In my view, Bablitz is correct to discount this opinion on the evidence of Tac. *Ann.* 14.19.

⁵² Plin. *Ep.* 4.16.1-3. See also Quint. *Inst.* 12.5.6. For a discussion of the need to project the voice to reach the whole audience.

⁵³ Dig. 5.2.8. (Ulpian, *Edict*, book 14). At the same passage we learn a mother also cannot bring an action for a son who is *impubes*, nor can a brother, unless against the father's will.

⁵⁴ Dig. 5.2.8.1. (Ulpian, *Edict*, book 14).

⁵⁵ The various combinations of inheritances present in the will can lead to some complexity in working out that actual amount which can be claimed. Ulpian, with reference to a reply of Papinian, outlines the convoluted but highly plausible scenario of a claim for undutiful will made by a son, but which has ramifications as a result of the entitlements of various other heirs, including another son who does not claim under the challenge for undutiful wills, see Dig. 5.2.8.8. (Ulpian, *Edict*, book 14). The circumstantial nature of the result of a successful challenge is also outlined at Dig. 5.2.15.2. (Papinian, *Questions*, book 14) where a ruling had been successful in favour of one claimant but not the other but yet stood, as an exception to the general rule of not dying partly intestate.

⁵⁶ Dig. 5.2.12. (Modestinus, *Prescriptions*, sole book). See also, Nicholas (1962) 262.

exclude the pursuer's right to make a claim against the testament under the *querela inofficiosi testamenti*. A time limitation also existed upon the right to claim, two years (five years in later law) must have elapsed since the time at which the defender made *aditio*.⁵⁷ The final criterion, and the one of most importance to us, is the final point on which the decision was ultimately made: the pursuer must demonstrate that he did not deserve to be disinherited and that his omission from the will was undutious.⁵⁸ The satisfaction of these criteria will lead to a successful claim. A claim which is made but fails results in the complainer losing any other provisions made to him under the will.⁵⁹

The immediately striking point is the distinction between the final criterion of deserved disherision and the other criteria set out for the satisfaction of a successful claim. The other criteria deal in easy to establish facts rather than the vague and imprecise need for evidence as to the deservedness of disherision, a criterion which is not easily established in fact. What is more, whereas the other criteria set up the basis for a claim, the final criterion, is the one on which the decision is actually made. The other criteria establish simply who is entitled to make a claim, not providing standards for whether a claim is successful or otherwise. Rather, the jurists, in a rare moment of incompleteness, leave the final decision-making event of a legal institution, which potentially undermines the integrity of the ancient civil law, ambiguous. The decision itself is made in the court of the *centumviri* after arguments are made by the litigants as to the deservedness of the disinheritance. The argument made in that court was chiefly rhetorical and the jurists placed no limitation on the scope of argument used in the fulfilment of the final legal criterion they provided for a successful claim. The essence of a claim under the *querela inofficiosi testamenti* is the ability of applicable claimants to convince the jury of the *centumviri* that they were divested of their due inheritance unjustly. The arguments used to persuade the jury to one side or the other were deeply rhetorical.

The silence of the jurists as to the fulfilment of the final criteria has been understood as them stepping down from a specificity about which they have little knowledge: rhetorical argumentation before a jury. This demarcation *prima facie* makes sense, that jurists have set up the legal criteria upon which a rhetorical argument can be made before a jury to make a decision, which, in turn, is best left to orators and therefore juristic writing goes no further than establishing the procedural basis for the decision without interfering on how the decision itself is made. This is the interpretation put forward – though somewhat tentatively - by Johnston, who states:⁶⁰

⁵⁷ Dig. 5.2.8.11. (Ulpian, *Edict*, book 14).

⁵⁸ Dig. 5.2.3. (Marcellus *Digest*, book 3) outlines the need “to argue one should not have been disinherited or passed over”. What this meant in practice will be examined throughout this chapter in more depth.

⁵⁹ Dig. 5.2.8.14. (Ulpian *Edict*, book 14).

⁶⁰ Johnston (1999) 50.

There are perfectly good reasons for the disinheriting relatives, but it is rather interesting that the jurists do not appear to discuss them. It may be that they took the high-minded view that this was a matter for rhetoricians.

The result of this interpretation, therefore, is that the final event of decision-making in the case of the *querela inofficiosi testamenti* exists as a separate phase to the legal phase on which the jurists offer requisite criteria. The law establishes who is entitled to claim, but does not go far enough to explain when a claim itself is actually valid, this responsibility is abandoned to orators who must simply convince the jury one way or the other. This would explain the omission of the jurists on the issue of the resolution of a claim. It is outwith their specialisation and having dealt with the broad legal criteria for a claim to exist, they are willing, it would seem, to retire from the issue and leave it to the separate specialism of rhetoric to decide on issues of justice and equity.

