An Analysis of Cicero's *Pro Caecina:* Piso's Argument Viewed From a Statuory Interpretation Perspective[1]

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Abstract

Statuatory interpetation is a discipline where many legal thinkers differ in both method and result. The following article fuses together two different ideas—the ancient legal definition of a possessory action and a modern tool of legal analysis, statutory interpretation. The article aims to analyze the arguments of an advocate in an ancient trial under two contemporary schools of statutory interpretation

Resumen

En los Estados Unidos existen diversas corrientes doctrinarias que interpretan las leyes[3]. Estas corrientes, o escuelas doctrinarias, difieren en su método de interpretación y también en el resultado de su análisis. El siguiente ensayo combina dos conceptos diferentes: la antigua definición de una acción posesoria y el análisis de escuelas doctrinarias de interpretación de leyes. La finalidad de este ensayo es analizar los argumentos de un jurista de la antigua Roma bajo la perspectiva de dos escuelas actuales de interpretación de leyes.

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[3] La palabra "Statute" no debe confundirse con la palabra "estatuto". "Statute" es una ley que emana de un órgano legislativo estatal o federal.

1. Introduction

The following article analyzes through current statutory interpretation doctrines a segment of Cicero's pro *Caecina.* The *pro Caecina* involves a suit between Aulus Caecina and Sextus Aebutius, the former represented by Marcus Tulius Cicero ("Cicero"), the latter by C. Calpurnius Piso ("Piso").[1] The specific segment of the trial under study revolves around Piso's definitions of a type of legal action known as "*Interdict de vi armata*." Based on Bruce Frier's comments on the *pro Caecina*, Piso defines *de vi armata* in two distinct manners. The main claim of this work is that Piso's first argument represents one current school of statutory interpretation, while his second argument represents a different contemporary school of statutory interpretation. In establishing this claim, the essay will also consider how this change occurs.

In order to provide proper context for the reader, the article begins first with a short description of the relevant actors in the Roman legal world during the Republican era. I identify the authors of Roman laws and those who would resolve a case comparable to that of the *pro Caecina*. Special emphasis is placed on discussing the jurists of the Republican era.

Next I offer a brief explanation of the most important contemporary doctrines of statutory interpretation. This section offers the modern tools to analyze Piso's argument.

Then the context of the *pro Caecina* is considered, allowing the reader to understand what led to the dispute between Caecina and Aebutius.

[1] C. Aquilius was the jurist who provided the interpretation of the *de vi armata* for Cicero's argument. As for Piso's argument, it is still an open question which jurist provided the rationale for his interpretation. Frier argues that this jurist was likely Servius Sulpicius Rufus. Frier, Bruce W. Rise of the Roman Jurists: Studies in Cicero's " Pro Caecina". Princeton U Pres, 1985.PP., 139, 140, 152-155. The praetor for the case was P. Cornelius Dolabella. An interesting fact is that Cicero represented Dolabella on a prosecution he faced. Even more interesting is that Dolabella was married to Cicero's daughter. See: Steel, Catherine. "Chapter 12: Early-career Prosecutors: Forensic Activity and Senatorial Careers in the Late Republic." In Du Plessis, P. J. (2016). *Cicero's Law: Rethinking Roman law of the Late Republic* (p. 218.). Edinburgh: Edinburgh University Press.

Afterwards, the main claim of this article is introduced, which demonstrates that Piso initially was arguing in line with one modern statutory interpretation theory and then changed to another interpretative theory.

As a way of concluding the article, I offer some final thoughts on why we should care to use statutory interpretation doctrines to analyze ancient Roman cases such as the *pro Caecina.* Briefly stated, using doctrines of statutory interpretation can provide precision to the analysis of ancient Roman legal texts by modern legal scholars.

Furthermore, using such doctrines to analyze an ancient Roman case allows the scholarly community to revise a traditional narrative. It has been suggested that the majority of Roman law as a developed legal tradition originates from the "classical" period and that the Republican era displays only a formative stage of the law.[2] (Barry, N., & Metzger, E., 1976. p. 14). On such an assessment, the interpretations expounded by Republican era jurists would be expected to be amateurish. Contrary to this view, the interpretations offered by the jurists of the Republican era are not dusty, ancient works that are only useful to us for antiquarian or historical reasons. Instead, their contributions are similar to the works of renowned modern legal scholars such as John Austin, Hans Kelsen, Herbert L. Hart and Lon Fuller in that their interpretations seem to answer the question of what "the law" is all about. In other words, the interpretations by these jurists are a contribution to a general theory of the law.

