Transactions of the American Philological Association 113 (1983) 221–241

URBAN PRAETORS AND RURAL VIOLENCE: THE LEGAL BACKGROUND OF CICERO'S *PRO CAECINA*

BRUCE W. FRIER
University of Michigan

This article has a broader and a narrower theme. The narrower theme is this: two of Cicero's private orations, the *pro Tullio* and the *pro Caecina*, concern violent confrontations in the countryside of Italy. Neither speech can be indisputably dated from internal evidence, but they have been traditionally assigned to 71 and 69 B.C. respectively. In recent years, however, legal historians have questioned both dates, as part of a more general inquiry into the development of the Edictal provisions on violence.[1] In this article I both defend the traditional dating of the two speeches and describe the likeliest development of the major Edictal provisions on violence.

More broadly, I hope to relate these two speeches, and particularly the *pro Caecina*, to the evolution of Roman private law and the Roman judicial system during the 70s and 60s B.C. Since the discussion below is necessarily somewhat technical, let me give my thesis in grand outline at the outset. In the 70s and 60s, the Roman judicial system's "center of gravity" shifted. The change was complex and not entirely unambiguous; but it may be thought of under two aspects. The first is a decline in the Urban Praetor's role as the central creative force in shaping Roman private law. As we shall see, Urban Praetors continued to exercise their historic "activist" role throughout the 70s, and to some extent even beyond. But the untrammelled freedom of the Urban Praetor to reshape his Edict on an annual basis, and then to exercise discretion in its enforcement during his term, was by the late 70s encountering substantial social opposition. The *lex Cornelia de iurisdictione* of 67 B.C., while

[1] On the *pro Tullio*, see note 18. The *pro Caecina* was redated by G. Nicosia in *Studi sulla 'Deiectio'* vol. 1 (Milan 1965); henceforth: Nicosia, *Studi*. See below, notes 17, 22, 66. Nicosia's views attracted widespread adherence, and no dissent: see the reviews of G. Broggini, *ZRG* 83 (1966) 458; G. Wesener, *SDHI* 32 (1966) 361; G. Pugliese, *Iura* 16 (1965) 380–81; C. A. Cannata, *Labeo* 13 (1967) 109. The new dating has begun to creep into non-legal literature; cf. note 22.

on its face it had quite narrow goals, in effect provided public sanction for the eventual decline of praetorian creativity.

The second aspect is more subtle. In the second century B.C., during the heyday of praetorian creativity, the Roman jurists had emerged more or less in the shadows of the Roman judicial system. Their role was, as it appears, mainly stabilizing and integrative at first. While the Urban Praetor swiftly adapted the system in order to meet perceived social needs, the jurists were by contrast a force for continuity amidst change, and accordingly their original role was both to organize legal terms and rules "scientifically" and to advise laymen on the application of law. But with the decline of praetorian creativity, the stage was set for the emergence of Roman jurisprudence also as the principal source of innovation within the Roman legal system.

It has long been recognized that the legal systems of the West are characterized by their strong emphasis both on formal justice (the Rule of Law) and on the "formal rationality" of autonomous legal science; in this, we are the heirs of Rome. As I shall argue, Cicero's private orations were delivered in an era when Western law reached and crossed its first decisive threshold in achieving this emphasis.

The first section of my article reassembles evidence for the *Fasti* and the judicial activity of Urban Praetors from Sulla's restoration down to the formation of the First Triumvirate; I also establish the most probable dates for Cicero's two speeches. The second section discusses the Edictal provisions on violence as an example of praetorian creativity in the "old era." My conclusion deals with the importance of "legal insecurity" in provoking the origin and rise of Roman legal science. Tables I and II give, respectively, the reassembled *Fasti* of Urban Praetors and a list of known changes in the Praetor's Edict from 81 to 60.

I. The *Fasti* of the Urban Praetors

Beginning with the Sullan restoration in 81, there is a period of eight years during which all but two of the Urban Praetors are known: Cn. Cornelius Dolabella in 81;[2] Cn. Octavius in 79 (later Consul in 76);[3] L. Cornelius Sisenna in 78;[4] Cn. Aufidius Orestes in 77 (Consul 71);[5]

[2] Dated on the basis of his governorship in Cilicia, 80–79; cf. *MRR*. He departed from procedures in his Edict: Cic. *Quinct.* 30; Ascon. p. 74 C.

[3] The date and identification may now be considered certain: see A. W. Lintott, *Violence in Republican Rome* (Oxford 1968) 129–30; A. Metro, *Iura* 20 (1969) 520–21. D. R. Shackleton Bailey, *Cicero: Epistulae ad Quintum Fratrem et M. Brutum* (Cambridge 1980) 153, still prefers to emend *Q.Fr.* 1.1.21; as it seems, wrongly. Octavius made substantial changes in his Edict; for a discussion see below at notes 52–54.

[4] Cf. *CIL* 1^2.2.589 (= *ILLRP* 512; *FIRA* vol. 1, no. 35). He departed from his Edict: Ascon. p. 74 C.

[5] Val. Max. 7.7.6: he used discretion in enforcing his Edict.

C. Licinius Sacerdos in 75;[6] and C. Verres in 74.[7] The gaps are at 80 and 76. Both gaps can tentatively be filled.

80—Perhaps L. Scribonius Libo,[8] the father of the Consul of 34 B.C. and of Augustus' sometime wife. The evidence is slight. In the late Republic, probably as a result of Sulla's building program in the Comitium area,[9] the Urban Praetor's tribunal was moved from the Comitium to the southeastern corner of the Forum, and most likely to the relatively small, flat area between the Regia and the Temples of Vesta and Castor; this is the area often associated with the *puteal Scribonianum* (or *puteal Libonis*), a small monument erected by a certain Scribonius Libo.[10] The relocation of the Praetor's tribunal was complete at least by 74 B.C. (Cic. 2 *Verr.* 1.129, 5.186). Porphyrion, commenting on Hor. *Epist.* 1.19.8, asserts that the tribunal and benches were first set up in this areas *a Libone*, obviously by the same Libo who constructed the *puteal*. Admittedly, Porphyrion's evidence is poor; but I hesitate to reject it out of hand. If Libo was responsible for moving the tribunal, he surely acted as Urban Praetor, and an appropriate date for the move is precisely 80, the last year of Sulla's *dominatio*.[11] The *puteal* is depicted on coins struck in 62 by the son of the presumptive Urban Praetor; to judge from this schematic representation, the *puteal* was probably set up no more than a few decades earlier.[12] The *puteal Libonis* eventually became virtually a symbol of the Praetor's court.

[6] Cic. 2 *Verr.* 1.130; Ascon. p. 82 C. (Verres' predecessor.)

[7] For sources, see *MRR*. He made substantial changes in his Edict, none of which was retained by his successors: Cic. 2 *Verr.* 1.104–19, 125; and also frequently departed from his Edict: ibid. 119–27.

[8] The man is known from *ILLRP* 411 and perhaps also from *ILLRP* 567–68 (dedications from Caudium); he may be the Proquaestor pro Praetore recorded from Farther Spain, cf. *MRR* vol. 2, p. 481.

[9] On the development of the Forum, cf. P. Zanker, *Forum Romanum* (Tübingen 1972); on the Sullan Forum, E. van Deman, *JRS* 12 (1922) 1–31, still useful.

[10] See above all C. Gioffredi, *SDHI* 9 (1943) 262–67; compare J. Paoli, in *Mélanges F. de Visscher* vol. 4 (Brussels 1950) 302, note 54; P. Romanelli, *Gnomon* 26 (1954) 258–60. L. Richardson, *MDAI(R)* 80 (1973) 222–23, 232, who does not cite Gioffredi, takes a different view. These topographical questions are hotly disputed, and I simply follow the likeliest view; for further bibliography, see E. Nash, *Pictorial Dictionary of Ancient Rome* (New York 1968^2). Gioffredi and Richardson discuss artistic representations of tribunals.