This view provides the simplest explanation for the jurists' omission of a discussion of what counts as justifying an undutious disinheritance. On closer inspection, however, it raises more problems than it resolves. In the first instance, as discussed at length, the separation of jurists and orators as specialists engaged in discreet and exclusive activities is overstated. Jurists, far from being ignorant of rhetorical concepts, would have been broadly aware of the kind of arguments their construction of the *querela inofficiosi testamenti* initiated. Their silence could not have been out of ignorance, nor even a lack of expertise, but is more likely to have been the result of another factor. Perhaps then, rather than acknowledging a complete lack of expertise in rhetoric, the jurists simply deferred to those who were truly expert, the orators who actually made the speech. This again seems unconvincing for two reasons: first, supposed rivalry developed out of intellectual snobbery has become a centrepiece of the narrative of a distinction between jurists and orators, it would seem odd for the jurists to concede ground to orators of their own volition; secondly, as the ultimate decision for the equitability of a claim under the *querela inofficiosi testamenti* lay with a persuaded jury, the vagueness of the jurists in this instance is deeply uncharacteristic. The final and most evident problem to arise from this interpretation is evident: why would the jurists not have provided for a legal solution to a legal form of their own creation? As we have seen, the *querela inofficiosi testamenti* did not develop out of the praetorian court like *bonorum possessio*, but was rather the development of pure juristic law. Why then would the jurists construct the law in such a way that it ultimately descended into a matter of rhetoric, which, it is contended, they high-mindedly dismissed as beneath their skillset? This would seem an unnecessary concession of the law to rhetoric and an imperfect way for the jurists to conclude law of their own creation. What then could be the basis for this; for the current proposition is far from convincing?

Though the court of the *centumviri* was not restricted in its discretionary ability to hear challenges to wills, the first, early justification given for hearing the case was that the challenge was based on the sanity of the testator when the will was made. The sources belie the authenticity of insanity

as the actual cause for action, as the wide scope of what was meant by insane is perceptibly disingenuous, as can be seen in the jurist Marcian's definition:⁶¹

Hoc colore inofficiosi testamenti agitur, quasi non sanae mentis fuerunt, ut testamentum ordinarent. Et hoc dicitur non quasi uere furiosus uel demens testatus sit, sed recte quidem fecit testamentum, sed non ex officio pietatis: nam si uere furiosus esset uel demens, nullum est testamentum.

The supposition on which an action for undutiful will is brought is that the testators were of unsound mind for making a will. And by this is meant not that the testator was really a lunatic or out of his mind but that the will was correctly made but without a due regard for natural claims; for if he were really a lunatic or out of his mind, the will is void.

A worryingly low bar for insanity, indeed. Yet, as Marcian points out, true insanity would render any will void *ab initio* as the testator is *furiosus*. The will is considered *iniustum* if a testator lacks the capacity, *testamenti factio*,⁶² to make a will at the time the will was made.⁶³ A generally insane person, therefore, could make a will, but only if he was lucid at the time the will was made; a person who was insane without lucid intervals was lacking in capacity and therefore could not make a valid will. Wills made before the onset of insanity, of course, remained valid despite the later decline in the mental health of the testator. So then, given that a will made by a person who was insane at the time of making was void *ab initio*, it is clearly outside the boundaries of logic to assume that a challenge *via* the *querela inofficiosi testamenti* could reasonably be based on an insane testator, as there would, in fact, be no legally valid will to challenge at all. Rather, as du Plessis argues, the juristic conversation of insanity was “pretence as it is clear that insanity was not really the issue”.⁶⁴ What then was really at issue in a challenge for an undutiful will?

The fundamental criterion which ought to be fulfilled was that the testator had been “undutiful” in the making of his will. This terminology is not brimming with clarity, yet it seems fair to suppose that the basic scenario which leads to an available challenge is when the testator acts in a manner which is unjust toward the pursuer. The issue then is not so much insanity as inequity. Yet, this realisation

⁶¹ Dig. 5.2.2. (Marcian, *Institutes* Book 4). Translated by Watson (1985) 175.

⁶² Dig. 28.1.4. (Gaius, *Institutes*, book 2): *Si quaeramus, an ualet testamentum, in primis animaduertere debemus, an is qui fecerit testamentum habuerit testamenti factionem, deinde, si habuerit, requiremus, an secundum regulas iuris civilis testatus sit.* In translation: “If we are inquiring whether a will is valid, we ought first of all to consider whether the person who made the will had *testamenti factio*, and then, if he did have it, we may investigate whether he made a will in accordance with the rules of the civil law”. Translated by Watson (1985) 816.

⁶³ Dig. 28.1.2. (Labeo, *Posthumous Works*, Epitomised by Javolenus, book 1): *In eo qui testator eius temporis, quo testamentum facit, integritas mentis, non corporis sanitas exigenda est.* In translation: “In the case of someone who is making his will, at the time when he makes the will, soundness of mind is required, not health of body”. Translated by Watson (1985) 816.

⁶⁴ Du Plessis (2015) 234.

does little to aid our understanding of the exact circumstances in which a claim may be brought, or in what way the court of the *centumviri* operated its discretion in allowing for these cases to be heard with any consistency.

One of the reasons the juristic sources point to as being the underlying cause for challenge to a will was a misunderstanding between the testator and the pursuer resulting in an undutiful disinheritance, as the jurist Marcellus writes:⁶⁵

Inofficiosum testamentum dicere hoc est allegare, quare exheredari uel praeteriri non debuerit: quod plerumque accidit, cum falso parentes instimulati liberos suos uel exheredant uel praetereunt.

To say a will is undutiful is to argue one should not have been disinherited or passed over. This generally happens when parents disinherit or pass over their children through a misunderstanding.

This certainly falls outwith what could be reasonably termed grounds of challenge by insanity, misunderstandings are not the same as madness on the part of the testator. Rather, the pretence of insanity was a ruse to justify the disregard which was being shown to the testator's right to choose to whom he could testate. It was also used as a reason for which the civil law of succession could be overturned. Rather, it is inequity which takes centre stage in considerations of when the *querela inofficiosi testamenti* could be brought, as Gaius tells us:⁶⁶

Non est enim consentiendum parentibus, qui iniuriam aduersus liberos suos testamento inducunt: quod plerumque faciunt, maligne circa sanguinem suum inferentes iudicium, nouercalibus delenimentis instigationibusue corrupti.

