# ROMAN RIGHTS TALK: SUBJECTIVE RIGHTS IN CICERO AND LIVY

*Dan Edelstein*[1] *and Benjamin Straumann*[2]

**Abstract:** While most scholars today recognize that Roman writers occasionally used *ius* to denote a subjective right, the extent and reasons for this usage have not been well studied. In this article, we offer an analysis, based on a statistical survey, of how Cicero and Livy used *ius* to designate a range of subjective rights. We also trace this usage back to the basic Ciceronian metaphor of the *populus* as a kind of *societas*. Rights, in the Roman context, emerged out of this legal-commercial comparison, in which citizens (or even members of different nations) are entitled to equal rights in their common venture.

**Keywords:** rights, Roman political thought, Roman history, Roman law, natural law, Cicero, Livy.



## Introduction

Scholarship on the history of natural rights theory was long dominated by the question of when exactly the Latin term *ius* acquired its subjective meaning of a legitimate, individual power to perform a particular action — or what we today call a right. Most historians have suggested that this meaning appeared somewhere between the twelfth (Tierney) and the fourteenth (Villey) centuries.[3] The historian of political thought Richard Tuck, building on Villey's work but with a different normative outlook, also placed the emergence of the explicit subjective usage of *ius* in the late medieval period.[4]

There used to be a consensus in scholarship that we look in vain for so-called 'subjective' rights in classical antiquity. That consensus has given way in the last few decades to a new consensus that there certainly *are* subjective rights to be found in classical antiquity, without a doubt in Rome and the Roman legal materials,[5] and perhaps even in some Greek institutions and

[1] Stanford University, 450 Jane Stanford Way, Stanford, CA 94305, USA. Email: danedels@stanford.edu

[2] University of Zurich, Culmannstrasse 1, CH-8006 Zurich, Switzerland. Email: benjamin.straumann@uzh.ch

[3] See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150–1625* (Atlanta GA, 1997); Michel Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', *Archives de philosophie de droit*, 9 (1964), pp. 97–127.

[4] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979). Tuck draws on Villey in his argument, though he acknowledges that some of the earlier, ancient examples of *ius* are ambiguous.

[5] Jed W. Atkins, *Cicero on Politics and the Limits of Reason: The Republic and Laws* (Cambridge, 2013); Jed W. Atkins, 'Non-Domination and the *libera res publica* in Cicero's Republicanism', *History of European Ideas*, 44 (6) (2018), pp. 756–73; Charles

normative texts.[6] In this paper, we deepen this insight, uncovering both the extent of subjective *ius* talk, and its logic, in the work of two major Roman writers, Cicero and Livy. We will try to specify what role these rights play in the writings of these authors.

First, before we embark on a more fine-grained analysis of rights in Cicero and Livy, let us briefly anticipate the quantitative aspect of *ius* as a right in our two authors. There can be no doubt that both use the term in its subjective sense very frequently. Cicero, in his mature works of political theory, deploys *ius* or *iura* in either their objective or subjective senses 246 times overall. Of these instances at the very least 44 are unambiguously subjective, which amounts to almost one fifth of cases.[7] Looking at these works of Cicero individually, we can see that he uses the term in its subjective sense 10 out of 42 times in the *Republic* (*ca.* 24%); at the very least 18 out of 127 times in the *Laws* (*ca.* 14%); and 16 out of 77 times in *On Duties* (*ca.* 21%). For Livy, in the first ten books of his *History*, we counted at least 80 subjective uses of the term out of a total of 193, which amounts to more than 40%. Very roughly speaking, therefore, we may already say that from a purely quantitative point of view, and even leaving aside words other than *ius* that could be used (and were used) to express the *concept* of a subjective right, the ratio of unambiguously subjective uses of *ius* versus its objective use is high in Cicero and very high in Livy.



Donahue, '*Ius* in the Subjective Sense', in *A Ennio Cortese*, ed. D. Maffei (Rome, 2001), Vol. 1, pp. 506–35; Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge, 2007); Benjamin Straumann, 'Constitutional Thought in the Late Roman Republic', *History of Political Thought*, 32 (2) (2011), pp. 280–92; Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Late Republic to the Age of Revolution* (New York, 2016); see also Max Kaser, 'Zum 'Ius'-Begriff der Römer', in *Essays in Honor of Ben Beinart* (= *Acta Juridica*, 1977), Vol. 2, pp. 63–81. For an early defence of a Roman concept of subjective right, see G. Pugliese, ' "Res corporales", "res incorporales" e il problema del diritto soggetivo', in *Studi in onore di Vincenzo Arangio-Ruiz* (Naples, 1954), Vol. 3, pp. 223–60; see further, in a similar vein, Michael Zuckert, ' "Bringing Philosophy Down from the Heavens": Natural Right in the Roman Law', *The Review of Politics*, 51 (1) (1989), pp. 70–85; Alan Gewirth, *Reason and Morality* (Chicago, 1978), p. 100.

[6] Fred D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford, 1995); Phillip Mitsis, 'The Stoic Origin of Natural Rights', in *Topics in Stoic Philosophy*, ed. K. Ierodiakonou (Oxford, 1999), pp. 153–77. For a survey of whether the Greek Stoics had a concept of rights, see Jon Miller, 'Stoics, Grotius and Spinoza on Moral Deliberation', in *Hellenistic and Early Modern Philosophy*, ed. J. Miller and B. Inwood (Cambridge, 2003), pp. 117–20. See also Tim Kammasch and Stefan Schwarz, 'Menschenrechte', in *Der Neue Pauly: Enzyklopädie der Antike*, ed. H. Cancik and M. Landfester (Stuttgart, 2001), Vol. 15.1, pp. 383–91, arguing against an ancient origin of subjective natural rights.

[7] If we count only the absolutely clear-cut subjective uses, these amount to 44 out of 246 (18%); if we count four more instances that can go either way in the *Laws*, we reach 48 out of 246 (19.5%).

The prominence of rights in Cicero and Livy is important for two reasons. First, as we will see, subjective rights in both Cicero and Livy could be conceived of as natural, or pre-political rights, which should make them more salient for histories of human rights. Second, the vast scale of rights in these two authors will also point us towards a slightly different conception of republican liberty and its place in Roman political thought than the one with which neo-republican scholarship has familiarized us. This is a conception of republican liberty that conceives of liberty as a requirement of justice and is less preoccupied with non-domination, and more with legality and equality before the law.