[11] The date is especially appropriate because in 80 the Senate also let contracts for refurbishing the Temple of Castor next to the Urban Praetor's tribunal; enforcement of these contracts devolved (at least eventually) on the Urban Praetor, cf. Cic. 2 *Verr.* 1.130. Festus, p. 448 L, though badly mutilated, makes clear that the Senate authorized the *puteal* as well.

[12] M. Crawford, *Roman Republican Coinage* vol. 1 (Cambridge 1974) 441–42. The *puteal* was copied on a round altar of Claudian date (inscribed ARA PIETATIS) found at Veii: cf. G. Fuchs, *Architekturdarstellungen auf röm. Münzen* (Berlin 1969) 23–26 and 124–25. On the date of the original *puteal*, ibid. p. 125: "etwa zu Beginn des 1. Jahrhunderts v. Chr."; similarly, E. Welin, *Studien zur Topographie des Forum Romanum* (Lund 1953) 33, who suggests that the *puteal* was put up by the moneyer's father.

76—Perhaps a Salvius. Legal historians have widely assumed that the *interdictum Salvianum*, regulating pledges by *coloni*, was introduced by an Urban Praetor named Salvius at about this date.[13] There is hardly proof, but a Salvius might be the father of the Salvius who was Plebeian Tribune in 43, and/or the grandfather of M. Salvius Otho the moneyer in about 7 B.C.[14]

Starting in 73 B.C. there is a long period down to the middle 60s during which it is not possible to be absolutely certain who was Urban Praetor in what year. The likeliest list from 73 to 69 is the following:

73—Probably Q. Caecilius C. f. Q. n. Metellus (Creticus), Consul 69. As Urban Praetor he denied *possessio bonorum secundum tabulas* to a pimp.[15] While campaigning in 75 for the praetorship of 74, he and his electoral entourage, including both Consuls, were ambushed by food rioters (Sallust, *Hist.* 2.45 M). Since Verres was Urban Praetor in 74, it is clear that Q. Metellus' first attempt at election failed; I have assigned his praetorship to the next available year, though he might have served in 72 (the last possible year under the *lex Cornelia de magistratibus*).

72—Probably C. Calpurnius Piso, Consul 67. As Urban Praetor he granted *possessio bonorum contra tabulas* to a man with eight sons, one of whom, given previously in adoption, had ignored his natural father and brothers in his will.[16] The date is uncertain (73, 72, and 70 are possible), but this is the likeliest slot.[17]

[13] So J. M. Kelly, *Irish Jurist* 1 (1966) 347 (ca. 74 B.C.), and see M. Kaser, *TR* 44 (1976) 240, note 41, who notes other views. The interdict should antedate the *actio Serviana*, apparently introduced under the influence of the jurist Ser. Sulpicius Rufus (Praetor 65, Consul 51). The first substantial sources on *coloni* date to about this time: cf. P. A. Brunt, *JRS* 52 (1964) 71; and on Republican legal sources, N. Brockmeyer, *Historia* 20 (1971) 732–42, in part uncritical. On the Salvian interdict, see now B. W. Frier, *ZRG* 96 (1979) 204–28, esp. 220ff.; M. Kaser, *SDHI* 45 (1979) 14–18; P. W. de Neeve, *Colonus: Privégrondpacht in Romeins Italië* (Diss. Utrecht 1981) 33–37, 69–71 (and *passim* on Republican tenant farming), with my review forthcoming in *ZRG*.

[14] On the family, see T. P. Wiseman, *New Men in the Roman Senate* (Oxford 1971) 258–59. They derived from Ferentium and probably entered the Senate under Sulla. The moneyer is the Emperor's grandfather.

[15] Val. Max. 7.7.7. *MRR* assigns this source to Metellus Celer (Praetor 63); but the Urban Praetor in 63 is already known (cf. below, note 40). For other arguments, see R. Seager, *CR* 20 (1970) 11, who rightly dates the praetorship to 73. Metellus' deviations from his Edict should have occurred before the *lex Cornelia* of 67 (below, at notes 45–49).

[16] Val. Max. 7.7.5. *MRR* dates the praetorship to 70 (the latest possible year) and overlooks the urban praetorship, cf. Seager (above, note 15) 11; G. V. Sumner, *The Orators in Cicero's Brutus* (Toronto 1973) 128. If M. Mummius is displaced from the urban praetorship of 70 (see below), then that year is likely for Piso.

[17] Piso was defense advocate in Caecina's lawsuit (Cic. *Caec.* 34). Nicosia, *Studi* 149–52, argues that Piso must have been Urban Praetor *after* Caecina's lawsuit, on the basis of *Caec.* 36 (Cicero, addressing Piso, asks whether the Urban Praetor will be defenseless in preventing seizures of private property); Nicosia reasons that such a question would be impossible if Piso had already been Urban Praetor. But Cicero's question is of course

71—L. Caecilius C. f. Q. n. Metellus, Consul 68. His praetorship is dated on the basis of his governorship (as Propraetor) in Sicily in 70. Since he had the *formula Octaviana* in his Edict (Cic. 2 *Verr.* 3.152), he was either Urban or Peregrine Praetor. A certain Metellus, either this man or his older brother (see above on 73), granted an action for *damnum vi hominibus armatis coactisve datum* to M. Tullius, a client of Cicero's (*Tull.* 39). As Münzer long ago observed,[18] the events leading up to this lawsuit occurred *in agro Thurino* (Cic. *Tull.* 14), an area that was occupied by Spartacus' bands during 72 (App. *BC* 1.117.547).[19] Cicero's description of the burned villas, depressed property values, and unsettled countryside around Thurii (Cic. *Tull.* 14, cf. 18–19) surely refers to the aftermath of this occupation,[20] and so the speech probably dates to 71. If so, the Praetor in question is L. Metellus, Consul 68.

70—Probably M. Mummius. Official letters on the letting of vectigal contracts were sent by L. Metellus, the governor of Sicily, to the Consuls, the Praetor M. Mummius, and the Urban Quaestors (Cic. 2 *Verr.* 3.123). Mummius was most probably the Urban Praetor, addressed here in his capacity as occasional president of the Senate. Mummius was presumably a *novus homo*, since the consular Mummii do not use his praenomen.[21]

69—P. Cornelius (L. f. P. n.?) Dolabella, Urban Praetor probably in this year, but perhaps in 68. He granted the interdict *de vi hominibus armatis* to Caecina (Cic. *Caec.* 23). The *pro Caecina* must date to later than 74 (cf. *Caec.* 28–29), but earlier than 66, since at *Orator* 102 Cicero

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rhetorical, really intended for the judges and not for Piso; nor is a note of piquancy missing if Piso had in fact previously been Urban Praetor. In any case, the whole passage *Caec.* 32–40 is highly condescending toward Piso.

[18] F. Münzer, *RE* s.v. "Fabius" (1909) 1747–48. (The Fabius in question was the defendant.) This ought to have settled the question of date, which legal historians have continued to dispute; cf. M. Balzarini, in *Studi G. Grosso* vol. 1 (Turin 1968) 323, note 2, for various views. A. Watson, *The Law of Property* (Oxford 1968) 88 (and elsewhere), still uses a date of 73 or 72. Historians have generally ignored L. Metellus' urban praetorship, apparently because Cic. 2 *Verr.* 3.152 went unnoticed (it is not cited in the *RE* article or in *MRR*).

[19] See E. Gabba's commentary on this passage, and on 542.

[20] On Thurii, see also Florus, 2.8.5; P. Brunt, *Italian Manpower* (Oxford 1971) 364.