For Parents should not be allowed to treat their children unjustly in their wills. They generally do this, passing an adverse judgement on their own flesh and blood, when they have been led astray by the blandishments or incitements of stepmothers.

Here we are given clear evidence that injustice and inequity is at the heart of what constitutes an undutiful will. Here, Gaius goes on to provide us with an example of when a misunderstanding between a testator and prospective heir can lead to an unjust and undutiful disinheritance: a child passed over by a father resulting from the machinations of a begrudging stepmother. This example reveals that rather than insanity of the testator being the reason for the use of the *querela inofficiosi testamenti* that an intuition of injustice is the pivotal factor in the challenge. Yet, this raises further issues. It is still not clear where the limitations of a potential challenge lay, and, more so, it seems less clear how consistency

⁶⁵ Dig. 5.2.3. (Marcellus, *Digest, book 3*). Translated by Watson (1985) 176.

⁶⁶ Dig. 5.2.4. (Gaius, *Lex Glitia, single book*). Translated by Watson (1985) 176.

could be attained where an intuition of injustice underpinned a challenge. It is not incredible to envisage a situation in which every child would feel unjustly cheated by every disinheritance by a parent and thus lead to the use of the *querela inofficiosi testamenti* with overzealous abandon. Certainly restriction existed as to the degree of familial separation by which claims were limited, alongside other limitations such as a personal bar through acquiescence to other terms in the will, yet a claim of pure dutifulness still made complaints under the *querela inofficiosi testamenti* relatively common. According to Ulpian:⁶⁷

Sciendum est frequentes esse inofficiosi querellas: omnibus enim tam parentibus quam liberis de inofficioso licet disputare. Cognati enim proprii qui sunt ultra fratrem melius facerent, si se sumptibus inanibus non uexarent, cum obtinere spem non haberent.

It should be noted that complaints against the undutiful are common; for it is possible for everyone to argue want of duty, parents as well as children. For one's cognates beyond the degree of brother would do better not to trouble themselves with useless expense since they are not in a position to succeed.

Challenges to the will as set out were reasonably common therefore; those who were not sufficiently close to the deceased did not commonly press a challenge, however, as their degree of separation made them unable to succeed in a claim. As the *querela inofficiosi testamenti* could only be brought forward as a challenge by those who would have inherited had the testator died intestate, the claims which succeeded were limited to those made by descendants, ascendants, brothers and sisters.⁶⁸

The key phrase in Marcian's description of when the *querela inofficiosi testamenti* was applicable is when the will was regarded as being "*non ex officio pietatis*".⁶⁹ That is without regard to the *pietas* that is required of a particular office, or relationship. The interplay between these two concepts is of prime significance in the reason for deciding the worthiness of a challenge. First, the relationship between the testator and the aggrieved claimant is of central importance to the merit of the claim, insofar as the status assigned to the parties, that is, how the interpersonal relationship is viewed institutionally, is the basis upon which the law itself assigns property transfers in the *ius civile*.

⁶⁷ Dig. 5.2.1. (Ulpian. *Edict*, book 14). Translated by Watson (1985) 175.

⁶⁸ Later law changed the early actions under the *querela inofficiosi testamenti* and also what developed in the classical law. In the later Empire collaterals were unable to launch the action unless against a disreputable person. As a result, if there were no descendants or no descendants in a position to make a claim then the right passed to ascendants. In Justinian's law the challenge was limited to those excluded from the will altogether. There was also a provision that ascendants had to expressly appoint as heirs those ascendants who would inherit on intestacy and vice versa, not doing so resulted in an invalid appointment and omission of the unnamed person, though the rest of the will remained valid. The omitted person had the *querela inofficiosi testamenti* available to him as a means to reclaim inheritance.

⁶⁹ Dig. 5.2.2. (Marcian. *Institutes*, book 14).

9.4. *Pietas* as Applied in respect to the *Querela inofficiosi testamenti* in the *Codex Iustinianus*.

It is right to say that outwith the attestation of Valerius Maximus and Cicero there is little evidence for the actual application of *pietas* as the *ratio decidendi* for decisions made in challenges under *querela inofficiosi testamenti* during the later Republican period. Nonetheless, we can certainly be sure that it was applied as a key factor in the decision-making process. The jurists, as outlined, give verification of this fact. However, our source material is dishearteningly limited in providing us with an insight as to the exact mechanisms by which the *querela inofficiosi testamenti* was dependent upon *pietas* as the fundamental, underpinning factor by which the *centumviri* were persuaded. Furthermore, the justification for the reasoning behind *pietas* overriding the civil law as a basis for decision-making remains shrouded in uncertainty. This uncertainty is behind the rise of the prevailing idea that a separation occurred between the law as set out by jurists in the first phase of a challenge and an extra-legal second phase which began in pleadings before the centumviral court, where rhetoric was applied with little relation to the preceding legal phase. Despite this lack of sources from the time of the late Republic, legal literature from later periods provides us with a discernible insight as to how *pietas* operated in relation to law in challenges for undutiful wills. In particular, the *Codex Iustinianus* provides a series of imperial rescripts which, though written at a much later period than that of the inception of the *querela inofficiosi testamenti*, and, as such, subject to the social and legal differences which the separating centuries impose, nevertheless makes mention of claims of undutiful wills in their historical context, either directly or as an analogous legal form through which other issues could be solved. These texts are useful, though it must be stressed imperfect, in providing us with evidence of the actual, practical relationship between law and rhetoric in the centumviral court in the period of the later Republic.