2. Relevant Roman Legal Actors in the Republican Era

The subsequent paragraphs aim to orient the reader historically and culturally. Cicero's *pro Caecina* dates from 69 B.C. of the Republican era. Therefore, although legal sources from the late antique period such as the *Justinian's Digest* are essential to the Roman legacy (and contain important Republican material), for the purposes of this

[2] "…the period from Julian to the middle of the third century or, more widely, the period of the Principate, is commonly called the classical period of Roman law." Barry, N., & Metzger, E. (1976). *An introduction to Roman law* (p. 14). Oxford: Oxford U Press.

work they are less central. In essence, as one scholar has recently observed, "the late Republic was a world that lacked a single ultimate authority and as such ownership of the law was diffused." (Matthijs, W., 2016. P. 101) Nonetheless, during this period, there were essentially three sources of law—statutes, praetorian edicts and juristic interpretations.

There were three legislative bodies that enacted statutes; the *comitia centuriata*, the *comitia tributa*, and the *concilium plebis*. The *comitia* enacted legal instruments known as *lex*, while the *concilium plebis* had *plebiscita*. The oldest kind of *lex* (and source of law) attested to us is the "Twelve Tables", but it was not necessarily enacted by any of the legislative bodies previously mentioned. It is said that the Twelve Tables provide the "foundation of the Roman law," (Barry, N., & Metzger, E., 1976. p. 14) yet the fact that such laws were enacted does not mean that statutes played a particularly important role in the formation of Roman law. (Barry, N., & Metzger, E., 1976. pp. 14, 15) Actually, between the time of the "Twelve Tables" and the end of the Republic, there are only thirty statutes known to have been enacted. (Barry, N., & Metzger, E., 1976. pp. 14, 15) Formation of Roman law during the Republican era appears to have developed under the urban praetor rather than the legislative bodies.[3]

The urban praetor was a magistrate that dealt with issues regarding *ius civile*.[4] This is the private law between citizens. When a praetor began his term, he enacted a general edict containing "series of statements of policy". (Barry, N., & Metzger, E. 1976. p.

[3] "The praetors where the most important magistrates in the development of law: they could introduce new regulations to deal with issues that were not covered by the *ius civile*, or new instruments of law for those whole could not use the *ius civile.* The new regulations were collectively called the the *ius honorarium,* the body of law created by the magistrated of the Roman Republic. Roselaar, S. T. (2016). Chapter 9: Cicero and the Italians: Expansion of Empire, Creation of Law. In *Cicero's Law: Rethinking Roman law of the Late Republic* (p. 148). Edinburgh: Edinburgh University Press.

[4] As opposed to the *Praetor Peregrini* who dealt with disputes concerning Roman citizens and the *peregrini* (non-roman citizens). This praetor also contributed to the formation of law in the Republican Era in a similar manner as the urban praetor did: "Where Roman law could not be applied, the praetor could protect the interests of a *peregrinus* by means of an *actio ficticia*; this ordered the judge to proceed as if something was the case, which in fact was not true (Sotty, 1997). Thus the praetor could treat the plaintiff as a Roman citizen when in fact he was not, through the fiction *si civis romanus esset* (citing Gai. Inst. 4.37 and Coşkun 2009: 49-50). Roselaar, S. T. (2016). Chapter 9: Cicero and the Italians: Expansion of Empire, Creation of Law. In *Cicero's Law: Rethinking Roman law of the Late Republic*(p. 147). Edinburgh: Edinburgh University Press.