## I
## Greek Justice: An Order of Virtue, or a Structure of Rights?



Today, the first and most natural place to look for rights is in the context of conceptions of justice. Modern theories of justice tend to show an intimate relationship with systems of rights. Classical, and especially Greek, theories of justice have generally been said to lack this intimate relationship, and to base their ideas of justice on justifications of rule that depend on knowledge and virtue instead, and on the potential of knowledgeable and virtuous rulers to shape the ability to lead virtuous lives by those who are being ruled. Aristotle, who deplored the fact that, apart from Sparta, ancient Greek states had neglected to inculcate virtue by legislation and public education,[8] considered the end or goal of the *polis* to consist in justice. Justice, Aristotle went on to argue, consists in the common advantage (*tò koinê sumphéron*),[9] the achievement of which requires the rulers themselves to be virtuous.[10]

It is not at all obvious how this view of the goal of the state could be reconciled with rights that cannot be overridden by considerations of virtue and the common good. Even those scholars who have attempted to find ideas about rights in Greek political thought, such as perhaps most prominently Fred Miller, have been forced to find those ideas wrapped up in claims about merit and virtue. Miller, making use of Wesley Hohfeld's well-known analysis of legal rights, argues that Aristotle in fact had the concept of rights in all the senses identified by Hohfeld, especially the conception of Hohfeldian claim-rights.[11] According to Miller, Aristotle at times uses the term *tò díkaion* in the sense of 'claim right'.

As Jed Atkins remarks, however, these claim rights appear as merit-based in Aristotle, and Miller, who translates accordingly, does not deny that. But

[8] Aristotle, *The Nicomachean Ethics*, trans. H. Rackham (Cambridge MA, 1934), 10.1180a25–29.

[9] Aristotle, *Politica*, ed. W.D. Ross (Oxford, 1957), 3.1282b14–18.

[10] *Ibid*., 1282b14–1284a3.

[11] See Wesley N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Review*, 23 (1913), pp. 16–59.

this means, Atkins explains, that one's rights 'are a function of one's merit. And, as Aristotle points out, different parties suggest different characteristics on the basis of which to determine merit. Thus, on Aristotle's account different theories of distributive justice will generate different political rights for different people'.[12] This makes it look as though virtue, or merit, does all the argumentative work in Miller's account and this is indeed what Malcolm Schofield has convincingly argued: virtue, merit and desert are what drive Aristotle's account of justice. Adding to the idea that the virtuous person deserves a ruling position in the *polis* that this person therefore has a *right* to the position does nothing but provide an 'idle cog'.[13]

Atkins puts his finger on the key difference between Aristotle's 'rights', such as they are, and the view of rights Cicero has Scipio develop in the *Republic*:

> Since rights on Scipio's account are no longer strictly rendered according to merit, they can enter into the calculation of how to distribute goods according to justice at a different point. Whereas for Aristotle 'rights' are the product or result of distributive justice, for Scipio and the moderns rights are factors that one must take into account as one performs the calculations. They are trumps or limitations on how the goods may be distributed.[14]

This is all to say that there is no intrinsic connection between rights and Aristotle's theory of justice. Aristotle could entirely do without the concept of rights, since there is 'no conception of the citizens as a body of rights-holders possessing rights that have not been conferred by the ruling regime and that place limitations on how the regime may rule'.[15]

## II
## Cicero's Conception of Justice

This Aristotelian view is in stark contrast with Cicero's conception of justice.[16] For not only does Cicero, as Atkins convincingly shows, certainly have an

[12] Atkins, *Cicero on Politics*, p. 146.

[13] Malcolm Schofield, 'Sharing in the Constitution', in Malcolm Schofield, *Saving the City* (London and New York, 1999), pp. 141–59, at p. 155.

[14] Atkins, *Cicero on Politics*, p. 147.

[15] *Ibid*., p. 148.

[16] For recent interpretations that emphasize the centrality of justice for Cicero, see Christoph Horn, 'Gerechtigkeit bei Cicero: kontextualistisch oder naturrechtlich?', in *Res publica und Demokratie: Die Bedeutung von Cicero für das heutige Staatsverständnis*, ed. G.-E. Richter, H. König and R. Voigt (Baden-Baden, 2007), pp. 105–38; Ernst Baltrusch, '*Recta ratio* und *varietas opinionum*: Cicero, Karneades und die Gerechtigkeit', in *Das römische Recht — eine sinnvolle, in Auguralreligion und hellenistischen Philosophien wurzelnde Rechtswissenschaft? Forschungen von Okko Behrends revisited*, ed. C. Möller, M. Avenarius and R. Meyer-Pritzl (Berlin/Boston, 2020), pp. 34–47, who largely follows O. Behrends, 'Die Republik und die Gesetze in den Doppelwerken

explicit concept of subjective rights, but this concept of rights, far from being an idle cog, does crucial argumentative work in Cicero's political and legal theory. Atkins points out that in the *Republic*, Cicero has Scipio formulate an account of legitimacy and the state which is based on rights, understood subjectively, and indeed that in this context 'one cannot help but translate *ius* as "a right" or "rights" ', because Cicero deploys verbs like 'holding', as when it is said that 'peoples hold onto (*teneant*) their right (*ius suum*)'.[17] As we will see, and as Atkins also points out, this way of phrasing it was not confined to Cicero; we can find Livy writing that in the very early republic, after the rule of the kings was abolished, the consuls held (*tenuere*) all the rights (*iura*) of the kings.[18]

But what happens to the extraordinary weight given to virtue in Aristotle's thought, to the idea that the *polis*, correctly understood and in the best of cases, will provide both the necessary and the sufficient conditions for the development of virtue and thus for the good life? What happens, in other words, to the eudaemonist political theory we find in most Greek thinkers, the loss of which is routinely deplored by latter-day Aristotelians such as Michel Villey or Alasdair MacIntyre? Compared to Aristotle's political theory, the rather more fundamental role that we can find rights playing in Cicero's political thought makes one wonder whether or not Cicero can rely, with most of the Greeks, on a virtue-based political theory — whether his state may rest quite as much on the ancient *mores* as his quote from Ennius in the *Republic* (5.1) leads one to suppose.

A first problem arises when we confront the issue of Cicero's philosophical outlook. Cicero was of course an adherent of the academy, a sceptic. Unlike Aristotle, whose eudaemonism is built on the foundation of a concept of virtue that carefully delineates both the content of virtue and its precise contribution to the highest good, and unlike the various Hellenistic philosophical schools which featured competing positive accounts of the contribution of virtue to the *summum bonum*, Cicero's own scepticism surely prevented him from adhering in any clear-cut, dogmatic way to such a positive doctrine of virtue and the good life. That this need not be an obstacle to the formulation of a positive political theory, however, Cicero makes very clear.