Before such an examination some consideration must be given to substantive changes in succession law which occurred in the intervening time which has a direct impact on the cases presented. First, the obvious institutional changes which separate the Republic from the Empire, the introduction of specific legal instruments with regards to succession law must be borne to properly contextualise the law according to period. The second of these is the *Senatusconsultum Orphitianum* of AD 178, during the reign of Marcus Aurelius. This made provision for the children to make first claim of their mother's estate as *legitimi* under the praetorian rules of succession. This prevented fathers from limiting emancipated daughters from making wills through guardianship, but also afforded children the same priority of inheritance from mothers' wills as they were due under fathers' wills, changing the

dimension of the order of succession.⁷⁰ Thirdly, the edictal category of *unde liberi* was not conclusively in existence by the 50s BC, and therefore is of dubious application in regards to development of the *querela inofficiosi testamenti* in the mid-first century BC.⁷¹ These changes to the law caused divergence in terms of substantive legal points but did not undermine the general integrity of the form of challenge for undutiful wills. Therefore, bearing in mind these changes, the general principles which existed in the imperial period were largely the same as those which were present in the form of the challenge in the later Republic. The rescripts of emperors in this later period are therefore of merit in deciphering the methodology used in the approach to the *querela inofficiosi testamenti* during the earlier period.

The first of the related rescripts found in the *Codex Iustinianus* is given by the emperor Philip the Arab to a certain Nicanor and Papiniana, and deals directly with the *querela inofficiosi testamenti*, dating from AD 245. The case presented a mother offering gifts to strangers and certain children in order to deprive other children of their legal portion:⁷²

Imp. Philippus A. Nicanori et Papinianae. Si, ut adlegatis, mater vestra ad deludendam inofficiosi querellam paene universas facultates suas, dum ageret in rebus humanis, factis donationibus sive in quosdam liberos sive extraneos exhausit ac postea vox ex duabus unciis fecit heredes easque legatis et fideicommissis exinanire gestivit, non iniuria iuxta formam super inofficiosi testamenti testamento constitutorum subveniri vobis utpote quartam partem non habentibus desideratis.

Emperor PHILIP Augustus to Nicanor and Papiniana. If, as you allege, your mother, in order to frustrate a complaint seeking to have her will set aside as undutiful, during her lifetime almost exhausted all her property by making gifts either to certain of her children or to strangers, and afterwards made you heirs to two-twelfths of her property and wanted to reduce that to nothing through legacies and testamentary requests, you do not unjustly desire to be aided by the provisions of the constitutions made concerning undutiful wills, as not having received your legal portion.

⁷⁰ For a good outline of the implications of the *senatusconsultum Orphitianum* see Gardner (1998) 231-233. A view of the social reasons for its introduction is found at Moreu (2010) 319-320. As an instrument for the protection of children's welfare and the safeguarding of succession within the *familia*, see Rawson (1997) 226-227. For a more doctrinal analysis see Buckland (1963) 373-374. Juristic references: Dig. 38.17; Paul. *Sent.* 4.8.; Ulp. *Reg.* 26.7. *Inst.* 3.4.

⁷¹ Watson (1971) 83 points to the testament of Val. Max. (7.8.4) to deduce that had the category been in existence then *bonorum possessio* would have provided a more obvious remedy than the claim under *querela inofficiosi testamenti*. Dig. 2.2.23. (Paul) is also of interest insofar as it states that an emancipated son could claim under *bonorum possessio contra tabulas* but not bring the *querela inofficiosi testamenti* if disinherited, the implication being that before *unde liberi* was introduced, that is, before this text, only *sui heredes* had to be expressly named to be disinherited or instituted. Gardner (1998) 34-38 points to some evidence of the existence of *unde liberi* and *unde cognati* by 66BC based on Val. Max. 7.7.2. but the documentary evidence remains inconclusive.

⁷² Cod. Iust. 3.29.1. Posted on August 29th AD 245, in the consulship of Philip Augustus and Titianus. Translated by Blume, in Frier (2016) 703.

The text here provides us with a clear case of a challenge based upon a mother neglecting her supposed duty to make provision in her will for her children. As the text dates from after AD 178, the *senatusconsultum Orphitianum* applies. Given that there is a use of legacies and testamentary requests (i.e., fideicommissa), to delimit that actually inherited to below a quarter of the estate, an immediate issue arises, as this is a reduction to below the value which ought to be apportioned to heirs under the *lex Falcidia* of 40 BC. A quarter of the estate is recoverable for apportionment between named heirs on this ground alone and combats legacy provisions which reduce the inheritance to nothing.⁷³ Yet, the deliberate exhaustion of the estate through a series of gifts given to strangers and other children still frustrates the pursuers from attaining an equitable amount in the will. Phillip the Arab, on noting this, points out that a remedy can be sought for the mother's cynical attempt to manipulate her property away from Nicanor and Papiniana and can be redressed by a challenge under the *querela inofficiosi testamenti*. The challenge for an undutiful will is due as such a claim would not be unjust in relation to the constitutions regarding the assignation of the legal portion. The text provides us with clear evidence that the *querela inofficiosi testamenti* had survived in a discernible form to the 3rd Century AD. Moreover, it reveals that it is applied in scenarios where an injustice has occurred due to a non-receipt of the prescribed legal portion in a will for heirs to whom a certain portion is owed. Other than that this injustice presents us with a viable challenge, the text does not go further to reveal the bases on which a raised action would be successful. Nevertheless, the text frames the use of the *querela inofficiosi testamenti* in a similar vein to earlier juristic texts and allows us to proceed with confidence that claims for undutiful wills were made in circumstances similar to those set out by the classical jurists. The question in law here is whether the exhaustion of the property by the mother was done to frustrate a duty to provide for the legal portion to the claimant children. If the dispersal of gifts was designed to do so, the fact that the claim is made under provisions for undutious wills is indicative of the existence of a relationship of duty between mother and children beyond simply the provision for the remaining *hereditas* under the quarter apportionment rule of the *lex Falcidia*. The inference being that some portion of *mortis causa* gifts can be recovered under a challenge of an undutiful will by aggrieved child heirs. The implication here is that the duty by which that inheritance is owed is more akin to *pietas* than it is to the kind of apportionment set out in positive law. An examination of other rescripts sheds further light on this.