21).[5] These statements contained the circumstances under which he would grant remedies to a particular cause of action. Moreover, because the particular form was crucial in order for a claim to exist in Roman law, the remedies that the praetor granted would have corresponding *formulae*. It was by granting remedies and constructing *formulae* that the praetor influenced Roman law. In other words, the praetor did not create substantive laws directly, but by influencing the procedure he indirectly created substantive rights. Moreover, it is also important to note that the praetor did not decide the trial at issue. Once the Praetor established the *formulae*, the parties went to trial, which was conducted by a *iudex.* The *iudex,* like the praetor, was a layman, and for legal knowledge he often relied on jurists.[6,7]

Particularly relevant to the analysis of Piso's argument in the *pro Caecina* is the prominent role of the jurists. Jurists of the Republican era normally came from noble families. (Barry, N., & Metzger, E. 1976. pp. 28-32) They did not have a legal academic formation, but rather learned by being a pupil of an elder jurist.[8] Citing Cicero, Matthijs Wibier illustrates how the education of a jurist-in-training was undertaken:

…in educating the next generation some prominent jurists allowed students to merely observe their giving of *responsa,* while others invited students to their houses for question-and-answer sessions that went over old cases and sometimes developed hypothetical problems as well. For the specific legal cases we hear about in the sources, it is often impossible to establish in what form their dossiers reached the jurist-teacher who discussed them with his students; but generally speaking it must have involved a

[5] For a description of an edict see Frier, Bruce W. (1985). p. 42. *Rise of the Roman Jurists: Studies in Cicero's " Pro Caecina"*. New Jersey: Princeton U Pres.

[6] *see* see Frier, Bruce W. (1985). p. 48. *Rise of the Roman Jurists: Studies in Cicero's " Pro Caecina"*. New Jersey: Princeton U Pres.

[7] However, Christine Lehne-Gstreinthaler explains that the range of actors that could provide legal knowledge to the *iudex* and participate in the legal realm of the Republic is more widespread. For a more detailed discussion see: Lehne-Gstreinthaler , C. "Chapter 6: 'Jurists in the Shadows': The Everyday Business of the Jurists of Cicero's Time." *Cicero's Law: Rethinking Roman Law of the Late Republic*, Edinburgh University Press, 2016, pp. 88–99.

[8] "In the Republic there was no formal legal education…but in the Empire there emerge two 'schools' to which most if not all of the leading jurists of the first two centuries of the Empire seem to have belonged. They were founded, we are told, by two leading jurists of the reign of Augustus, Capito and Labeo, but took their names from subsequent heads, Massurius Sabinus, already mentioned, and Procolus." Barry, N., & Metzger, E. (1976). *An introduction to Roman law* (p. 32). Oxford: Oxford U Press.

mixture of the senior jurist's personal recollection, of documents preserved in the family archive, and increasingly also of material found in opinion collections in book form. Cicero's oeuvre once more makes it clear that by his time opinion collections circulated that contained the views of more than one older generation of jurists. For example, we learn from one of Cicero's letters that the work of *De Iure civili* of Quintus Mucius Scaevola the Pontifex (consul 95 BC) listed the opinions of different jurists organised by topic. (Matthijs, W, 2016. p. 103)

The traditional view of the jurists is that they were not advocates, but rather scholars. (Du Plessis, P. J. 2016. pp. 1-2) However, this view is not uncontested: "…the work of [Tellegen and Tellegen-Couperus] has introduced persuasive arguments that the separation of the professions and the absolute beliefs in the law/rhetoric, jurist/orator divides are questionable, and the product of nineteenth-century *Dichtung* rather than *Wahrheit*."[9,10]Moreover, law was not their occupation; it was an additional contribution to public life for them.[11] The jurist would provide legal opinions called *responsa* to the praetor, the *iudex*, and to the parties in the trial. In the case of the praetor, for example, the r*esponsa* influenced the design of an edict. Additionally, "[s]ince they clarified problematic aspects of the law, *responsa* along with case descriptions (occasionally including case decisions) were preserved for future reference, which in addition to legal disputes included legal education." (Matthijs, W, 2016. pp., 103) In this sense, the fact

[9] Dichtung means "poetry" (or "fiction") in German, while Wahrheit "truth". Philip, T. (n.d.). Chapter 2: A Barzunesque View of Cicero: From Giant to Dwarf and Back. In P. J. Du Plessis (Ed.), *Cicero's Law: Rethinking Roman law of the Late Republic*(p. 14). Edinburgh: Edinburgh University Press.