In a digression, in the first book of the *Laws*, on the nature of the highest good, Cicero first seeks to minimize the tensions between the competing Greek doctrines — especially between the Old Academy, the Peripatetics and the Stoics — by claiming that the differences are merely verbal, not

Platons und Ciceros', in O. Behrends, *Zur römischen Verfassung: Ausgewählte Aufsätze* (Göttingen, 2014), pp. 513–58.

[17] Atkins, *Cicero on Politics*, p. 146. Marcus Tullius Cicero, *De re publica/Vom Gemeinwesen*, ed. and trans. Karl Büchner (Stuttgart, 1979), 1.48, our translation (hereafter Cic. *Rep*.).

[18] Livy, *History of Rome*, trans. B.O. Foster (Cambridge, 1919) (hereafter Livy, *History*), 2.1.7.

substantial.[19] At the end of the digression, however, Cicero has his brother Quintus lower the stakes of this particular issue even further. 'I don't know', Quintus says, 'whether this dispute can ever be settled; we certainly can't solve it in this discussion, at least if we are to accomplish what we set out to do'. Marcus, i.e. Cicero himself, replies that he enjoyed the digression, but when Quintus claims that 'this disagreement about the highest good and worst evil has nothing to do' with the issue at hand,[20] namely 'universal justice and law' and 'the nature of law', Marcus agrees, calling this a 'very wise' course of action.[21] Law (*ius*), Marcus had suggested earlier, is to be sought out and cared for for its own sake and is thus not a mere instrument for the achievement of virtue.[22] Similarly, in Cicero's last philosophical work, the *De officiis*, he differentiates between two kinds of inquiries into the nature of moral duty. One is the inquiry into the highest good (*finis bonorum*), which he however forgoes in *De officiis* in favour of an inquiry into the rules (*praecepta*) which seem to aim more at the arrangement, or instruction, of public life (*vita communis*).[23]



## III
## A Jural Approach: Rights in Cicero's Oratory

It is this 'jural' approach to political theory[24] that may explain the fact that Cicero, unlike Aristotle, does in fact make room in his mature political philosophy for a concept of rights that is not merely parasitical upon virtue. The way rights are indeed basic to Cicero's conception of justice can perhaps be made clearer with the help of John Stuart Mill, who, when searching for the 'distinguishing character of justice', observed that

> When . . . a law is thought to be unjust, it seems always to be regarded as being so in the same way in which a breach of law is unjust, namely, by infringing somebody's right; which, as it cannot in this case be a legal right,

[19] Having already disqualified, for the purposes of the task at hand, the Epicureans and the academic sceptics: Cicero, *On the Commonwealth and On the Laws*, ed. and trans. James E.G. Zetzel (Cambridge, 2nd edn., 2017), 1.39–52 (hereafter Cic. *Leg*.).

[20] Cic. *Leg*. 1.56 f.

[21] *Ibid*., 1.57.

[22] *Ibid*., 1.48: *per se igitur ius est expetendum et colendum*. For the Latin we use Marcus Tullius Cicero, *De legibus: Paradox Stoicorum/Über die Gesetze — Stoische Paradoxien*, ed. and trans. R. Nickel (Düsseldorf/Zürich, 2nd edn., 2002). Law implies justice, and the other virtues, but is not instrumental to their achievement. But see Julia Annas, *Virtue and Law, in Plato and Beyond* (Oxford, 2017), ch. 7, for a different view of Cicero.

[23] Cicero, *On Duties*, trans. Walter Miller (Cambridge MA, 1913), 1.3 (hereafter Cic. *Off*.).

[24] The expression is Henry Sidgwick's, who contrasts it with teleological views. For discussion, see Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge, 2015), pp. 86–8.

> receives a different appellation, and is called a moral right. We may say, therefore, that a . . . case of injustice consists in taking or withholding from any person that to which he has a *moral right*.[25]

Does this identify a crucial feature of Cicero's account of justice, too? Injustice is *defined* as the infringement of a (subjective) right and is said to 'consist in' a violation of a right, which implies that justice conversely needs to be understood as a system of rights. In what follows, we will try to seek to understand whether and to what extent Mill here comes close to Cicero's view.

First, as we already noted in the quantitative analysis at the beginning of this article, Cicero, although he uses the term *ius* more often in the sense of 'higher-order law' or 'constitutional law' or something along those lines[26] is perfectly capable of using the term in the sense of a (subjective) right. For example, in his earliest extant speech, Cicero tells the judge (*iudex*) how much he appreciates that the judge had informed the opposing party about the 'right, and duty and power (*tuum ius officium potestasque*)' attached to the judge's function.[27] This is clearly a subjective right, namely a power, to use Hohfeld's nomenclature: the juror-judge has a Hohfeldian power to alter the rights and duties of those whose lawsuit he decides, and this is brought out quite clearly by the fact that Cicero speaks of *ius potestasque*. (The *iudex* also has duties, as Cicero points out.)

Sometimes Cicero uses the term *potestas* in the sense of power over the subject, which, if held by the subject as rights-holder himself, means liberty (*libertas*). If one has *potestas* over oneself, this implies that one is free, which in turn implies an immunity *vis-à-vis* the power of everyone else. This kind of personal freedom is implied by Roman citizenship, as Cicero argues in his speech *De domo sua*, given in 57 BCE. It is a right (*ius*) established by the ancestors that no Roman citizen may be deprived of his liberty (*potestas* or *libertas*) or of his citizenship (*civitas*) without explicit consent; crucially, this is something that cannot be curtailed by either the popular assemblies or any magistrate.[28] These are rights (*iura*) that are immune — in Hohfeld's sense of an immunity — *vis-à-vis* the violence of the times, the authority (*potentia*) of the magistrates, judicial decisions, even against the Hohfeldian power of the whole Roman people (*universi populi Romani potestas*), which in all other matters is the most expansive, as Cicero assures us.[29]



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[25] John Stuart Mill, *Utilitarianism*, in John Stuart Mill, *On Liberty, Utilitarianism and Other Essays*, ed. M. Philp and F. Rosen (Oxford, 2015), p. 157.

[26] See Straumann, *Crisis and Constitutionalism*, pp. 54–62; ch. 4; and *passim*.