[21] See E. Gruen, *The Last Generation of the Roman Republic* (Berkeley 1974) 73, 176, 203–4, who cautiously identifies him with Crassus' lieutenant in 72 (Plut. *Crass.* 10.1–3). Metellus' failure to send letters to the Aediles shows that his letters concerned not the grain supply itself, but rather public finances; however, it might be noted that in 68 L. Cassius, Praetor for the *quaestio de maiestate*, simultaneously exercised a *publici frumenti cura* (Ascon. p. 59 C, with the wrong praenomen), cf. G. Rickman, *The Corn Supply of Ancient Rome* (Oxford 1980) 180. On letters of governors to the Senate, see P. Willems, *Le Sénat de la république romaine* vol. 2 (Louvain 1883) 657, who notes several addressed to Urban Praetors. R. Seager, (above, note 15) 11, summarizing a letter from T. R. S. Broughton, suggests that Mummius was a Peregrine Praetor; the suggestion is amplified by Sumner, (above, note 16) 128, but seems doubtful in the absence of parallels.

clearly implies that the speech was delivered before the *pro lege Manilia* in 66, and the Urban Praetor for 66 is probably known (see below). The year 67 is ruled out because the advocate for the defense, C. Piso, was Consul in 67; it is scarcely credible that Piso as Consul would have argued a civil case, and even less so that Cicero would have failed to mention the fact if he had. After his praetorship Dolabella was governor of Asia.[22] All the Roman governors of Asia are known from 76 down to 69,[23] the year in which the former Consul L. Licinius Lucullus was relieved of command and the province "returned" to ex-Praetors (Dio 36.3.2). There are thus three possible dates for the praetorship: in 70, with a governorship during what of 69 was left from Lucullus' term;[24] in 69, with a governorship in 68; or in 68, with a governorship in 67. Of these possibilities, the middle one is preferable, on admittedly shaky grounds: this dating allows the politically powerful L. Manlius Torquatus to be Praetor in 68 and Propraetor of Asia in 67 (he was Consul in 65, and it is not likely that his *cursus* was delayed);[25] while there is already a serviceable candidate for the urban praetorship of 70 (see above).[26]

Some further details tend to confirm the deduction. First, at the outset of the confrontation between Caecina and Aebutius over the Fulcinian farm, Aebutius argued that Caecina was debarred from inheriting under a Roman will because of a Sullan law imposing civil restrictions on Volaterrans (Cic. *Caec.* 18, 102). It is likely that these restrictions were a talking point precisely in 70/69 because of the census then in progress.[27] Second, the complex series of events leading to Caecina's lawsuit began with the death of his wife Caesennia (*Caec.* 17), on my chronology presumably in late 70 or early 69. M. Fulcinius, Caesennia's son by an earlier marriage, had died four years before her (*Caec.* 19, 94), thus probably in late 74 or early 73. By his will (*Caec.* 12) Fulcinius left his entire estate to P. Caesennius, most likely a relative of his mother; but out of his estate Fulcinius legated a large fixed sum of money (*grande pondus argenti*) to his wife,

[22] Val. Max. 8.1 *amb.* 2; Gell. 12.7; Amm. Marc. 29.2.19, all with the same anecdote. A Pergamene dedication to him: *IGRRP* 4.422. Most of the arguments in this paragraph derive straightforwardly from *MRR*; it would be tedious to recite them had Dolabella's praetorship not been redated to 72 or earlier by Nicosia, *Studi* 147–52. It is true, as Nicosia remarks (p. 147, note 36), that the date of Dolabella's Asian governorship is "unknown"; but it cannot be redated at will. Nicosia was followed by most reviewers, and by W. Stroh, *Taxis und Taktik* (Stuttgart 1975) 100.

[23] They are M. Junius Silanus in 76; M. (Junius?) Juncus in 75; and Lucullus from 74 to 69.

[24] W. V. Harris, *Rome in Etruria and Umbria* (Oxford 1971) 281, raises this possibility.

[25] So *MRR* vol. 2, p. 142, note 9. On Torquatus' political connections, see Gruen, (above, note 21) 133–34.

[26] And there is an alternate: C. Calpurnius Piso (above, note 17).

[27] See Harris, (above note 24) 282–84. Harris' further suggestion (276–81) that Caecina's lawsuit disposed of the citizenship issue is rather less probable.

and the preponderance of his estate (*partem maiorem bonorum*) to his mother.[28] This curious arrangement was apparently designed to circumvent provisions of the *lex Voconia* of 169 B.C., which among other things forbade the *censi*, those registered in the first census class (an estate of more than HS 100,000),[29] from making women their heirs,[30] and also ordered that no single legatee of *censi* receive more than the heir received.[31] Now M. Fulcinius was not a *census*, since the last census had taken place in 86/85, and his father, who probably was a *census*,[32] died only a short time before him (Cic. *Caec.* 12). However, in 74 C. Verres as Urban Praetor had extended to *incensi* with sufficient estates the provision barring women as heirs (Cic. 2 *Verr.* 1.104–14, 118; 2.21), an extension that was eliminated from the Edict after 74 (1.111–12); but Verres did not extend to *incensi* the rule that no single legatee receive more than the heir (1.110). It seems obvious that Fulcinius' will was drafted in specific response to the peculiar provisions of Verres' Edict, and that Caesennia's relative P. Caesennius colluded with Fulcinius and her in an arrangement whereby she would take the lion's share of her son's estate.[33] Thus Fulcinius' will fits extremely well within a chronology that places Caecina's lawsuit in 69. All this makes very likely the dating of Dolabella's praetorship, and of Cicero's speech for Caecina, to 69 B.C. In any case, the speech must be later than the *pro Tullio*.

[28] Latin really allows no other interpretation of *partem maiorem bonorum* (cf. Cic. *Leg.* 2.49). But modern interpreters, beginning especially with C. A. Jordan, *Oratio pro A. Caecina* (Leipzig 1847) 26–29, have taken the phrase to mean "a larger share (than his wife received)," in an unnecessary effort to avoid the problem discussed below in note 31.

[29] The original law had 100,000 *asses* (Cic. *Rep.* 3.17; Gaius 2.274), which was reinterpreted as HS 100,000 (Ps.-Ascon. p. 247 St.; Dio 56.10) after the denarius was retariffed ca. 141 B.C.; at least, so Crawford, (above, note 12) vol. 2, 621–25. But C. Nicolet attempts to disprove this, in *Les 'Dévaluations' à Rome* (Rome 1978) 260–64; and see now H. Zehnacker, in *Les 'Dévaluations' à Rome* vol. 2 (Rome 1980) 31–47.

[30] Cf. A. Watson, *The Law of Succession* (Oxford 1971) 29–31, on the *lex Voconia*, and p. 129 on the *legatum partitionis* as a means to circumvent it. Compare H. Stiegler, *RE* Suppb. 11 s.v. "partitio legata" (1968) 1037–43, with further bibliography. The meaning of the adjective *census* in the *lex Voconia* was disputed, cf. Ps.-Ascon. p. 247 St. (on Cic. 2 *Verr.* 1.104); but Cicero's description of Verres' Edict makes it clear that in 74 it was understood to require not only a certain amount of wealth, but also actual registration.

[31] Cf. Watson, *Succession* (above, note 30) 167–70; the rule is not entirely clear, but probably was as I describe it. Most commentators have interpreted Cicero's description of Fulcinius' will so as to make it conform with this provision of the *lex Voconia*, e.g. A. Metro, *Labeo* 9 (1963) 314–16; but the results are very forced, cf. above, note 28.

[32] The elder Fulcinius was a banker (Cic. *Caec.* 10–11) and a member of the local aristocracy at Tarquinii: cf. M. Cristofani, *MAL* 14.4 (1969) 253. C. Nicolet, who considered Fulcinius an *eques* in *L'Ordre Équestre à l'Époque Républicaine* vol. 1 (Paris 1966) 364, omits him from the prosopography in vol. 2 (Paris 1974).

[33] I am arguing that Fulcinius' will was deliberately drafted to conform with Verres' Edict. However, it should be noted that even where wills were in technical violation of law, there was strong social pressure to execute them: Cic. *Fin.* 2.55, 58.

After 69, there is a gap of two years; the Urban Praetor of 68 is apparently unknown, and that of 67 is known only if we accept the widespread, but doubtful, belief among legal historians[34] that Q. Publicius, Praetor in 67 (Cic. *Cluent.* 126),[35] was responsible for the *actio Publiciana* granting *in rem* rights to bonitary owners.[36] For the remainder of the decade (down to the formation of the First Triumvirate), the urban praetorship was occupied by C. Antonius Hibrida in 66;[37] L. Licinius Murena in 65;[38] M. Valerius Messalla Niger probably in 64;[39] L. Valerius Flaccus in 63;[40] possibly Q. Tullius Cicero in 62;[41] and P. Cornelius Lentulus Spinther in 60.[42] (The Urban Praetor of 61 is apparently unknown.)