[10] This revision seems to comply with the historical evidence: Cicero for example, is most commonly known as an orator rather than a jurist. However, the Justinean Digest contains *responsa* attributed to Cicero. Jurists, not orators, are known to provide *responsa*. *See* Matthijs, W. (2016). Chapter 7: Cicero's Reception in the Jursitic Tradition of the Early Empire. In P. J. Du Plessis (Ed.), *Cicero's Law: Rethinking Roman law of the Late Republic*(pp. 100-122). Edinburgh: Edinburgh University Press. Furthermore, Q. Mucius Scaevola the Augur and his cousin, The Pontifex, who were two of the most renowned jurist during the Republican era, had to litigate themselves a case. see Benferhat, Y. (2016). Chapter 5: Cicero and the Small World of Roman Jurists (P. J. Du Plessis, Ed.). In *Cicero's Law: Rethinking Roman law of the Late Republic*(pp. 72-75). Edinburgh: Edinburgh University Press.

[11] Q. Mucius Scaevola the Augur and the Pontifex (who were both professors of Cicero), Servius Sulpicius Rufus and Gaius Trebatius Testa were among the most important jurists on the Republican era. They all seemed to have at some point of their life careers in the Roman estate. For a deeper analysis on this issue see: Benferhat, Y. (2016). Chapter 5: Cicero and the Small World of Roman Jurists (P. J. Du Plessis, Ed.). In *Cicero's Law: Rethinking Roman law of the Late Republic* (pp. 71-87). Edinburgh: Edinburgh University Press.

that some of the *responsa* from the Republican era were codified in subsequent texts such as the Justinian Digest should not surprise us. Regarding to the extent of authority of a *responsa:*

The authority of *responsa* was a function of the authority of their authors, who needed to be experts on customary practices in order to find a solution that could be considered 'right'-- that is, a solution in line with traditional interpretations of status, or customary law, or, in lack thereof, Roman traditions…. Legal opinions given in response to such problems were treated as interpretations of the law with certain authority, although this varied somewhat depending on the status of the issuing jurist. (Matthijs, W, 2016. pp. 101,103)

Besides *responsa*, a passage from Pomponius's *Enchiridion* reveals that Republican jurists also wrote books similar to legal treatises (Friar, B. W. 1985. pp., 155-156). Indeed, "… we learn from one of Cicero's letters that the work *De Iure civili* of Quintus Mucius Scaevola the Pontifex (consul 95 BC) listed the opinions of different jurists organised by topic [sic]." (Matthijs, W, 2016. p., 103)

"It is common knowledge that during the later Republic a paradigm shift took place, which laid the foundation for classical law." (Thomas. P. 2016, p., 17) Scaevola's *De Iure Civili* is said to be a manifestation of this "paradigm shift" in republican Roman law because it transformed the study of the law from a cautelary jurisprudence perspective to a methodological study of the law.[12,13] In this sense, it can be asserted that by the end of the late Republic the works provided by the jurists were not arbitrary

[12] Bruce Frier describes cautelary jurisprudence as "…the communication of informed pronouncements or advice on law to petitioners who are ignorant or uncertain about legal rules…was traditionally associated with the desire of upper-class jurists to win friends and secure themeselves for elective office; as a form of patronage. Frier, B. W. (1985). *Rise of the Roman Jurists: Studies in Cicero's " Pro Caecina"*. (pp. 140, 141) New Jersey: Princeton U Pres.

[13] " Q. Mucius ' achievement as a jurist probably lay less in the realm of "grand theoretical system" than in his salutary concentration on the legal meaning of the particular. His intensity marked a quantum leap in legal science. It is in this sense that he " established" the *ius civile.* Through his students, his methods passed into the generation of Cicero." Frier, B. W. (1985). *Rise of the Roman Jurists: Studies in Cicero's " Pro Caecina"*. (p. 163) New Jersey: Princeton U Pres. For further reading on the "paradigm shift" see Frier, B. W. (1985). *Rise of the Roman Jurists: Studies in Cicero's " Pro Caecina"*. (pp. 139-171) New Jersey: Princeton U Pres.

decisions, they were contributions to the law that had an inherent intellectual content. In "A Barzunesque View of Cicero: From Giant to Dwarf and Back," Philip Thomas provides support for the preceding sentence:

[M]ore than anything else the unquestioning acceptance that for centuries 'legal science' operated without any theoretical underpinning, but on intuition and authority has become difficult to acknowledge… The belief that during the second and first century BC Roman legal science came into being without theoretical underpinning, and that the accession of the *equites* to the ranks of jurists was the main reason requiring argumentation for legal opinions should be met with scepticism. It is suggested that even before the Twelve Tables some form of theory underpinned Roman jurisprudence, of which unfortunately little information exists [sic] (Thomas. P. 2016, pp. 19-21).