[27] Cicero, *Pro Quinctio* 33: Cicero, *Orations: Pro Quinctio. Pro Roscio Amerino. Pro Roscio Comoedo. On the Agrarian Law*, ed. J.H. Freese (Cambridge MA, 1930).

[28] Cicero, *De domo sua* 78 f. (hereafter Cic. *Dom.*). Cicero, *Pro Archia. Post Reditum in Senatu. Post Reditum Ad Quirites. De Domo Sua. De Haruspicum Responsis. Pro Plancio*, ed. N.H. Watts (Cambridge MA, 1923).

[29] Cic. *Dom*. 80.

While *De domo sua* provides us with an excellent example of Cicero availing himself of the idea of a Hohfeldian immunity against offices or institutions of the state — even the popular assemblies! — it is perhaps in a passage from Cicero's speech *For Caecina*, given in 69 or 68 BCE, that we can find the clearest expression of a subjective use of the term *ius*, in the sense of a Hohfeldian claim-right, and its key elements.[30] There, in a legal dispute involving complex matters of Roman property law, Cicero formulates a series of claims that unmistakably betray his and his audience's utter familiarity with rights talk. Cicero wants to show that Caecina was prevented by armed men from entering a piece of property that he claimed was his; and that therefore, after having been granted an order (*interdictum*) from the praetor, Caecina should be restored to what he claimed was his property. Expressing outrage at Caecina's having been prevented by force of arms from entering the disputed piece of land, Cicero addresses the lay judges (*recuperatores*) with heavy sarcasm: 'I, a man unskilled in law, ignorant of law-suits, think that I have a legal remedy (*habere actionem*), by means of the interdict which I have obtained, so that I can obtain my right (*ut meum ius teneam*) and prosecute you for your wrongdoing (*iniuria*).'[31] The legal action here is an interdict, an injunction or order, and it is supposed to do two things: help Caecina to obtain, or hold onto, his right (*ius*), while at the same time remedying the wrongdoing (*iniuria*) that had been inflicted on Caecina. One might say, with Mill, that according to Cicero Caecina's rights had been infringed, i.e. that to which he had a right had been withheld from him; and one might add, with Hohfeld, that the right in question is a claim right, implying a duty on the part of Caecina's antagonist to respect his claim. This is what constitutes wrongdoing, or injustice (*iniuria*). Procedural remedy and substantive right are conceptually distinct. The connection between a right and its violation is made very clear: *iniuria* implies a violation of a right, and vice versa — if and only if there is an *iniuria*, there is a violation of a right. This intimate connection between rights and *iniuria* is something we should keep in mind, as it turns out to be one of the necessary conditions of Cicero's Roman, juridical theory of justice that there be a legal remedy for injury; as we shall see, this will prove important once we look further at Cicero's developed political philosophy, below.

It is clear that the other party to the legal dispute also thought that the suit was about enforcing a right. In the speech, Cicero goes on to ask, 'is there any legal remedy (*actio*) available in my case or is there none? It is not right for

[30] For context, see Bruce Frier, *The Rise of the Roman Jurists* (Princeton, 1985); Alan Watson, *The Law of Property in the Later Roman Republic* (Oxford, 1968).

[31] Cicero, *Pro Caecina* 32 (hereafter Cic. *Caec.*): *ego, homo imperitus iuris, ignarus negotiorum ac litium, hanc puto me habere actionem, ut per interdictum meum ius teneam atque iniuriam tuam persequar*. Trans. Yonge, adapted from Cicero, *The Orations of Marcus Tullius Cicero*, trans. C.D. Yonge (London, 1913–21).

men to be gathered together on account of a dispute about possession; it is not proper for a multitude to be armed for the sake of preserving a right (*iuris retinendi causa*); nor is there anything so contrary to law/right (*ius*) as violence'.[32] In the juxtaposition of *ius* and violence (*vis*) in the last sentence, which Cicero is very fond of throughout his work, we can see an ambiguous case where one might translate with either (objective) law or subjective right.[33] But prior to that we have another clear-cut use of *ius* in the sense of a subject claim-right, something to be preserved or held onto — in this case not by legal process, Cicero alleges, but by force.[34]

## IV
## Rights in Positive Law

The subjective use of the term was by no means confined to oratory or philosophy. In a statute from the Caesarian age the colony at Urso (*colonia Iulia Genetiva*) in Spain is granted a foundational constitutional charter. In it, we find extensive use of the term *ius* in its subjective sense.[35] For the highest magistrates of the colony, the *duumviri*, the statute establishes that 'there is to be the right and power (*ius potestasque esto*) . . . for each one of them, to have two lictors'[36] and a row of other attendants. These magistrates are also authorized to assign money for sacrifices and 'there shall be the right and power (*ius potestasque esto*) to do it'.[37] Colonists themselves may acquire private claim-rights (*ius potestasque*) to use public overflow water.[38] Interestingly, the term *ius potestasque* is also used in the charter as an equivalent to a legal remedy or action: against someone who violated the seating order at spectacles 'there is



[32] Cic. *Caec*. 33: *quaero sitne aliqua huius rei actio an nulla. convocari homines propter possessionis controversiam non oportet, armari multitudinem iuris retinendi causa non convenit; nec iuri quicquam tam inimicum quam vis nec aequitati quicquam tam infestum est quam convocati homines et armati*. Trans. Yonge, adapted.

[33] For another ambiguous case, where a good case can be made for a subjective sense, see *ibid*., 34: *iura statuerint persecutique sint*. For another clear-cut case, see *ibid*.: *nondum de iure possessionis nostrae loquor*.

[34] When we jump to Cicero's last philosophical work, *On Duties* (*De officiis*), written in 44 BCE, we can find there, too, *ius* in its subjective sense: some philosophers 'would have the right (*haberent ius*) to dispute about duty', had they not deprived themselves of it: Cic. *Off*. 1.6.

[35] See Garnsey, *Thinking about Property*, p. 191; for the law, see also Andrew Lintott, *Imperium Romanum: Politics and Administration* (London and New York, 1993), pp. 137–44.

[36] *Lex Coloniae Genetivae*, in *Roman Statutes*, ed. M.H. Crawford, Vol. 1 (London, 1996), p. 400, n. 25, ch. 62. Trans. Crawford, slightly adapted.

[37] *Ibid*., ch. 65.