The rescript of the emperors Valerianus and Gallienus to Aetia from AD 256 is of great interest in terms of establishing the operation of the *querela inofficiosi testamenti* in relation to rhetorical conceptions and arguments. The scenario set up is typical of a claim for undutiful will: a daughter, Aetia, does not receive the allotted quarter portion as a child on the death of her father due to the "extravagant generosity" with which the father gave all his property to his son prior to his death. The decision is

⁷³ Not only is the Lex Falcidia a protection against the reduction of the estate to nothing, but also a *senatusconsultum* of a date between Hadrian and Vespasian. See Talbert (1984) 148 in relation to Dig. 39.6.15.

dependent upon whether the son was emancipated or not, and the emperors' rescript makes provision for both circumstances:⁷⁴

Impp. Valerianus et Gallienus AA. Aetiae. Pater si omne patrimonium suum impetu quodam immensae liberalitatis in filium effudit, aut in potestate is permansit, et arbitri familiae erciscundae officio congruit, ut tibi quartam debitae ab intestate portionis praestet incolumem, aut emancipatus fuerit, et, quia donatio non indiget alieno adminiculo, sed suis viribus nititur, iuxta constitutionis is qui provinciam regit ad similitudinem inofficiosi querellae auxilium tibi aequitas impertiet.

Emperors VALERIAN and GALLIENUS Augusti to Aetia. If your father, by some impulse of extravagant generosity, gave all his property to his son, the latter either remained in the power of his father, in which case, in an action to divide, it behoves the judge to divide the property in such a way that you fully receive the fourth of the portion due on intestacy; or the son is emancipated, in which case, since a gift requires no outside help but is supported by its own strength (i.e., it requires no confirmation), the governor will, according to the constitutions, extend equitable relief following the pattern of a complaint to set a will aside as undutiful.

The first instance is in reference to the apportionment of wills under the *Lex Falcidia*. Were the son, presumably Aetia's brother, to whom Aetia's father so generously granted all of his property so extravagantly, not emancipated but in the power of his father, then Aetia ought to receive the legal portion which is legally owed her, that is, the quarter share which would be due on intestacy. The remedy attested to here is given as one which seems well attested. It shares a factual and legal theme with the rescript of Philip the Arab to Nicanor and Papiniana. Where a legal portion of an inheritance has been taken away from a child in order to benefit another child then the law offers the *querela inofficiosi testamenti* as a standard remedy form for the recovery of the legal portion. The reasoning behind the exercise of a challenge of undutiful wills goes no further than allowing a remedy for a recovery of an amount that ought to be inherited by prescription of positive law. The more significant scenario is that outlined in the case where the son is emancipated and outwith *patria potestas*.

In the second situation presented in the rescript consideration is given to Aetia's position were the son to whom her father gave so generously emancipated. The son's emancipation changes the complexion of the problem. The gift, if the son is emancipated, remains legally valid. No direct legal remedy is offered to Aetia and the gift of the father to his son legally stands. Yet, the imperial rescript does not leave Aetia without redress. Rather, we are told that the provincial magistrate is able to hear a

⁷⁴ Cod. Iust. 3.29.2. Posted on the 27th of July AD 256, in the consulship of Maximus and Glabrio. Translated by Blume, in Frier, ed. (2016) 703. In reading this it is worth bearing in mind that gifts to unemancipated sons were generally invalid, see C.8.53.11. Gifts to emancipated sons were valid, see C.8.53.17

challenge to assignment of the property. Although the gift is able to stand validly on its own strength (*suis viribus*), the constitutions (*iuxta constitutiones*) made provision for equitable relief to be sought in analogy to the *querela inofficiosi testamenti* (*ad similitudinem inofficiosi querellae auxilium tibi aequitas impertiet*). This is interesting for two reasons: first, despite a valid gift existing in law the emperor is still willing to attempt to find Aetia a remedy on the grounds of equity (*aequitas*) through the constitutions; secondly, the argument is made in analogy to the *querela inofficiosi testamenti* indicating that the decision reached upon equitable grounds against a legally valid gift in order to redress an unfairness in inheritance law shares the conceptual and mechanistic qualities of the *querela* itself.

The fact that the emperor felt comfortable making an analogy to the *querela inofficiosi testamenti* in this instance is not in isolation. Later examples show that actions against “undutious gifts” were introduced to the law on analogy with the *querela inofficiosi testamenti*.⁷⁵ The interesting feature is the means by which the emperor frames the resolution of the issue: by following the solution provided by equitable remedy in extension from cases of challenges for undutious wills.