Thomas suggests that the theoretical underpinning that caused Roman law to develop a methodology in the Republican period was the influence of Greek science (Thomas. P. 2016, p. 17). The arguments of Tellegen and Tellegen-Couperus further elaborate on Thomas' claim by demonstrating that in the context of inheritance law, the Roman jurists likely were influenced by concepts of the New Academy to solve problems related to the *voluntas testatoris* (Tellegen-Couperus, O. 2016. pp. 26-49). But Benedikt Forschner when analyzing Cicero's legal arguments, who contrary to the traditional narrative is now considered to be a jurist, claims: "Cicero did develop a comprehensive and coherent theory of the law and its nature…This theory finds its origins in Stoic writings, especially in the *oikeiosis* doctrine…"(Forschner, B. 2016. pp. 50-67).[14] In other words, scholars may have associated certain areas of the law or certain jurists with specific Greek philosophical schools successfully.[15] But there is still a debate as to which school predominated in its influence on the law as a whole:

[14] Renowned scholar Alan Watson argues on the other hand that Cicero was a distinct figure at his time, and as such was no jurist. Watson, A. (2008). *The spirit of Roman law*. Athens: University of Georgia Press.

[15] Additionally, Tellegen and Tellegen-Couperus citing Schiavone claim that this author identifies Q. Mucius Scaevola with the Stoic school. But they discredit this association because "…the Roman jurists themselves do not explicitly call themselves adherents of Stoicism…." Tellegen-Couperus, O. And Willem Tellegen. J. (2016). Chapter 3: Reading a Dead Man's Mind: Hellenistic Philosophy, Rhetoric and

It is now generally assumed that there was a connection between the rise of Roman law and the arrival of Greek philosophy and rhetoric in Rome. However, the question of which of the two philosophical schools [*sc.* Stoic or New Academy] was most relevant to the development of Roman law has not yet been answered satisfactorily(Tellegen-Couperus, O. 2016. p. 26).

While this question remains important, one may nonetheless suggest that jurist writings need not to rely primarily upon a single philosophical school: "…it is precisely the partly inhomogeneous character of [Roman Jurist] writings that demonstrates that legal discourse was open enough to integrate different strands of philosophical argument [sic]" (Forschner, B. 2016. p. 62).

This section aimed to develop important features of the jurists during the Republican era. In the next section, examples of modern schools of statutory interpretation will be provided in order to better prepare the reader to explore Piso's position from a modern perspective.

3. Modern Doctrines in Statutory Interpretation

To interpret a law means to make sense of that law. Without interpretation, ordinances, statutes, constitutions and even treaties would be akin to blank pieces of paper, with their language futilely indeterminate. In the context of statutory interpretation, "[j]udges look to the words at issue, to surrounding text, to the statute's history, to legal traditions, to precedent, to the statute's purposes, and to its consequences evaluated in light of those purposes" (Breyer, S. G. 2011. p. 88) to give a statute a meaning.

"One naturally must begin with the words of the statute when the subject of the litigation is what the statute requires" (Scalia & Garner, 2012. p.16). Yet although the

Roman Law (P. J. Du Plessis, Ed.). In *Cicero's Law: Rethinking Roman law of the Late Republic*(p. 28). Edinburgh: Edinburgh University Press.

text is where all judges start the inquiry for the meaning of the statute, for many it is not the end.

From the combination of the list provided in the paragraph *supra* and depending on the importance that each element deserves, judges are sometimes called "intentionalist", "purpositivists", "consequentialists" (or also called "pragmatist") "textualist" or "strict constructionist". The first three schools of interpretation share the common characteristic in not being constrained by the exact text of the statute. Opposing them are "textualism" and "strict constructionism". These doctrines share common cause in that the aim of their inquiry into the meaning of the statute is the text itself, and many times they are confused with one another. Though, as it will be demonstrated *infra*, in theory they have a subtle difference, which can lead to diametrically opposed results in practice.

Briefly, intentionalism looks to the "objectified" intent of the legislature. For this, legislative history is used many times to discover that intent. However, Judge Easterbook provides the following critique to intentionalism: "[e]very Legislator has an intent, which usually cannot be discovered, since most say nothing before on most bills; and the legislature is a collective body that does not have a mind; it "intends" only the text to be adopted, and statutory texts usually are compromises that match no one's first preference [sic]" (Scalia & Garner, 2012. p. 22).