Two final observations can be made about the list of Urban Praetors from 81 to 60. First, they constitute a relatively typical cross-section of the late Republican aristocracy:[43] six patricians (in 81, 78, 69, 64, 63, and 60), of whom two later became Consuls (those of 64 and 60); five plebeians of consular families (in 79, 73, 72, 71, and 66) and two plebeians of praetorian families (in 77 and 65), all of whom became Consuls; and

[34] See, e.g., M. Kaser, *Eigentum und Besitz* (Cologne 1952²) 298; F. Sturm, *RIDA* 9 (1962) 414–15; Kelly, (above, note 13) 347; G. Diosdi, *Ownership in Ancient and Preclassical Roman Law* (Budapest 1970) 155–56. Against this view, see A. Watson, *Property* (above, note 18) 104–7, who dates the *actio* to the Empire. The *actio* was allegedly introduced by a Praetor: Just. *Inst.* 4.6.6. While the *actio* is probably late Republican, it is hard to justify assigning it specifically to the Praetor of 67, who is listed second by Cicero. F. Serrao, *La "Iurisdictio" del pretore peregrino* (Milan 1954) 110–11, argues, perhaps rightly, that he was Peregrine Praetor, and that M. Junius, named first by Cicero, was Urban Praetor (cf. Plin. *NH* 35.100).

[35] On the man and his family, cf. Wiseman, *New Men* (above, note 14) 8 note 6, 20, 255; Wiseman follows his article in *CQ* 15 (1965) 158–59. *Contra*, Gruen (above, note 21) 166.

[36] Cf. M. Kaser, *Das römische Privatrecht* (Munich 1971–75²) [*RPR*²] vol. 1, 438–39. The *actio* was highly favorable to commerce; in this regard, it deserves note that Q. Publicius is probably identical with the eminent benefactor of Asia mentioned by Cicero, *Q.Fr.* 1.2.14. Differently, Shackleton Bailey, (above, note 3) 164 *ad loc.*

[37] Cf. Cic. *Mur.* 40, discussing the political advantage (to Antonius) of the games given by Urban Praetors. For other sources on his praetorship, see *MRR*. He was Consul in 63.

[38] Cic. *Mur.* 35–41, 53; Plin. *NH* 33.53. Consul in 62.

[39] Listed as Urban Praetor in an *elogium*: *Inscr. Ital.* 13.3.77 (= *ILS* 46). He was Consul in 61. This year is the latest possible, and also the likeliest slot.

[40] Cic. *Flacc.* 6, 100 (*urbana iuris dictio*). For other sources, see *MRR* (which does not list him as Urban Praetor).

[41] Q. Cicero presided at the trial of Archias under the *lex Papia* (*Schol. Bob.* p. 175 St.; cf. Cic. *Arch.* 3, 32); such non-standing *quaestiones* usually fell to the Urban Praetor, cf. F. Horak, *RE* s.v. "quaestio" (1963) 747–48.

[42] Plin. *NH* 19.23; cf. Val. Max. 2.4.6. Dated on the basis of his governorship in Nearer Spain, 59 (Cic. *Fam.* 1.9.13). He was Consul in 57.

[43] Compare the statistics for the praetorship as a whole: Gruen, (above, note 21) 163–77. I include also the doubtful names. The *novus homo* Licinius Sacerdos, Urban Praetor in 75, was still hoping for the consulate in 64 (Ascon. p. 82 C).

one plebeian of a senatorial family (in 75) and five *novi homines* (in 76, 74, 70, 67, and 62), none of whom made it to the consulate. On the whole, a high proportion of these Urban Praetors (9 out of 19, or 47%) became Consuls at a later date, a fact which justifies Cicero's remark in 63 B.C. (*Mur.* 41) that those selected as Urban Praetors were at an advantage when

TABLE 1

Urban Praetors, 81–60 B.C.

81	Cn. Cornelius Dolabella	D
80	L. Scribonius Libo	
79	Cn. Octavius (Cos. 76)	E
78	L. Cornelius Sisenna	D
77	Cn. Aufidius Orestes (Cos. 71)	D
76	Salvius (?)	E
75	L. Licinius Sacerdos	
74	C. Verres	E, D
73	Q. Caecilius Metellus (Cos. 69)	E, D
72	C. Calpurnius Piso (Cos. 67)	D
71	L. Caecilius Metellus (Cos. 68)	E
70	M. Mummius	
69	P. Cornelius Dolabella	
68		
67	Q. Publicius (?)	E
66	C. Antonius Hibrida (Cos. 63)	
65	L. Licinius Murena (Cos. 62)	
64	M. Valerius Messalla Niger (Cos. 61)	
63	L. Valerius Flaccus	
62	Q. Tullius Cicero	
61		
60	P. Cornelius Lentulus Spinther (Cos. 57)	

(*Note*: A question mark after the name indicates that the identification as Urban Praetor is based solely on an eponymous action in the Edict; however, several of the names or dates of other Praetors are also uncertain. An "E" indicates that the Praetor made changes in his Edict; a "D" indicates that he allegedly used his discretion in enforcing it.)

they later sought the Consulate.[44] This advantage also was closely correlated to family background, however; if one had the right ancestry, the urban praetorship was a political plum.

Second, the Urban Praetors of this period are also unexpectedly well attested. In large part this is a consequence of the fact that their activities as Urban Praetors attracted notice. Innovations in the Edict were still frequent, as we shall see. Cicero, writing to his brother on the importance of proclaiming a good Edict, recalls as an *exemplum* the praetorship of Cn. Octavius in 79 (*Q.Fr.* 1.1.21). C. Verres in 74 stood as an *exemplum* less worthy of imitation (cf. Cic. 2 *Verr.* 1.104–19, 125). But Urban Praetors also became noted (or notorious) for their exercise of discretion in enforcing their own Edicts; a line of anecdotes in Valerius Maximus (7.7.5–7), and another line cited by Asconius (p. 74 C) from a lost speech of Cicero, all concern Urban Praetors of this period and tend to confirm the prevalence of this tendency, which reached a sort of apogee in the remarkable year of Verres (Cic. 2 *Verr.* 1.119–27). What may be more surprising is that, by and large, this form of "freie Rechtsfindung" enjoyed considerable popularity, at any rate among the socially privileged; indeed, Urban Praetors were expected to make liberal use of discretion in granting actions. For example, when in 77 the Urban Praetor granted *possessio bonorum secundum tabulas* to an otherwise fully qualified man who happened to be a eunuch, he was stripped of his *iurisdictio* by a Consul and reprimanded by the Senate (Val. Max. 7.7.6).

The lost speech of Cicero mentioned above was given in 65 as a defense of C. Cornelius, whose extensive tribunician legislation in 67[45] included a statute requiring Praetors to announce at the outset of their terms what law they would use, and then not to deviate from that standard (Ascon. p. 59 C; Dio 36.40.1).[46] As Asconius tells us, the law was highly unpopular even though no one dared to oppose it; yet this law apparently did no more than state a hitherto tacit constitutional principle.[47] The excerpts from Cicero's speech quoted by Asconius (p. 74 C) make it clear that Cicero, in defending Cornelius, hunted out counterexamples of "honorable men" who had suffered from capricious Praetors; Cicero's argument must have been that the power to violate formal justice at will, through the arbitrary or idiosyncratic enforcement of

[44] Since there were eight Praetors per year after 81, each Praetor had in principle a one-in-four chance of becoming Consul.

[45] On Cornelius' legislation, cf. M. Griffin, *JRS* 63 (1973) 196–213 (esp. 208); A. M. Giomaro, *St. Urbinati* ser. A (Sci. Giur.) 43 (1974/1975) 269–325.

[46] Cf. Metro, (above, note 3) 500–524; idem, *La 'Denegatio Actionis'* (Milan 1972) 145–50.