On what basis is the challenge made? We see that by this stage the pretence of insanity as the grounds for a claim has long since evaporated. Aetia’s case is clear that the father’s motivation for favouring gifts is extravagant generosity (*immensae liberalitatis*), which though unwise, is not insane. So, the development of a claim analogous to the *querela inofficiosi testamenti* need not dwell on the sanity of the challenged, as, in fact, the challenge of undutiful wills itself did not. Rather the solution provided is simply born out of a feeling of equitability. This seems, as with the juristic sources, to be a vague and insufficient method for solving the problem presented. Were it not for the fact, as we have seen, that *aequitas* was a definable and understood concept in Roman society. This was the same for *pietas*. Rather than an appellation to woolly and esoteric ideals, these terms had social and legal meaning. Both of them relate to Aetia’s case and to the decision of the emperors to allow for a challenge to the apportionment of her father’s estate based on the constitutions, despite the legal validity of the will in the civil law.

We have seen that *pietas* forms the foundation for a claim under the *querela inofficiosi testamenti*. Aside from the requirements of status which entitle a claimant, *pietas* is the concept which asserts itself as the principle consideration in the *ratio decidendi*. *Pietas* is itself dependent upon status and relationship. The form of *pietas erga parentes* is the definitive factor in establishing a moral and social duty, which, though not symmetrical, nevertheless creates reciprocal social and moral duties upon

⁷⁵ The law regarding undutious gifts was a late introduction of the law and is evidenced by a rescript of the emperor Constantine on May 19, AD 361. The rescript reads: *Imp. Constantinus A. Olybrio*. Non convenit dubitari, quod immodicarum donationum omnis querela ad similitudinem inofficiosi testamenti legibus fuerit introducta et sit in hoc actionis utriusque vel una causa vel similis aestimanda vel idem et temporibus et moribus. Frier (707) translates as: “*Emperor CONSTANTINE Augustus to Olybrius*. There is no doubt that the action concerning immoderate gifts has been introduced into the laws following the pattern of laws regarding undutiful wills, and in this respect both actions must be deemed as one or similar or the same, both as to time and conditions”.

parents and children. The challenge to undutiful wills is the transformation of moral and social duty to legal obligation. That transformation is provided through the enforcement of the challenge in the centumviral court. That *pietas* and *aequitas* are used as tools of legal reasoning is also a transformation. These ideas change from moral and social virtues to legal concepts. Legal concepts can authoritatively decide legal remedies and here we find that Aetia is provided with a challenge based upon the legal authority of *pietas* and *aequitas*, as is done in a challenge for undutiful wills, to provide her with a redress in law.

A further example is provided in a rescript of the emperors Diocletian and Maximian to a certain Calpurnia Aristaeneta who sought remedy for a prodigal son lavishing gifts unreasonably to the detriment of the familial property. Yet again the redress is provided by analogy to a claim for undutiful will:⁷⁶

Impp. Diocletianus et Maximianus AA. Calpurniae Aristaenetae. Si filius tuus immoderatae liberalitatis effusione patrimonium suum exhausit, praesidis provinciae auxilio uteris, qui discussa fide veri, si in integrum restitutionem ex filii persona competere tibi ob improbabilem donationis enormitatem animadverterit, in removendis his quae perperam gesta sunt tibi subveniet. Ideoque non est tibi necessarium adversus immodicas donationes auxilium ad instar inofficiosi testamenti.

Emperors Diocletian and Maximian Augusti to Calpurnia Aristaeneta. If your son exhausted his property through extravagant and lavish generosity, you may call the governor to your aid; and if on investigation of the basis of truth he finds that you, through your son, should have restitution of your rights as to the unreasonably large gifts, he will aid you by annulling the wrongful acts. Hence, for the purpose of setting the immoderate gifts aside, you need no action similar to that of setting a will aside as undutiful.

The extension of the criteria of a claim for undutiful will to a claim for undutiful gifts is telling on two points. First, it indicated that the emperor in making these rescripts is not adverse to the application of analogy in legal reasoning. This, in itself, reveals the scope for rhetorical figures in the expansion of legal concepts, as dutiful gifts are viewed, *ex similitudine*, to share a fundamental essence with undutiful wills. The logic being that property divested unreasonably, whether *inter vivos*, or on death through testament, is challengeable on the grounds that it breaches a duty. The establishment of that duty, we can infer, is through the maternal relationship shared between Calpurnia Aristaeneta and her profligate son, the duty of *pietas erga parentes*. Secondly, based on this first inference, we can state with reasonable confidence that the reasoning which underpins a claim for undutiful wills is the same as that

⁷⁶ Cod. Iust. 3.29.4. Posted on the 10th of February AD 286 at Milan, in the consulship of Maximus, for the second time, and Aquilinus. Translated by Blume in Frier, ed. (2016) 705.

used for undutious gifts. The importance of this observation is that we can directly see the law expanding purely on the basis of rhetorical reasoning: wills are challengeable when a duty of *pietas* is breached; undutiful wills are analogous to undutiful gifts, insofar as they both amount to the transfer of family property unreasonably against a duty of *pietas* to a relative, on the basis of this analogy the remedy for the two ought to be the same. From this, therefore, a remedy similar to the *querela inofficiosi testamenti* is provided for undutiful gifts. This demonstrates not only that rhetoric provided the underlying *ratio decidendi* for decisions on undutiful gifts, insofar as it followed the pattern of undutiful wills in using breaches of *pietas erga parentes* as the definitional breach in allowing for a challenge, but also that rhetorical reasoning, through the use of analogy, was central to legal development, in expanding the scope of the remedy from challenges to wills to challenges to *inter vivos* donations.