Purpositivisim looks to the objective of the statute: "[t]o determine a provision's purpose, the judge looks for the problem that congress expected the particular statutory words in question to help resolve. The Judge also examines the likely consequences of a proposed interpretation…a judge can try to determine a particular provision's purpose even if no one in Congress said anything" (Breyer, S. G. 2011. p. 92). However, "[t]he purpositivist, who derives the meaning of text from purpose and not purpose from meaning of text, is free to climb up this ladder of purposes and to "fill in" or change the text according to the level of generality he has chosen" (Scalia & Garner, 2012. p. 19).

As for the Consequentialists, "[t]he proponents of this view…urge that statutes should be construed to produce sensible, desirable results, since that is surely what the

legislature must have intended"(Scalia & Garner, 2012. p. 22). In a way, a Consequentialist is a Herculean purpositivist. "But it is precisely because people differ over what is sensible and what is desirable that we elect those who will write our laws-and expect courts to observe what has been written"(Scalia & Garner, 2012. p. 22).

"Textualism, in its purest, form, begins and ends with what the text says and fairly implies…relying as it does on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted"(Scalia & Garner, 2012. p. 16). For a textualist then, there is no need to recur to nontextualist sources in order to find the meaning of the statute. But opponents to this tradition claim that "text-oriented judges…will try to give them the meaning, they carry in ordinary, non-statutory life…The assumption begs the further question: "What part of ordinary life?" (Breyer, 2011, p., 90).

Lastly, Strict Constructionism implies "…a narrow, crabbed reading of the text…the hyperliteral meaning of each word in the text."(Scalia & Garner, 2012, pp. 355-358) However, even textualists oppose this view: "Textualism should not be confused with the so- called strict constructionism, a degraded form of textualism…A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means"(Scalia & Gutmann, 2017, p., 23).

Textualism and Strict Constructionism will be the focus of this article. In this sense, understanding the refined difference between them is vital. In order to grasp better their variance, Justice Scalia provides us with the following real-life illustration:

The statute at issue provided for an increased jail term if, "during and in relation to…[a] drug traffic crime," the defendant "uses…a firearm." The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had "used a firearm during and in relation to a drug trafficking crime."…a proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase "used a gun" fairly connoted use of a gun for what guns are normally used for,

that is, as a weapon. As I put the point in my dissent, when you ask someone, "Do you use a cane?" you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway(Scalia & Gutmann, 2017, p., 24).

Briefly put, the difference between these two types of language-oriented doctrines is that while textualism views statutes within a context, that is, its ordinary meaning, strict constructionism views the statute in the abstract.

4. Facts of the Case

The broad theme in the *pro Caecina* revolves around inheritance. The legal issue, however, is grounded upon possession (Friar, 1985, p. 27). The case involved Marcus Fulcinius (first husband) and Caesennia (wife) who were descendants of two aristocratic families from the city of Tarquinii. This city had been under Roman rule for a long time, and it seems that around a given point Tarquinian aristocracy was given Roman citizenship and was also converging into the Roman nobility (Lintott, 2008, p. 74-75). [16]

Fulcinius and Caesennia actually lived in Rome, not in Tarquinii; yet, they still had particular interests in the city of their ancestors.[17] In Rome, Fulcinius worked in the banking industry but he had a hard time financially. Evidently, he suffered the consequences of an important credit collapse in Roman history. This collapse was result of the invasion by Mithridates' forces to the Roman province of Asia and then by subsequent intestinal wars within Italy.

Due to the financial hardship that Fulcinius was facing, he needed to acquire liquid assets. Therefore, Fulcinius sold his farm in Tarquinii to Caesennia in exchange for her dowry. Still, the situation in Rome was not improving. Fulcinius then decided to dissolve his banking commerce and to return to Tarquinii. With the dowry money that

[16] "In the early first century BC, after the Social War, all Italians were granted Roman Citizenship. However, it took a while before the Roman state was willing to grant them the full benefits of this status." Roselaar, S. T. (2016). Chapter 9: Cicero and the Italians: Expansion of Empire, Creation of Law (P. J. Du Plessis, Ed.). In *Cicero's Law: Rethinking Roman law of the Late Republic*(p. 145). Edinburgh: Edinburgh University Press.