[47] See, for a summary of recent scholarship, A. A. Schiller, *Roman Law: Mechanisms of Development* (Hague 1978) 412–13. There is no sign that the *lex Cornelia de iurisdictione* bore a sanction.

legal procedure, is a threat to everyone.[48] Doubtless Cicero found occasion to mention Verres as well.

In any case, the *lex Cornelia de iurisdictione* probably signalled the beginning of the end of praetorian creativity in freely reshaping private law on an annual basis.[49] For if Urban Praetors were to rewrite their Edicts freely and frequently, it was the inevitable consequence that they have considerable discretion about enforcing the Edict in unforeseen "hard cases." When this discretion was taken from them, the result was a gradual decline in the pace of Edictal innovation.

Against this background, let us turn to examine the activity of the Urban Praetors in the last few years of the "old era."

II. Violence and the Praetor's Edict

At the beginning of his term, each Urban Praetor issued an Edict that purported to list the causes and forms of action which he would enforce within his court. The Urban Praetors of the late Republic, in their quest "to aid or supplement or correct the *ius civile*,"[50] retained and exercised virtually unlimited power to alter the Edict of their predecessors, either by omitting previously valid actions, or by giving them new wording, or by introducing altogether novel actions; in all these respects, the power of a Praetor was essentially limited only by his own sense of the appropriate. In this section of my paper I discuss a series of changes in the Edict, all of which were designed to cope with the

[48] So, in essence, A. W. Lintott, *CQ* 27 (1977) 184–86. Many, but by no means all, of the deviations from the Edict involved specifically praetorian remedies. Deviations won general praise for the Urban Praetor of 91 (Val. Max. 3.5.2), but led to the lynching of the Praetor of 89 (cf. App. *BC* 1.54.235–36; also Livy, *Per.* 74; Val. Max. 9.7.4). I lack access to M. Bartošek, *'Verrinae,' Die Bedeutung der Reden gegen Verres für die Grundprobleme von Staat und Recht* (Prague 1977).

[49] On the role of the *lex Cornelia* in the decline of the Edict, see F. Wieacker, *Vom römischen Recht* (Stuttgart 1961²) 122. Note the interesting remarks of H. Hübner, in *Gedächtnisschrift Hans Peters* (Berlin 1967) 104–6; also B. Vonglis, *La Lettre et l'esprit de la loi* (Paris 1968) 187–90. New literature on Roman theories of legal sources is discussed by M. Kaser, in *Festschrift W. Flume* vol. 1 (Cologne 1978) 101–23; on which, O. Behrends, *ZRG* 97 (1980) 467–71. Cicero's model of the impartial Urban Praetor, described in the *pro Murena* (41) and exemplified for Cicero by Cn. Octavius in 79 (*Q.Fr.* 1.1.21–22), was by no means universally accepted at Rome; for the aristocratic counterview, see e.g. Livy 2.3.3–4 (with Ogilvie). Compare Max Weber, *Economy and Society* vol. 2 (ed. G. Roth and C. Wittich, Berkeley 1968) 978: "During the time of the republic, Roman law itself presented a unique mixture of rational and empirical elements, and even of elements of *Kadi*-justice."

[50] Papinian, D. 1.1.7.1, the classic definition of the Praetor's role in shaping private law. In addition to the Edictal changes discussed below, see note 52 on Cn. Octavius; note 13 on Salvius; notes 7 and 30 on Verres; and notes 34–36 on Q. Publicius. See also Table 2 for a summary.

unsettled social conditions of the 70s B.C.[51] These changes, complexly interrelated, substantially strengthened the legal position of the victims of violence by offering them new means both to recover the property wrested from them and to wreak civil punishment on the perpetrators.

In 79 B.C. the Urban Praetor Cn. Octavius introduced into his Edict the *formula Octaviana*,[52] an action governing extortion from private citizens through force or fear (Cic. 2 *Verr.* 3.152: "Quod per vim aut metum abstulissent"). Octavius' aim was explicit and political: through this new action Octavius forced Sulla's followers to return what they had extorted (Cic. *Q.Fr.* 1.1.21: *Sullani homines*). Cicero goes on to report how Octavius, before granting suits against them, listened tirelessly to the complaints of the accused; his austere harshness was tempered by a gentleness of manner and much seasoning of human sympathy—a highly pleasing combination, so Cicero observes, amid the general arrogance and license at Rome (ibid. 22). Octavius' new action was received into the permanent Edict (cf. Cic. 2 *Verr.* 3.152) as an action for either the restoration of property extorted through fear, or quadruple damages.[53] On the public law side, the *formula Octaviana* may have prepared the political climate for the establishment of the permanent criminal *quaestio de vi*, through the *lex Lutatia* probably of 78 B.C., and then the *lex Plautia* probably of 70.[54]

The uneasy social conditions of the 70s soon provoked further measures. In 76 the Peregrine Praetor, M. Terentius Varro Lucullus (Ascon. p. 84 C),[55] created a new *iudicium*, the nature and background of which

[51] These disturbances resulted from the aftermath of the Sullan *dominatio*, the rebellions of Sertorius and Lepidus, the constant pirate raids, the slave revolt of Spartacus, and Pompey's return. Cicero refers to this recent history at *Caec.* 104.

[52] See esp. B. Kupisch, *In Integrum Restitutio und Vindicatio Utilis* (Berlin 1974) 158–67, and M. Kaser, *ZRG* 94 (1977) 124–26, with whom I substantially agree. Kaser, modifying Kupisch, suggests that the *formula Octaviana* already ordered either return of extorted property or quadruple damages, but was directed only against the actual extortionist; the later *actio quod metus causa* also embraced third parties (pp. 126–32). Both authors cite additional bibliography. Octavius also provided in his Edict that, when magistrates had "decreed wrongfully" (*iniuriose decreverant*), these same rules of law should later be enforced on them as private individuals (Cic. *Q.Fr.* 1.1.21); in altered form, this action too was received into the permanent Edict, cf. O. Lenel, *Das Edictum Perpetuum* (Leipzig 1927[3]) [*EP*[3]] 58–59. Octavius' innovation anticipates the *lex Cornelia de iurisdictione* (cf. above at notes 45–49).

[53] Lenel, *EP*[3] 111–14, recognizing the connection with the *formula Octaviana* at p. 111 note 1.

[54] While the date and content of these statutes is controversial, I am reasonably convinced by R. A. Bauman, *Labeo* 24 (1978) 60–74, reviewing L. Labruna, *Il Console Sovversivo* (Naples 1976). Bauman, citing earlier literature, argues that the *lex Lutatia* established a special *quaestio*, the *lex Plautia* a permanent one.

[55] This source also gives the date (the latest possible). The fact that the *iudicium* was introduced by the Peregrine Praetor has caused legal historians some unease; see the summary by L. Labruna, *Vim Fieri Veto* (Naples 1971) 19, note 41; and cf. below note 58. The census of 86/85 apparently failed to register a great many new citizens: Brunt,

is discussed by Cicero five years later in the *pro Tullio* (7–12).[56] Due to the continual internal war (10: *ex bello diuturno atque domestico*),

TABLE 2
Summary of Known Changes in the Edict, 81–60 B.C.

79 Cn. Octavius
introduced forerunner of *quod quisque iuris* (§8)
introduced *formula Octaviana*, forerunner of *actio quod metus causa* (§ 39)

76 Salvius (?)
introduced *interdictum Salvianum* (§ 266)
(?) introduced *iudicium de vi coactis armatisque hominibus*, probable forerunner of *actio vi bonorum raptorum* (§ 187)

74 C. Verres
changed rules on *possessio bonorum secundum tabulas* (§ 149)
awarded share *contra tabulas* to daughter of patron of testate freedman (§ 152)
changed rules for *possessio bonorum* upon presumed intestacy (§ 156)
extended part of *lex Voconia* to *incensi* (§ 163)

73 Q. Caecilius Metellus
removed all changes made by Verres

71 L. Caecilius Metellus
introduced *interdictum de vi armata* (§ 245.2)
(?) eliminated *detrudere*-interdict

67 Q. Publicius (?)
introduced *actio Publiciana* (§ 60)

(*Note*: A question mark before the change indicates that the change probably occurred either in this year or the next. The numbers in parentheses refer to the numeration of Edictal rubrics in Lenel, *EP*[3]. Evidence for these changes is discussed in the text.)