The rescript to Calpurnia Aristaeneta is not in isolation. Further rescripts follow a similar theme of addressing undutiful gifts with analogous reference to the remedy provided for undutiful wills. Examples of these are readily available: Cottabaeus was informed by Diocletian and Maximian that gifts given to emancipated sons which were “extravagant and generous” are recoverable by children seeking “the amount legally due to them” in analogy to the *querela inofficiosi testamenti*;⁷⁷ the same emperors informed a certain Demetria that she was entitled to recover for extravagant gifts made to her brother by her father “following the pattern of a complaint for setting undutiful wills aside”;⁷⁸ Ammianus was told by the same *Augusti* that if his mother “dissipated her property and bled her resources dry through extravagant generosity” to his younger brother, then such gifts could be set aside following the logic “from a complaint to set a will aside as undutiful”;⁷⁹ the emperor Constantius wrote to a certain Olybrius that “there is no doubt that the action concerning immoderate gifts has been introduced into the laws following the pattern of laws regarding undutiful wills, and in this respect both actions must be deemed as one or similar, both as to time and conditions”.⁸⁰ The use of a version of the challenge to undutiful gifts formulated on the basis of the challenge to undutiful wills is well established. The same logic is also extended, though with less evidence, to claims for undutiful dowry gifts, *de inofficiosis dotibus*.⁸¹

The reasoning which underpins these points is consistent with that used in the decision in the case of Calpurnia Aristaeneta. The fundamental points are as follows: undutiful gifts are analogous to

⁷⁷ Cod. Iust. 3.29.5. Posted on the 28th of February AD 286, in the consulship of Maximus, for the second time, and Aquilinus. Translated by Blume, in Frier, ed. (2016) 705.

⁷⁸ Cod. Iust. 3.29.6. Posted on the 26th of April AD 286, in the consulship of Maximus, for the second time, and Aquilinus. Translated by Blume, in Frier, ed. (2016) 705-707.

⁷⁹ Cod. Iust. 3.29.7. Posted on the 11th of May AD 286, in the consulship of Maximus, for the second time, and Aquilinus. Translated by Blume, in Frier, ed. (2016) 707.

⁸⁰ Cod. Iust. 3.29.9. Posted on the 19th of May AD 361, in the consulship of Taurus and Florentius. Translated by Blume, in Frier, ed. (2016) 707.

⁸¹ Cod. Iust. 3.30.1. Posted on the 19th of December AD 358, in the consulship of Datianus and Cerealis. Translated by Blume, in Frier, ed. (2016) 709.

undutiful wills and therefore the same remedy following the same criteria is a reasonable resolution to claims; secondly, the reason that these claims are analogous is that they fundamentally hinge upon *pietas* as the *ratio decidendi*.

9.5. Summary of Findings.

This Chapter has examined the concept of *pietas* as the basis for rhetorical arguments in challenges of undutiful wills. The *querela inofficiosi testamenti* arose as a form of juristic law in the late Republican period to offer a remedy to expectant heirs who would receive a portion of the estate under intestacy or who had been disinherited by the testator. The chapter argues that this challenge developed as a result of the social understanding of the value of *pietas erga parentes*, an affectionate duty between parents and children. This social value offered an equitable solution to disinherited expectant heirs before the centumviral court. The fundamental argumentative methodologies undertaken by advocates in the court to persuade the judges of the justice of providing a remedy to the expectant heir were rhetorical. This is evidenced not only by the juristic texts, but also through a series of literary sources. The Chapter argues that far from being a separate form of argumentation from a legal claim, that the rhetorical arguments made on behalf of expectant heirs were in fact legalistic and that rhetorical arguments from *pietas* formed the legal *ratio decidendi* in cases of undutiful wills. This reveals a close tie between rhetorical argumentation and legal development during the period.

10. Conclusion.

This thesis has aimed to provide a new approach to the treatment of the Roman law of succession during the Republican period. It makes four fundamental claims. First, that the dogmatic approach which had dominated contemporary Roman law scholarship was informed by erroneous narratives of patriotic continuity and legal science. Secondly, that rhetoric, which had been isolated from consideration, directly as a result of these narratives, was a vital contemplation in Republican legal argumentation. Thirdly, that socially understood concepts within Roman society were crucial to understanding the topical nature of this rhetorical argumentation. Fourthly, that the Republican legal instruments of *bonorum possessio* and the *querela inofficiosi testamenti* are demonstrably rooted in topical argumentation from socially understood postulates, not an anachronistic conception of legal science.

As the first substantive chapter, Chapter Two, *The Challenge to Dogmatism: New Methods in Roman Law*, explains, the narratives of continuity and legal science have their origin in nineteenth century Germany. Within the context of the fall of the Holy Roman Empire, German scholars of what became known as the Historical School attempted to salvage the legal crisis in their nation by turning to Roman law. The interest in Roman law led to the imposition of modern understandings of science, as the need for political and intellectual validity mingled with Enlightenment thought, to ascribe to Roman law a scientific quality, supposedly dating from Quintus Mucius Scaevola *Pontifex* adopting Greek principles of categorisation in the late second/early first century BC. The injection of Greek philosophical thought was supposedly momentary, as Roman law quarantined itself against external influence, becoming an autonomous, scientific system, accountable only to its own internal logic. A narrative of continuity accompanied this notion, arising from the supposition that Roman jurists were the direct ancestors of modern scholars of ancient law, and as such approached the law with regard to the same scientific principles and to the exclusion of other subjects. As a result, rhetoric was discounted from consideration in accounts of legal development. So too were orators and rhetoricians, like Cicero, whose work was seen as outwith the legal canon. Chapter Two offers a challenge to that dogmatism, revealing the suspect origins of these narratives and framing Roman law within its social context, as part of a wider challenge to the dogmatic view.