[17] Fulcinius had a large property, which would later be sold to his wife.

he obtained from his previous land sale to his wife, he purchased a new estate adjacent to the old property. The new estate, which was used for the cultivation of olives, was the object in dispute. Bruce Frier calls this farm the "Fulcinian Farm".

At a given time, Fulcinius died and the dowry money returned to Caesennia. Furthermore, the deceased additionally left a will whereby his estate would go to his son, also named Marcus Fulcinius. The estate included the Fulcinian Farm. Additionally, Caesennia obtained a right to usufruct on that land.

Some years later, Caesennia's son also died. By will, he left his entire estate to a Tarquinian relative of his mother by the name of P. Caesennius. Furthermore, young Fulcinius also bequeathed a sum of money to his wife, and the majority of his estate to his mother.[18] In *Cicero as Evidence: A Historian's Companion* Andrew Lintott explains: "In order to distribute the shares owed to the women there was an auction at Rome of the estate" (Lintott, 2008, p. 75)

In the estate's auction, a friend of Caesennia by the name of Sextus Aebutius won the "Fulcinian Farm."[19,20] Caesennia knew Aebutius from Rome, and when she became a widow, he apparently supported her in business affairs. Aebutius was the defendant in the *pro Caecina*. After the auction, Caesennia married her second husband, Aulus Caecina, who in turn would be the plaintiff of the case.

After her second marriage, Caesennia died. She left an unclear estate and from here the dispute in question arose. Frier explains that "Caecina's goal was plain: to consolidate his grasp on the handsome estate he had inherited practically intact…Aebutius' aim was to increase the portion allotted by Caesennia; he was at first obligated to pursue with cunning rather than force." (Friar, B. W., 1985, p. 20)

[18] Frier understands that this will was done fraudulently as women at that time would not be able to inherit by will.
[19] It is also important to note that Caesennia had leased this property to a tenant farmer subsequently.
[20] Lintott clarifies that Aebutius convinced Caesennia to lend him money in order to buy this property out of the auction.

Initially, the dispute arose with Aebutius "…by challenging, apparently in conversation with others, Caecina's right to inherit under a Roman will (18); Aebutius argued that Caecina was barred from inheriting because of a Sullan law imposing civil restrictions on Volaterrans (102) [*sic*]" (Friar, B. W., 1985, p. 20). Lintott refines: "Aebutius contested Caecina's inheritance on the ground that he was not a Roman citizen with full rights…" (Lintott, 2008, p. 75) Aebutius' attempt to contest the inheritance failed and by the order of the praetor, Caecina was granted *bonorum possessio.* Caecina also requested an arbiter to preside over the division of the inheritance. Still, Aebutius asserted that he purchased the Fulcinian Farm and that it was therefore outside of the inheritance.

The parties eventually agreed to meet on a certain date so that Caecina could be formally removed from the farm before witnesses. This expulsion would give Caecina a cause to seek an interdict before the praetor. Caecina ultimately reached the Fulcinian Farm, and to his surprise, Aebutius and some neighbors met him there. What followed was a clash between both parties and their men. The parties later decided to go to the courts to settle their dispute, which ultimately revolved around the issue of who got to keep the Fulcinian Farm.

5. Central Claim

After the encounter between Caecina and Aebutius, Caecina went before the praetor and requested for an "Interdict *de vi armata."* Interdict is the technical name given to a possessory remedy. The debate between Cicero and Piso consisted in defining the meaning of the *de vi armata*, which in turn depended on determining the meaning of the Latin word *deiecisti*. Depending on how this word was understood, Cicero's client would be able to gain possession of the Fulcinian farm. In the exchange, Piso makes two arguments to describe the real meaning of the interdict. His second argument is a modification of his first argument; Frier calls it a "fall back position" (Frier, 1985, p. 113).

The central claim of this article is that, when viewed with modern eyes, Piso's initial qualification of the interdict is an argument based on strict constructionism and that Piso's "fall back position" represents a shift to the standpoint of a textualist. The move to contextualize the term *deiecisti* produces this shift.