[38] *Ibid*., ch. 100.

to be an action, suit and claim (*actio petitio persecutio*) according to this statute, a right and power (*ius potestasque esto*)'.[39]

Note that this is somewhat similar to the way Cicero had conceptualized the relationship between legal remedy and subjective right in the *Pro Caecina*. At first sight, however, it is even closer to the way the classical jurist Celsus was to characterize an action at law (*actio*) as a right (*ius*) in the *Digest*: 'An action is nothing else but the right to recover by judicial process that which is owing to one.'[40] For Celsus, and perhaps for the author of the charter for Urso, the legal remedy is itself a right — the right to remedy wrongdoing at law, perhaps best conceptualized as a Hohfeldian liberty right.[41] In Cicero's speech, we found a conceptual distinction between legal process and substantive right, but, given that *ius* in classical Roman law could be used subjectively both in a procedural sense and a substantive one, we probably should not overemphasize the differences between Cicero, Urso and Celsus. As the legal historian Charles Donahue has put it, we should certainly entertain the possibility that for the Roman jurists, 'the phrase "habere actionem" . . . was the functional equivalent of *ius habere*'.[42] In short, actions could be seen as procedural rights used to realize substantive rights.

Finally, we should note that the constitutional charter for Urso bestows subjective rights to the wives of the colonists: 'they are to have according to this statute in all matters their rights (*iuraque . . . habento*)'.[43] In sum, the colonial charter for Urso contains Hohfeldian claim-rights and powers (for magistrates), claim rights for anyone wishing to prosecute, and claim rights and such limited legal capacity as there was for women for the wives of colonists.

Before leaving the charter for Urso behind, we should remember that according to Roman law, at least in the classical period, colonies and municipalities were corporate entities, with legal personality and rights and duties apart from the rights and duties of their members, and with the ability to own property and act corporately.[44] This corporate personality is already inchoately visible at Urso and can be seen in the ability of the city to own property



[39] *Ibid*., ch. 125.

[40] *Dig*. 44.7.51: *nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi*. For further examples from classical Roman law, see the appendix in Donahue, '*Ius* in the Subjective Sense in Roman Law', pp. 531 ff. (which does not contain the Celsus passage however). Arguably there is already a subjective *ius* contained in the XII Tables: see *Roman Statutes*, Vol. 2, p. 654, Tabula 6.1.

[41] See Donahue, '*Ius* in Roman Law', pp. 73 f., for examples of subjective *ius* as a procedural right.

[42] *Ibid*., p. 75. Celsus supports this equivalence. Cf. *Vocabularium Iurisprudentiae Romanae*, Vol. 1 (Berlin, 1903), pp. 110 f.

[43] *Lex Coloniae Genetivae*, ch. 133.

[44] See Patrick William Duff, *Personality in Roman Private Law* (Cambridge, 1938), ch. 3.

and revenues to which the colonists as individuals have no claim,[45] and in the rules concerning how the city as a corporate body exercises control over certain matters, namely by majority voting in the local senate with a quorum of two-thirds present.[46] These rules themselves were also enforced by giving standing to sue to any citizen (again, there is to be action, suit and claim, which amounts to *ius potestasque*, to enforce the decrees of the local council).[47] There were, then, Hohfeldian property claim-rights on the part of the city, corresponding to duties on the part of everyone else to respect these claims; and there were power rights held by the local senate, corresponding to Hohfeldian liabilities on the part of the citizens; the enforcement of these rights was left to actions at law, which could be seen as Hohfeldian liberties.

## V
## Rights in Cicero's Mature Political Theory

Let us now return to Cicero's works of political philosophy. Above we agreed with Jed Atkins that often in the *Republic* or the *Laws* we simply 'cannot help but' translate *ius* as a right someone has. Indeed, as our quantitative analysis shows, Cicero, in his three major works of political philosophy — the *Republic*, the *Laws* and *On Duties* — uses the term *ius* in its subjective sense in almost one fifth of cases.[48] We should, however, expand our outlook beyond the word *ius*. We have already seen how Cicero thinks of violation of rights as *iniuria*. Looking at the way Cicero deals with *iniuriae* in his political philosophy might therefore help us to determine the role rights play in his political theory. If, as he seems to indicate in the *Pro Caecina*, rights violations and *iniuria*, understood as injustice, are equivalent, it would seem that, conversely, justice will require intact rights.

Furthermore, as Hohfeld points out, to the extent that rights necessarily correlate with duties, or obligations — my having a duty to do X corresponds



[45] *Lex Coloniae Genetivae*, chs. 65; 82 (public land, woods, buildings could not be sold or let long-term by the colonists).

[46] *Ibid*., chs. 64 (*decurionum maior pars . . . decreuerint statuerint, it ius ratumque esto*); 99; 100; 129 (vote binds magistrates as well as individual *decuriones*). Cf. also *possessio*, enforced by possessory interdicts, but honest possessors usually could fall back on *actio*; possession required *corpus et animus*, difficult for *universitates/municipia* to have, since *animus* would have required consent by all; however, see Duff, *Personality*, p. 81: 'Even if all the *municipes* had met together, they would not have been the *municipium*; for a corporation, like a man, is something other than the sum of its members; . . . a corporation consents, or is deemed *by the law* [emphasis ours] to consent, if consent is expressed by the lawfully constituted authority'. So any town assembly vote or council vote was taken to express the town's will: *refertur ad universos quod publice fit per maiorem partem*. Even an order of the magistrate might be taken to be the *animus municipum*.

[47] *Lex Coloniae Genetivae*, ch. 129.

[48] See the introductory quantitative paragraph above.

to your right that I do X — we should look for rights not just as hiding in the terms *ius* or *iura*, but also in the vicinity of obligation. An obligation in classical Roman law is conceived of as 'a strictly personal bond between the two parties who had concluded [a] contract',[49] a bond, however, that is protected by law: *obligatio est iuris vinculum, quo necessitate adstringimur alicuius rei secundum nostrae civitatis iura*.[50] Obligation, Justinian's *Institutes* say, is a tie or bond that is created and guaranteed by law (*ius*), with which we oblige ourselves with necessity to perform some act/discharge something according to the laws of our state. Again, as already pointed out above, we should also keep in mind that *ius* can have the meaning of (higher-order) law.