Chapter Three, *The Orator and Jurist Dichotomy*, takes on board the notion that these narratives have affected the scholarly view of ancient Roman lawyers without reference to the evidence, but rather in order to achieve narrative fit, and thus examines the nature of lawyers within the context of Roman sources. It exposes the supposition that jurists and orators acted as two mutually exclusive, professionalised groups. Instead, by examining the education and practice of Romans in the period, using Cicero as a case study, it concludes that jurists and orators were very often the same, or similar people, engaged in the same, or similar activity. The nomenclature used was often applied according to

reputation and particular ability in one skill or the other, rather than an unswerving commitment to one activity at the preclusion of others.

Chapter Four, *Cicero, "the Insider"*, takes this argument further. It challenges Alan Watson's view that Cicero, as a man principally known for his oration and theory, was an "outsider" to the legal world of the jurists. A view generally accepted. Rather, this Chapter points out the vast interaction Cicero had with the law, proposing his legal knowledge and practice amounted to more than a passing interest. Moreover, the Chapter challenges the narrow limitations placed upon what counts as "lawyerly" at Rome, arguing that Cicero's theoretical works were very much a part of the Roman legal world.

Chapter Five, *Rhetoric as a Theory of Legal Reasoning*, develops the nature of Cicero's rôle in legal argumentation. It begins by tracking the development and use of rhetoric in the Roman Republic, from Greek origins. It then uses the works of Cicero to reveal the use of rhetorical arguments in practical legal disputes. In particular, the chapter focuses on topical argumentation, especially as set out in *Topica*, as a theory of legal reasoning, rather than as a work, as Horak argues, which is essentially useless to lawyers. The Chapter concludes that topical argumentation develops from socially understood values in Roman society, such as *aequitas* and *pietas*, into arguments which were used in the practice of law, and which were instrumental in legal development, even at the time when the Mucian revolution was supposed to have systematised law into an autonomous science.

Chapter Six, *Rhetorical Concepts in Society and Law: Mos Maiorum*, examines the claims of Chapter Five with more specificity. It established the nature of *aequitas* and *pietas* in Roman Republican society. From there it reveals how these concepts are developed into the bases of legal arguments, relying upon Roman sources from the period. The crucial point arising is that the socially understood nature of these concepts makes them ideal postulates for the topical foundation of a rhetorical argument, which, before a praetor or jury assembly, became persuasive in affecting legal change.

Chapter Seven, *Legal Change in the late Republic*, outlines social and legal development of the time, contextualising the claims made in previous chapters. From there, it presents a summary of succession law, as a basis for the following chapters, which argue that succession law in their period changed on the basis of rhetorical argumentation.

Chapter Eight, *Rhetoric and Bonorum Possessio*, looks into the development of *bonorum possessio* as an instrument by which the praetor circumvented the established civil law to offer remedies based on rhetorical appeals to the principle of *aequitas*. The argument outlines that *aequitas* is a socially understood concept, known to the Roman people. In the court of the praetor, appeals were made to grant *bonorum possessio* on the basis of *aequitas*, using topical argumentation of the kind outlined in *Topica*, to conclude that parties were entitled to possession against the prescription of the civil law. The Chapter

concludes, using primary sources, that this evidences the claim that rhetorical argumentation was affecting legal development at Rome, even after law had supposedly become a science.

Chapter Nine, *Rhetoric and the Querela Inofficiosi Testamenti*, adopts a similar approach to Chapter Eight. It claims that the socially understood value of *pietas* was central to the development of the *querela inofficiosi testamenti*, as another instrument in succession law which granted inheritance against the prescription of the civil law. Claims, in this instance, were made before the large jury court of the *centumviri*, and the Chapter argues that topical argumentation was employed by orators in order to convince the court to change the law on the basis of a socially understood notion of *pietas*. In this way, the law was again altered from its normal course by rhetorical argumentation, not from the academic writing of a hypothetical juristic science.

The fundamental argument of this thesis is that rhetoric was vital to legal development in the late Republic. Its importance was rooted in its ability to frame arguments within the culture of Rome, using socially understood values as a guiding principle. This works as the law ought to be regarded within the society in which it is found, not as a concept abstracted to some perceived science. Law is deeply reflective of its own time, culture and society. It is not a collection of transferrable ideas that can be superimposed across time and space, but rather the culmination of careful and contextualised argument, of the consideration of its cultural and social framing, and of the practical realities on which its argumentative integrity is based. In the two examples provided, this thesis shows that the power of grand narratives to explain moments, let alone trends, in legal history is suspect when compared to contextualised investigation.

Looking forward, this thesis raises as many issues as it purports to answer. While it offers two examples of rhetorical influence on the law at Rome, more must surely be done. A fuller overview of the rhetorical impact on the development of Roman law in the future would be overdue and welcome. As a particular effort, an examination of the examples of the *Topica* in relation to their legal sources would cast light onto the arguments which underpin the law in these cases. As a broader effort, the need for a recognition of the law as a derivative social feature must be advanced, particularly against movements which aim to use comparative law as a tool towards harmonisation through legal transplant and institutional amalgamation.

The diversity of law is not an accident. It is a result of the diversity of culture. And something to be appreciated.

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