Frier provides the words and translation of the *de vi armata* interdict: Unde tu aut familia aut procurator tuus illum vi hominibus coactis armatisve **deiecisti**, eo restituas. (English) Whence you or your household or procurator thrust out this man by force with men assembled or armed, thereto shall you restore him (Frier, 1985, p. 55).[21]

In this rendering, the translation of *deiecisti* is "thrust out." This translation undergirds Piso's first argument—that his client Aebutius has not "thrust out" Caecina, as he never stepped onto the Fulcian Farm in the first place (Frier, 1985, p. 111). Rather, Caecina was not permitted to enter upon the farm (Frier, 1985, p. 111). For Piso, the *de vi armata's* definition depends solely on the physical meaning of "thrust out", rather than allowing that the term is used in the context of a possessory interdict. In other words, Piso initially views the letter of the *de vi armata* divorced from its immediate context. Thus, if Caecina first had legally possessed the farm but later left to explore the adjacent properties, and in the meantime Aebutius and his men camped in the farm, Aebitius would be left without legal remedy, as he simply was not "on" the farm. In Scalia-like terms, Piso relies upon the "hyperliteral" meaning of *de vi armata.*[22]

Even Cicero, who of course did not know the modern distinction between a strict constructionist and a textualist, seems to have thought that Piso's interpretation was a "…narrow, crabbed reading of the text" (Scalia & Gutmann, 2017, pp. 355-358). He built a strong critique and therefore Piso had to switch strategies on defining the interdict (Frier, 1985, pp. 111-114).

[21] The bold highlight of " deiecisti" is my own

[22]See Frier, B. W. (1985). *Rise of the Roman Jurists: Studies in Cicero's " Pro Caecina"* (pp., 16-17). New Jersey: Princeton U Pres.

Frier says the following about Piso's second argument:

…the "fallback provision" differs from Piso's initial view in that it allows the "thrusting out" not only of someone who is physically expelled from a place where he is, but also of one who possesses something that he is then prevented from reaching (Frier, 1985, p. 113).

Frier here seems to imply that Piso's adjustment of the meaning of "thrusting out" is that it is no longer viewed isolated from the relevant context of the dispute (i.e. that of a possessory claim). Thus, Piso's second argument incorporates a broader (and more natural) meaning of "thrusting out" into the *de vi armata.* The marriage of context to the dry letter of the interdict completely changes the *de vi armata* semantically. This incorporation results in a shift, from "…a narrow, crabbed reading of the text…" (Scalia & Gutmann, 2017, pp. 355-358), to a reading of what "thrusting out" means in the ordinary context of a possessory interdict. In other words, Piso's second argument becomes textualist.

6. Conclusion

The preceding section has sought to demonstrate how Piso's initial argument was one based on strict constructionism and that it was then transformed into a textualist position. But this begs a further question: why should it matter to analyze the *de vi armata* with contemporary statutory doctrines?

The Roman jurist likely did not view this issue in terms of statutory interpretation. And perhaps, one may argue, to rely on contemporary interpretative tools distorts the real legal issue at the time of the *pro Caecina*.

First of all, when one reads any work of modern scholarship (such as those by Bruce Frier and Jennifer Hilder), it is clear that these works employ words such as "literal" or "letter of the law" to denote a textual type of interpretation applied by the jurists. The question remains, however, whether in using such terms these authors mean that a given jurist interpreted the words of the law within its ordinary meaning (textualism), or whether they mean that the jurists interpreted the words of the law in the abstract (strict

constructionism)? Stated differently, which text-centered doctrine do Roman jurists employ? One can most likely determine the answer—even if it does not map entirely onto a modern interpretative school—from a careful reading of the scholar's analysis. Yet, using statutory interpretation terminology can help the modern scholarly community by facilitating precision at the hour of classifying a jurist's interpretation.

Furthermore, it enables the revision of a narrative that views the Republican jurists as mere ancient commentators by enlisting the Republican jurists as contributors of a general theory of the law: the fact that an ancient legal dispute is examinable under contemporary statutory doctrines demonstrates that the Republican Romans already had notions of these schools in their mind, regardless of the fact that these schools did not exist as such in antiquity. In other words, being able to examine these ancient legal disputes with modern tools of analysis enables the reader to appreciate how elaborate the Romans were in their legal discussions; Roman juristic discussions, in other words, are parallel in their complexity to modern ones.

Oliver Wendell Holmes Jr. said "the life of law has not been logic; it has been experience" (Holmes & Howe, 1963). In this sense, it would not be a stretch to claim that doctrines of statuary interpretation are another experience passed down by the Romans.

7. Bibliography

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