(above, note 20) 90–94; if jurisdiction of them remained with the Peregrine Praetor until 70/69, some anomalies in the 70s might be explained. In any case, as Prof. W. V. Harris has pointed out to me, the eventual mass enfranchisement of the Italians is certain to have had disruptive effects on the Roman judicial system; for example, in general the new citizens are likely to have favored curbing praetorian use of discretion.

[56] The development of this *iudicium*, and its putative relation to the later *actio vi bonorum raptorum*, are hotly debated; bibliography in M. Kaser, *RPR*[2] vol. 1, 626–27; vol. 2, 435–36.

armed violence in the countryside had become rampant, particularly through gangs of slaves (*familiae*); Cicero undoubtedly refers to the chaos unleashed by Lepidus' rebellion in 78/77. Lucullus' new action was directed towards the owners of *familiae* and empowered a panel of *recuperatores* to estimate the amount of damage done to the plaintiff (up to an amount that had been previously set by him); adverse judgment was for quadruple. Cicero quotes the *intentio* of the judicial *formula* for Tullius' lawsuit (7 and 31):

> Quantae pecuniae paret dolo malo familiae P. Fabii vi hominibus armatis coactisve damnum datum esse M. Tullio, . . .

Lenel reconstructed the remainder of the *formula*:[57]

> tantae pecuniae dumtaxat HS <——> quadruplum recuperatores P. Fabium M. Tullio condemnanto; si non paret, absolvunto.

Cicero (*Tull.* 9) calls this the *iudicium de vi coactis armatisque hominibus*. The new *iudicium* had passed into the Edict of the Urban Praetors at least by 71 B.C. when Cicero delivered the *pro Tullio*, and perhaps already in 76.[58] Lucullus' *iudicium* created a new legal phrase and category: *vis hominibus armatis coactisve*.

In 71, the year in which Cicero spoke for M. Tullius, the Urban Praetor's Edict thus contained two relatively novel actions based on the defendant's liability for violence, namely the *formula Octaviana* (Cic. 2 *Verr.* 3.152, of L. Metellus) and the Lucullan *iudicium de vi coactis armatisque hominibus* under which Tullius' case was argued. Both were for quadruple damages, indicating the seriousness and energy with which the Urban Praetors had counteracted the epidemic of violence.[59]

In his speech for Tullius, Cicero also discusses the interdicts grouped under the Edictal rubric *unde vi*. This discussion is crucial to understanding how the Edictal rubric developed during the late 70s; but unfortunately the *pro Tullio* is more than slightly lacunose, which makes analysis difficult and controversial. I will try to set out the evidence clearly.

[57] Lenel, *EP*[3] 395. I have omitted, after *quadruplum*, the phrase *aut noxae dedere*, which was evidently not in the *formula* in Cicero's time: Lenel, *EP*[3] 395, note 4.

[58] So A. Watson, *Law Making in the Later Roman Republic* (Oxford 1974) 65–67, whose argument on the relationship between the Urban and Peregrine Praetors is however not entirely persuasive; cf. M. Kaser, *TR* 45 (1977) 165–66.

[59] On the significance of quadruple penalties, see J. M. Kelly, *Roman Litigation* (Oxford 1966) 153–72 (p. 171: "typically attached to wrongs in which the condemnation of the wrongdoer presents the victim-plaintiff with especial difficulties in practice"). The seriousness of the offense is also indicated by the use of recuperatorial procedure in the *formula Octaviana* and the Lucullan *iudicium*; cf. B. Schmidlin, *Das Rekuperatoren-verfahren* (Freiburg 1963) 50–51 and 45–47, respectively.

By far the oldest interdict had existed *apud maiores nostros* (*Tull.* 44), probably since the early second century B.C.[60] As Cicero observes, its wording had evolved;[61] in 71 it ran (*Tull.* 44):

> Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi deiecisti, cum ille possideret, quod nec vi nec clam nec precario a te possideret, <eo restituas>.

This is the classical interdict *de vi*, and it appears to have had the identical wording in 69,[62] when Cicero refers to it as "the everyday interdict" (*Caec.* 91: *illud cotidianum interdictum*). This interdict underwent only a few further changes, mainly involving elimination of superfluous words, before reaching its final form in the redaction of Julian.[63]

Alongside this "everyday" interdict there was in 71 another interdict, with a somewhat harsher form;[64] Cicero gives a hypothetical example of it (*Tull.* 29):

> Unde dolo malo tuo, M. Tulli, M. Claudius aut familia aut procurator eius vi detrusus est, <eo restituas>.

This interdict differed in form from the interdict *de vi* in four significant ways: (1) it used the verb *detrudo* instead of *deicere* (the two are basically synonyms,[65] but *detrudo* connotes greater force and physical directness, cf. *Caec.* 49); (2) it eliminated the requirement that thrusting-out have occurred "within this year"; (3) it required that the defendant's own "maliciousness" (*dolus malus*) lie behind the thrusting-out (cf. *Tull.* 29–30), while eliminating specific reference to the defendant's vicarious liability for his *familia* and procurator;[66] and (4) it omitted the entire *exceptio*

[60] The exact date is unknown; but the *exceptio vitiosae possessionis*, first attested in 161 B.C. (Ter. *Eun.* 319–20), probably originated in this interdict.

[61] Cf. Lenel, *EP*[3] 462. Note the somewhat different wording in the *lex agraria* of 111 B.C. (*FIRA* vol. 1, no. 8 line 18): "Si quis . . . ex possessione vi eiectus est. . . ." By contrast, *Rhet. ad Herenn.* 4.40 (". . . ut me vi de meo fundo deieceris") probably indicates that the later wording was in place by the mid-80s.

[62] Cic. *Caec.* 91, and in general 86–93; so also in 63 B.C.: Cic. *Leg. Ag.* 3.11.

[63] Cf. Ulpian D. 43.16.1 pr., with Lenel, *EP*[3] 461–65, and M. Kaser, *RPR*[2] vol. 1, p. 399.

[64] Whether this interdict was in fact harsher has been the subject of protracted, largely pointless debate, cf. Nicosia, *Studi* 98–99. Cicero, in any case, specifically construes it as such (*Tull.* 29–30), which at a minimum must indicate that it was so used in the late 70s. This interdict probably led to a trial before *recuperatores*, as did the later interdict *de vi armata*; cf. Schmidlin, (above, note 59) 47–50.

[65] So Cicero, *Tull.* 44–45. See also note 67.

[66] Nicosia, *Studi* 97–109, sees here the fundamental characteristic of the *detrudere*-interdict and thinks that this interdict became outmoded as the interpretation of the interdict *de vi* expanded; he is thus inclined to exaggerate the novelty of the interdict *de vi armata*. Significantly, Nicosia scarcely deals with Cic. *Caec.* 49, where the interdict *de vi armata* is regarded as a successor to the *detrudere*-interdict. The reference to *dolus malus* in the *detrudere*-interdict was plainly responsible, as Cicero saw, for the similar reference in the Lucullan *iudicium*.

vitiosae possessionis which in effect directed a verdict for the defendant if the plaintiff, prior to his being thrust out, had possessed "by force or by stealth or on grant" from the defendant. We may call this the *detrudere*-interdict; it too was plainly of considerable vintage.[67]

In introducing the *detrudere*-interdict, Cicero states to the judges: "You observe that Praetors issue this form of interdict during these years" (*Tull.* 29: *Videtis praetores per hos annos interdicere hoc modo*). The present tenses of the main verb and infinitive imply either that the *detrudere*-interdict was still in the Edict in 71, or (just possibly) that it had been eliminated in this very year.[68]

On the other hand, some sections later in his speech, Cicero, after discussing the "everyday" interdict *de vi* (*Tull.* 44–45), invites the judges (46) to "consider the second interdict which has now also been established due to the same unsettled conditions and men's excessive (license)":

> Age illud alterum interdictum consideremus, quod item nunc est constitutum propter eandem iniquitatem temporum nimiamque hominum <licentiam> . . .[69]

Unfortunately the text breaks off at exactly this point, just before Cicero describes the "second" interdict. What we can say about the "second" interdict is the following: it was obviously a harsher form of the "everyday" interdict; it had just been introduced, probably by the Edict of 71; and it was established in specific relation to the Lucullan *iudicium* of 76 (since Cicero refers back to his discussion of the reasons for that *iudicium* as given in *Tull.* 8).