With all this in mind, let us consider the famous definition of *res publica* put forward by Scipio in the *Republic*. The first time he formulates it, it goes like this: 'The commonwealth (*res publica*) is the concern of the people (*res populi*), but a people is not every group of men assembled in any way, but an assemblage of some size associated with one another through agreement on law (*iuris consensu*) and community of interest (*utilitatis communione*).'[51] In the third book, after the Carneadean debate, the definition is revisited by Laelius and Scipio.[52] Jed Atkins has shown, with great sensitivity and perspicuity, that what is at the centre of Scipio's definition is the relationship between state and people: what does it mean for the state to be by definition a *res populi*? The answer lies in the way the *populus* itself is defined: not just any group or multitude (not like the armed mob denying Caecina entry to the disputed piece of land he claimed possession of!), but a group associated (*sociatus*) with each other through agreement on *ius* and common advantage. Atkins argues that we must pay attention to the technical legal terms at work: the associated group, the *populus*, is meant to be like a Roman *societas*, a partnership. This partnership, Atkins suggests, implies certain rights on the part of the citizens: the citizens are partners who collectively *own* the *res publica*.[53] The property metaphor, which for Atkins hinges on the way Cicero uses *res* in the sense of a thing owned by the people, is put forward by Scipio



[49] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1990), p. 34.

[50] *Institutiones Justiniani* 3.13 pr.

[51] Cic. *Rep*. 1.39, trans. Zetzel. The state, then, is of instrumental value for Cicero, but not *purely* instrumental. This is not because it inculcates virtue; it is because given our innate sociability and its attending problems there must be law, and law is why we have states (Cic. *Off*. 2.41: *iustitiae fruendae causa*). Once the principles of legality 'infect' a society, even a robber band, legality will import, as it were, some of its formal features, even into the band of robbers, and lend it thus some elements of statehood. Conversely, without law and legality, there is no state, which for Cicero is both a conceptual and an empirical point.

[52] Cic. *Rep*. 3.43–45.

[53] Atkins, *Cicero on Politics*, pp. 128–38.

to suggest that 'the fact that the people own the *res publica* implies the right to manage this property'.[54]

But this partnership that is the *populus* is fragile and exists only by virtue of the underlying *ius societatis*. Cicero cannot have meant to describe Roman day-to-day government as involving control by a literal partnership — the requirements of consent that these partnerships were subject to were far too difficult to meet. Partners in a *societas* could delegate governance to managers, but to a far lesser extent than a corporation could.[55] Partnerships were not, after all, entities distinct from their members, but simply *were* those members, governed by their contractual relations among each other and the law of partnership (*ius societatis*) itself.[56] This means that the *populus* needed for the *res publica* to exist is not a corporate entity but simply the sum total of its individual members, connected by a consensual contract;[57] a contract, however, which presupposes a set of rules (*ius*) that govern it. Given this enormously demanding consensual framework, it is plausible to assume that what Cicero had in mind was a metaphor that extended precisely as far as he suggested, and no further: to the *consensus iuris* that is said by Scipio to create the *societas* in the first place.

This *ius* — a very basic, very lean jural order, lean enough to generate agreement among all the members of the *populus* — also provides for rights. Among the rights it creates are those, as Atkins points out, that the partners (*socii*) have by virtue of the contract of partnership and which can be sued for if they 'are infringed by either another partner or the manager (*tutor*) of the partnership'.[58] Such infringement brings back to mind John Stuart Mill's text quoted above, as well as Cicero's talk of *iniuria*: wrongdoing that amounts to a violation of rights.[59]

For the partnership of citizens to be held together, these rights necessarily need to be equal — this does not imply equality of wealth or natural capacity,



[54] *Ibid*., p. 138.

[55] See Andreas M. Fleckner, *Antike Kapitalvereinigungen: Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft* (Cologne, 2010), § 1.

[56] For the law of partnership in Cicero's time, see A. Watson, *The Law of Obligations in the Later Roman Republic* (Oxford, 1965), ch. 6.

[57] This means that although we agree with Atkins that the people have rights *qua socii*, they do so individually, and not 'as a body': Atkins, *Cicero on Politics*, p. 141

[58] *Ibid*. Note that here, too, the language of subjective *ius* is prevalent in classical Roman law: a partner whose rights to common ownership have been infringed is said to have a *ius prohibendi*, a right to veto or prohibit this infringement, in the *Digest* (10.3.28).

[59] And again the rights contained in *societas*: cf. Cic. *Off*. 3.70 (*societas vitae*) and 3.72 (*iniuria*). On *vitae societas* and its connection with Q. Mucius Scaevola, see J.E.G. Zetzel, 'A Contract on Ameria: Law and Legality in Cicero's "Pro Roscio Amerino" ', *American Journal of Philology*, 134 (2013), pp. 425–44.

but equality of some basic rights (*iura paria*).[60] If statutory law (*lex*) is to bind the citizens — if it is to be the bond of the partnership and thus create obligation — then the underlying higher-order law (*ius*) has to guarantee the equality of the law.[61] This equality is inbuilt into the very concept of legality: otherwise, it would not be *ius*.[62] That wealth or capacity need not be equalized is not just a concession of the democratic point of view to the oligarchs and aristocrats — it also follows from the partnership analogy. In Roman law, by default shares in losses and profits were equal, but partners were free to bargain for terms for sharing profits and losses, so that some partners could share disproportionally in profits.[63] This idea might also provide an explanation for Cicero's account of those Roman popular assemblies weighted according to wealth (the *comitia centuriata*) — Cicero seems to defend the weighted voting by reference to the differential stake citizens (in analogy with partners) have in the condition of the commonwealth: 'no one was kept from the right to vote but the people who had the most power in the voting were those who had the greatest interest in maintaining the state in the best possible condition'.[64] What was not up for grabs, however, were the basic rights associated with being a partner, and it is these rights that are held — by analogy — equally among all the citizens.[65]



[60] Cic. *Rep*. 1.49: *Quare cum lex sit civilis societatis vinculum, ius autem legis aequale, quo iure societas civium teneri potest, cum par non sit condicio civium? Si enim pecunias aequari non placet, si ingenia omnium paria esse non possunt, iura certe paria debent esse eorum inter se qui sunt cives in eadem re publica. Quid est enim civitas, nisi iuris societas* [***]

[61] We are following Karl Büchner's interpretation of *ius autem legis aequale*; *aequale* 'muss heissen, dass das *ius* in Hinsicht auf das Gesetz in dessen spezifischer Eigenschaft, für alle gleichmässig zu gelten, die Gleichheit des Gesetzes ist'. He points out that *aequale* has this meaning rarely, but it does so at Cic. *Leg*. 1.49, too: *societas hominum et aequalitas et iustitia per se est expetenda*. K. Büchner, *M. Tullius Cicero, De re publica: Kommentar* (Heidelberg, 1984), pp. 136 f.