The recently introduced "second" interdict is the interdict *de vi armata*, under which Caecina's suit was brought in 69.[70] At that date the interdict's wording ran (*Caec.* 41–48, 55, 60–61, 88):

> Unde tu aut familia aut procurator tuus illum[71] vi hominibus coactis armatisve deiecisti, eo restituas.

[67] Note Lucilius, frg. 825 Marx (= 903 Krenkel): "detrussus tota vi deiectusque Italia," probably of Hannibal. Lucilius' phrase was picked up by Cic. *Caec.* 47, and, as Marx comments, it must refer to the interdicts *de vi*. Lucilius died in 102 B.C. Nicosia, *Studi* 103–4, dates the *detrudere*-interdict to ca. 76 B.C., obviously much too late.

[68] Nicosia, *Studi* 97–101 and 152–53, argues much the same from *per hos annos*; this phrase, in any case, clearly indicates that change was "in the air."

[69] The restoration of this word is certain on the basis of *Tull.* 8: the Lucullan *iudicium* was instituted "propter hominum malam consuetudinem nimiamque licentiam."

[70] So Nicosia, *Studi* 103, note 39, 140, note 126.

[71] Following Keller and Rudorff, Nicosia, *Studi* 154–57, inserts at this point the words "aut familiam aut procuratorem illius" (parallel to the wording of the interdict *de vi*). This is unpersuasive in view of Cic. *Caec.* 37, which Nicosia fails to explain away. Absolutely identical wording need not be assumed for the interdicts *de vi* and *de vi armata*; the differences in the latter are accounted for through its later date and its sources.

The "second" interdict followed the interdict *de vi* within the Edictal rubric *unde vi*.[72] The interdict *de vi armata* resembled the older *detrudere*-interdict in that it lacked the restriction "within this year" and the *exceptio vitiosae possessionis*; but it expanded the defendant's vicarious liability by eliminating the requirement of *dolus malus* and listing the subordinates for whom he was responsible. The general form and wording of the interdict *de vi armata* derived directly from the interdict *de vi*, while the phrase *vi hominibus coactis armatisve* came from the Lucullan *iudicium*. The new interdict *de vi armata* (or *de vi hominibus armatis*, Cic. *Caec.* 23) thus explicitly assumed the nature of a special case of the interdict *de vi*; and that special case was largely determined through a reference to the legal category of *vis hominibus coactis armatisve*, as established in the Lucullan *iudicium*.

The historical reconstruction most favored by this evidence is the following one. In 71 the Urban Praetor L. Metellus, doubtless responding to problems that arose from Spartacus' slave revolt, introduced into his Edict the interdict *de vi armata*; he modelled its wording both on the "everyday" interdict *de vi* and on the Lucullan *iudicium* of 76 B.C. Metellus may, however, have left the old *detrudere*-interdict in place (this depends on the precise interpretation given to *Tull.* 29); if so, then the *detrudere*-interdict was probably removed from the Edict almost at once, presumably by Metellus' successor in 70, and in any event by 69 (cf. *Caec.* 49, where it is designated a thing of the past). Depending on the circumstances, Cicero could treat the interdict *de vi armata* as an essentially new interdict, established to counter the same licentiousness that Lucullus had combatted in his *iudicium* (so *Tull.* 46); or he could regard it as a more modern form of the *detrudere*-interdict it had effectively supplanted (so *Caec.* 49; cf. 34, 40). Even today it is not possible, I think, to claim that either view is technically incorrect. The interdict *de vi armata* was undoubtedly different in form, and to some extent also in content, from the *detrudere*-interdict; above all, it was far more specific in identifying the cases it covered. Its creation soon rendered the older interdict superfluous. Whether or not the two interdicts remained alongside one another in the Edict for a year or two is largely a moot question.

Conclusion: Legal Insecurity and the Origins of Roman Jurisprudence

In the preceding pages I have depicted a legal system swiftly responding to unsettled social conditions. But this picture could easily mislead. For all the evident vigor of the Urban Praetors during the 70s, it was not inevitable that their efforts would succeed in curbing the rash of wanton

[72] Lenel, *EP*[3] 467–68.

violence. The Urban Praetor's power to create or abolish procedural law was, in itself, undeniably impressive; but swiftly changing procedural law also carried with it the substantial risk of confusion, as a law-affected population struggled to bring its conduct into conformance with rapidly shifting sources of legal liability. New praetorian remedies did not establish themselves *sua sponte*; indeed, their very purpose, meaning, and scope could form, not a basis for obedience, but an occasion for uncertainty and debate. Much depended on the capacity of the Roman judicial system to transmit its "messages" clearly and effectively. Who bore the responsibility for preserving continuity and coherence within a system that laid such emphasis on change?

The decade of the 70s offers us an unparalleled opportunity to observe the Urban Praetors at work creating procedural forms in accord with their perceptions of social utility; but it also allows us to study the social and legal consequences of such continual change. A large portion of Cicero's speech for Caecina is devoted to setting out the "proper" interpretation of the interdict *de vi armata*, which, if my reconstruction is correct, was then only a little more than two years old. While detailed discussion of the interdict is best reserved for another place, it deserves noting that the new interdict raised substantial legal questions, especially as to the manner in which its use of the category *deiectio* was to be interpreted: by reference to the older legal category of *detrusio* (cf. *detrusus est* in the *detrudere*-interdict), or rather by reference to the probably wider concept of *deiectio* relied on in the interdict *de vi*? Was the change from the *detrudere*-interdict to the interdict *de vi armata* merely a formal change, one set of words replaced by a more "modern," but basically equivalent, set? Or did the change involve an alteration in substantive law as well, and if so, what alteration? Could any inferences be drawn in this regard from the fact that the interdict *de vi armata* did not have the one-year limitation and other features of the interdict *de vi*? What was the precise significance of its borrowings from the Lucullan *iudicium*? It is not clear (at any rate, not to me) that any of these questions of *interpretatio* had an evident and unequivocal answer; rather, answers had to be found through the hard tests of experience. But this legal insecurity, it must be stressed, is not simply a matter of one lawsuit's outcome being initially indeterminate; insecurity will alter the whole impact of a legal system upon society,[73] and few who orient their conduct toward legal rules will remain unaffected. When Sex. Aebutius used armed slaves to prevent Caecina from entering the Fulcinian farm,

[73] On the consequences of legal insecurity, see now the economic analysis of G. Tullock, *Trials on Trial* (New York 1980). On legal insecurity at Rome, see F. Schulz, *Principles of Roman Law* (Oxford 1936) 243–47; C. A. Maschi, in *Studi E. Betti* vol. 3 (Milan 1962) 411–49. Both are too optimistic, at least for the Republic.

neither man could be certain what the legal implications of such an act would be.

Cicero's private orations are generally characterized by a rather heavy-handed didacticism; they tend to range far beyond the case at hand, and into the recent legal history underlying it. Cicero himself recognizes this as true of the *pro Caecina*.[74] Cicero's didacticism no doubt reflects in part the legal insecurity caused by continually shifting procedural forms: not just new actions, but new forms of old ones.[75] The judges in these trials were normally laymen, and Cicero could not necessarily rely on their being familiar with recent changes in the Edict. Cicero's orations give us a rare insight into this side of things; but they were delivered in the twilight era of praetorian creativity, when the most numerous and important Edictal innovations were already long since accomplished. Legal insecurity must have been far more pervasive in the second century B.C.

The *pro Caecina* shows clearly the extent to which the responsibility for curing this insecurity had fallen on the jurists. Both plaintiff and defendant relied heavily on jurists in advancing their rival interpretations of the newly created interdict *de vi armata*; Cicero cited the eminent C. Aquilius Gallus (*Caec.* 77–78), while Piso, advocate for the defendant, had obtained an opinion from a jurist who is unfortunately not named by Cicero (*Caec.* 79–80), but whose views on the interdict virtually duplicate the views of the "classical" jurists.[76] Aquilius had also

[74] Cic. *Orat.* 102, describing his tactics: "res involutas definiendo explicavimus, ius civile laudavimus, verba ambigua distinximus." On the passage, see R. Rau, in *Silvae: Festschrift für Ernst Zinn* (Tübingen 1970) 173–81 (but the emendation at p. 181 of *laudavimus* to *enodavimus* should be rejected). This didacticism made Cicero's orations far longer than was tolerable two centuries later, when private law had become more settled; cf. Tac. *Dial.* 20.1 (specifically naming the *Tull.* and *Caec.*). Cicero's career as a private advocate is surveyed by H. J. Mette, *Gymnasium* 72 (1965) 10–27; three of the four orations are now discussed by Stroh, (above, note 22).

[75] On this, Watson, *Law Making* (above, note 58) 33–34 (though it need not follow that analysis of form is futile).

[76] Compare Cic. *Caec.* 90 (addressed to Piso): "eum qui non possideat negas deici posse," with Ulpian D. 43.16.1.23: ". . . nec alius deici visus est quam qui possidet"—as Lenel, *EP*[3] 464, observes, Piso's position almost word for word. (Cf. Nicosia, *Studi* 85–86.) The jumble at Cic. *Caec.* 79 is emended by D. R. Shackleton Bailey, *HSCP* 83 (1979) 240, to read: "Illud autem miror, cur meum auctorem vos pro me appellatis, vestrum, quem vos aliquid contra me sentire dicitas (?), <non> nominetis." F. L. Keller, *Semestrium ad M. Tullium Ciceronem* vol. 1.2 (Zurich 1850) 507–8, records many similar suggestions. It is worth conjecturing that Piso did not name this jurist because the jurist did not wish to be overtly associated with the defense, presumably because he was a friend of Cicero (cf. *Caec.* 79–80); if so, this jurist is surely Cicero's close friend the eminent Ser. Sulpicius Rufus, who in fact wrote the first commentary on the Edict (Pompon. D. 1.2.2.44). Cicero's ironic treatment of the jurist in *Caec.* 79 reads much like his remarks on Servius in *Mur.* 25ff. Cicero's view of law is now surveyed by C. J. Classen, *Latomus* 37 (1978) 597–619; on his relations with jurists, see M. Bretone, *Quaderni di Storia* 10 (1979) 243–72 (on Servius, pp. 252–58).

offered legal advice to Caecina during the events leading up to the trial (*Caec.* 95), and someone with legal skills had advised the younger Fulcinius on drafting his will in accord with Verres' Edict.[77] Years later, when Aquilius opted not to run for the consulate, he gave as his excuse *illud suum regnum iudiciale*, as Cicero recounts with considerable sarcasm (*Att.* 1.1.1). But Cicero himself has given us a vivid picture of the enormous demands placed upon the public services of Ser. Sulpicius Rufus (*Mur.* 22).[78]

The jurists must have played such a role right from the emergence of "scientific" jurisprudence in the latter half of the second century B.C. Indeed, it is surely probable that this was, in large measure, the original *raison d'être* of Roman jurisprudence: not so much to influence and manage Edictal innovations,[79] as rather to provide, through their learning, a counterbalance of "scientific" calm and continuity.[80] In other words, the original purpose of Roman legal science might well be thought of as stabilizing and conservative, rather than innovatory. Indeed, it is precisely their conservative function that Cicero stresses (*Caec.* 70–73). However, during

[77] See above at notes 28–33. The text at *Caec.* 95 is confused; I follow Clark's version though it is not easy to justify. Keller, (above, note 76) 524, has a good note. In any case, the reference to Aquilius cannot simply be deleted, as in the editions of A. Boulanger (Paris 1929) and A. D'Ors Pérez-Peix (Madrid 1943).

[78] Comparing Servius with the *vir militaris* Murena: "Vigilas tu de nocte ut tuis consultoribus respondeas, ille ut eo quo intendit mature cum exercitu perveniat; te gallorum, illum bucinarum cantum exsuscitat; tu actionem instituis, ille aciem instruit; tu caves ne tui consultores, ille ne urbes aut castra capiantur; ille tenet et scit ut hostium copiae, tu ut aquae pluviae arceantur; ille exercitatus est in propagandis finibus, tuque in regendis." See, with commentary, A. Bürge, *Die Juristenkomik in Ciceros Rede Pro Murena* (Zurich 1974) 86–91. Comparable are Cicero's remarks on Aquilius at *Caec.* 78; and cf. also Pomponius, D. 1.2.2.42: "Gallum maximae auctoritatis apud populum fuisse Servius dicit," with its faint note of disapproval. On the division of functions between orators and jurists in the late Republic, see the seminal article of C. Broggini, in *Studi B. Biondi* vol. 2 (Milan 1965) 683–705 (esp. 691).

[79] For this view, see for instance F. Schulz, *History of Roman Legal Science* (Oxford 1946) 50–51, with bibliography; compare M. Kaser, *RPR*^{2} vol. 1, 205–6. Curiously, there seems to be no clear evidence that *any* second-century changes in the Edict were sponsored by jurists. (I do not speak of draftsmanship, of course.) The first Edictal innovation indisputably due to a jurist is the *actio de dolo*, devised by Aquilius Gallus (cf. Cic. *Off.* 3.80 and *Nat. Deor.* 3.74); it is probably later in date than the *lex Cornelia de iurisdictione*, cf. Watson, *Law Making* (above, note 58) 72–75. (Cf. also note 13.) Even into the Empire jurists continued to recommend Edictal changes: Vonglis, (above, note 49) 184.

[80] The cautelary nature of Republican jurisprudence has often been observed; cf. Schulz, (above, note 79) 49–52; W. Kunkel, *Herkunft und Soziale Stellung der röm. Juristen* (Graz–Vienna–Cologne 1967^2) 323–24. Aquilius Gallus is the last major jurist who was mainly engaged in cautelary activity: Klebs and Jörs, *RE* s.v. "Aquilius" (1895) 327–30. My belief is that the origins of Roman jurisprudence have more to do with the internal needs of the judicial system than with its political or "ideological" ambiance. For a different view, see (e.g.) A. Schiavone, *Nascita della Giurisprudenza* (Rome 1976), with the review by R. Vigneron, *Bull.* 22 (1980) 312–21.

Cicero's lifetime the Urban Praetors gradually receded into the background, due mainly to the increasing social and legal restraints placed upon their free use of discretion and the concomitant decline in their Edictal innovations; while the jurists, whose work had begun in consolidation, emerged also as the central source of creativity in private law.[81] It seems fair to say that this fundamental shift from Praetors to jurists is the real milestone in the rise of classical Roman law.

[81] Long into the Empire the "historical tradition" of Roman jurisprudence preserved in public the misleading image of conservatism; see, for instance, the speech of Cassius Longinus given by Tac. *Ann.* 14.43, with Schulz, (above, note 73) 34, who takes the words literally (in which he is not alone!). Only gradually did the jurists become confident enough to express the full extent of their power; see the interesting contrast between Neratius and Celsus in V. Scarano Ussani, *Valori e Storia nella Cultura Giuridica fra Nerva e Adriano* (Naples 1979). F. Wieacker, *ZRG* 94 (1977) 1–42, studies the rise of "overtly evaluative jurisprudence" during the Empire. By contrast, in the late Republic the jurists were still acutely concerned to bound their discipline as against rhetoric and philosophy; cf. recently D. Nörr, in *Symposion 1977* (ed. J. Modrzejewski and D. Liebs, Cologne 1982) 269–305.