[62] Cic. *Off*. 2.42: *Ius enim semper est quaesitum aequabile; neque enim aliter esset ius*.

[63] Except that it was not permitted to have partners who shared in losses only, and not in profits — the other way around, however, was permitted. See, on this debate between Quintus Mucius Scaevola and Servius Sulpicius Rufus, Aldo Schiavone, *The Invention of Law in the West* (Cambridge MA, 2012), pp. 219 f.

[64] Cic. *Rep*. 2.40. Trans. Zetzel. It is the *assidui*, those who contribute to the state, who will have more weight in the *comitia centuriata*. Note, however, that this concerned mostly the election of consuls and praetors and does not therefore concern most legislation, which was in the late republic passed in the *comitia tributa*, where voting was not weighted at all. It is also important not to forget that weighting according to wealth, as opposed to family pedigree, originally had an anti-patrician thrust. It is striking that Cicero does not praise the *comitia centuriata* on epistemic grounds, but argues that the weighting is rights-based.

[65] And, to an attenuated extent, even among all human beings as far as the *hominum societas* is concerned (see, e.g., Cic. *Leg*. 1.49).

## VI
## Subjective Rights in Livy

While other readers of Livy have noticed that the Roman historian often employs *ius* to designate a power lawfully held by a particular magistrate or member of a circumscribed group (e.g. social order), the extent of this language has not, to our knowledge, been previously measured. To that end, we tallied up all the mentions of *ius* (across every declension) found in the first decade of Livy's *History*, and sorted them into subjective/non-subjective groups. We also classified the subjective uses into a set of general categories (discussed below).

Overall, as pointed out at the beginning, Livy mentions *ius* 193 times in the first ten books of his history. Around ten or so of these uses are ambiguous. Leaving those aside, the cases where *ius* clearly refers to a subjective right amount to slightly under half (44%, or 80 out of 183; this percentage hardly changes if the ambiguous cases are counted). If one were to exclude certain phrases that include the term *ius* (e.g. *ius gentium*, *ius iurandum* or *ius fasque*), this percentage would rise significantly.

So it is not just the case that Livy occasionally uses *ius* to indicate a subjective power; *ius* features extensively in this sense. But equally interesting are the kinds of rights that Livy recognizes, and the contexts in which they appear. Indeed, while the subjective instances of *ius* are manifold, they are not distributed evenly across the text. For instance, they spike in books 3 and 4 (which contain over 40% of the total number of instances, or 33 out of 80), and drop off significantly in books 7 and 10. As we will see, this pattern tracks specific episodes in Livy's history.

If we loosely sort the different instances of subjective *ius* talk into various categories, we find the following distribution:

| *Category of rights* | *Total across Livy's first decade* |
|---|---|
| Rights derived from nature/law of nations | 16 |
| Rights of all Roman citizens | 17 |
| Rights of social orders | 16 |
| Rights of office holders | 29 |

As is clear from this table, the most common rights are those affixed to particular offices. Arguments about tribunicial rights in particular make up the largest number of these mentions, around one third. Many appeals to the rights of patricians (classified here under 'rights of social orders') are also indirectly connected to this office. For instance, after the first secession of the

plebs, the patricians plot to 'recover the right' (*recuperandi iure*)[66] that they claimed to have lost with the establishment of the tribuneship. It is likely because the tribunicial rights are so contested (unlike the rights of consuls, which are simply inherited from the kings)[67] that they are such a significant source of subjective rights talk. The extent and jurisdiction of tribunicial rights is also a flashpoint: Coriolanus claims that he does not fear the tribunes because 'they were given a right to protect, not to punish' (*auxilii non poenae ius datum*),[68] and the consul Appius Claudius (ancestor of the future decemvir) insists that the right of tribunes only extends over plebeians, not the patricians.[69]

Debates over the extent of tribunicial rights later lead to clashes with the consuls, whose 'unlimited power' (*immoderata infinita potestas*) comes to the fore in book 3.[70] Tribunes want restrictions on the 'right' that the people had granted the consuls,[71] whereas the patricians seek, again, to limit that of the tribunes.[72] One attempt to resolve this conflict is the appointment of the *decemviri* to draw up written laws for the republic. Accordingly, many mentions of *ius* in book 3 refer to objective law.

At 3.33.10 Livy writes — in what looks a pretty clear-cut example of subjective rights talk — that one of the decemvirs, although being the legitimate sole judge (since there was no *provocatio* against him), still gave up his right (*decessitque iure suo*) so that the liberty of the people increased by what he'd given up of the power of the magistrate. Livy goes on to write[73] that both the highborn as well as the lowest equally (*pariter*) obtained justice (*ius*) from the decemvirs and that the statutes they had prepared were also aimed at equalizing their rights (*iura aequasse*).[74] These statutes (the Twelve Tables) are then supposed to be pondered and deliberated upon, so that once they were adopted it is as if the *consensus omnium* had proposed, and not merely ratified, them.

The appointment of the decemvirs of course turns out badly, as they refuse to give up power after a second term in office. Now it is not just the rights of office-holders or social orders, but of the Roman citizens that are in question.[75] Unsurprisingly, arguments over the legal and political rights of all citizens (category 2) account for half the subjective uses of *ius* in book 3. Many arise in the context of the decemvir Appius Claudius's attempt to seize the daughter of Verginius. During a first trial, Verginius repeatedly asserts his legal rights

[66] Livy, *History* 2.34.8–9; and 2.34.12.
[67] *Ibid*., 2.1.7; also 4.3.9.
[68] *Ibid*., 2.35.3.
[69] *Ibid*., 2.56.11.
[70] *Ibid*., 3.9.4.
[71] *Ibid*., 3.9.5; and 3.11.2.
[72] *Ibid*., 3.9.12.
[73] *Ibid*., 3.34.1 ff.
[74] *Ibid*., 3.34.3.
[75] *Ibid*., 3.38.10–13.

as a Roman citizen.[76] At a subsequent trial, and to the disbelief of the Roman people, Appius invokes the *provocatio* — the foundational right of Roman citizens which he, as decemvir, had sought to suppress, along with 'every right of the people' (*omnia iura populi*).[77] Appius is thought to be undeserving of this 'right to liberty' (*ius libertatis*),[78] which in his defence he calls the 'common right of Roman citizens' (*commune ius civitatis*).[79] Only after the basic constitution of Rome had been reestablished — that is, after the despotic interregnum of the decemvirs — could the Romans go back to squabbling over the respective rights of the different orders.[80] The rights of the plebeian order, in these debates, are generally identified with those of the tribunes, sometimes to the latter's personal advantage.[81]

The clash of the orders continues to drive subjective rights claims in book 4. While some of the rights in question fall under the purview of different office holders (consuls, senators), the real question is plebeian access to these offices. This conflict stretches across subsequent books as well.[82]

Rights are also central to Livy's argument that liberty, properly understood, is a kind of legal equality. This was an argument that Cicero had already developed, insisting that a free people must enjoy equality before the law.[83] Livy took this argument a step further, defining freedom in terms of equal *rights*. The clearest expression of this idea can be found when Livy recounts the unveiling of the Twelve Tables, which 'equalized the rights of all, both high and low' (*omnibus, summis infimisque, iura aequasse*).[84] This idea of equal rights had also featured centrally at the very foundation of the republic, after the expulsion of the Tarquins. The gilded youth of Rome regretted the monarchy, since now 'all enjoyed equal rights, and they had



[76] *Ibid*., 3.45.3, 3.46.3, 3.47.4.

[77] *Ibid*., 3.56.8.

[78] *Ibid*.

[79] *Ibid*., 3.56.10.

[80] E.g. *ibid*., 3.63.10, 3.67.9, 3.69.4. 'The State will only be free, the laws equal, on condition that each order preserves its own rights, its own power and dignity' (*liberam civitatem fore, ita aequatas leges, si sua quisque iura ordo, suam maiestatem teneat*, 3.63.10); 'the suppression of our rights and privileges under the pretext of making the laws equal for all' (*sub titulo aequandarum legum nostra iura oppressa tulimus et ferimus*, 3.67.9); *iura ordinis*, 3.69.4

[81] *Ibid*., 3.64.2.

[82] See e.g. *ibid*., 6.18.7, 6.37.4, 7.6.11, 7.22.9.

[83] Cic. *De off.*: 'In liberis vero populis et in iuris aequabilitate exercenda'; 1.88 (Loeb 88). See also *De re publica*, 1.47 (Loeb 73): 'If it is not the same for all, it does not deserve the name of liberty [si aequa non est, ne libertas quidem est]'. More generally, see Elaine Fantham, '*Aequabilitas* in Cicero's Political Theory, and the Greek Tradition of Proportional Justice', *The Classical Quarterly*, 23 (2) (1973), pp. 285–90; and Henrik Mouritsen, *Politics in the Roman Republic* (Cambridge, 2017), p. 14.

[84] Livy, *History* 3.34.3.

got into the way of complaining to each other that the liberty of the rest had resulted in their own enslavement' (*eam tum aequato iure omnium licentiam quaerentes, libertatem aliorum in suam vertisse servitutem inter se conquerebantur*).[85] It is this same definition of freedom that the patricians Valerius and Horatius invoked during the second secession of the plebs: 'It is enough and more than enough for a lowly citizen when he lives in the enjoyment of equal rights in the state' (*qui iure aequo in civitate vivit*);[86] this, they argue 'is enough to regain your liberty'. As Jed Atkins recognized, 'in Livy *aequa libertas* [generally] means equality before the law rather than equal political participation'.[87]

Equally fascinating, if on a lesser scale, are the mentions of pre-political rights, or rights that do not arise within the constitution of the Roman republic (or kingdom, for book 1). The most common occasion when these rights surface is war. Generally, Livy mentions *ius gentium* or *ius belli* in the objective sense of 'law of nations' (or law of war). But he also uses *ius* in a subjective sense when discussing these same matters. Consider the very first sentence of book 1, where we read that the Greeks 'refrained from every right of war' (*omne ius belli Achivos abstinuisse*) against Aeneas and Antenor.[88] It does not make sense to translate *ius belli* here as the 'law of war', since that would imply that the Greeks 'abstained' from a duty, when the sentence clearly presents a different meaning.[89] Livy in fact uses *ius belli* in a subjective fashion multiple times throughout the first decade.[90]

Warfare even leads Livy to voice ideas about rights that can sound remarkably modern. In a speech to the Samnite Assembly, Pontius argues against surrendering to the Romans in the following terms:

> what more do I owe to you, Romans, or to the treaty, or to the gods, its witnesses? Whom can I proffer as umpire betwixt your anger and my punishment? I refuse no nation, no private citizen. But if, in dealing with the mighty, the weak are left no human law, yet will I seek protection of the gods . . .[91]

Foster here renders *iuris humani* as 'human rights', which obviously exaggerates the modernity of Livy's phrase, notably as *ius* is used here in the singular (*quod si nihil cum potentiore iuris humani relinquitur inopi*). But the phrase is admittedly ambiguous — *ius* can be rendered as 'right', but need not: one might

[85] *Ibid*., 2.3.3.

[86] *Ibid*., 3.53.9.

[87] Jed W. Atkins, *Roman Political Thought* (Cambridge, 2018), p. 51.

[88] Livy, *History* 1.1.1.

[89] Rev. Canon Roberts translates this passage as 'the Achivi refused to exercise the rights of war' (Perseus); Benjamin Foster's translation reads 'Aeneas and Antenor were spared all the penalties of war by the Achivi' (Loeb).

[90] See Livy, *History* 2.12.14, 5.27.6, 8.1.8, 8.4.8, 9.1.5, 9.3.11.

[91] *Ibid*., 9.1.8. Modified translation from Foster's Loeb edition.

say 'is there no human law that protects the weak?'. The main distinction at issue in this passage seems to be between (positive) human norms and divine intervention. Yet the underlying sentiment is recognizable — is there no right that protects the resourceless (*inops*) from the more powerful (*potentior*)?

But where would a *ius humanum* come from, if not from a lawful and law-granting human society? There is, in fact, a clear conception of natural law in Livy, which appears to be the source of all *iura* that are not authorized by a human society. This conception is most evident in the speech by Camillus to the Faliscan teacher who led the children of Falerii outside the besieged city's walls to play, before treacherously handing them over to the Romans. Camillus refuses to take the city in this way, and berates the traitor:

> Between us and the Faliscans is no fellowship founded on men's covenants [*quae pacto fit humano societas non est*]; but the fellowship which nature has implanted in both sides is there and will abide [*quam ingeneravit natura utrisque est eritque*]. There are rights of war as well as of peace [*sunt et belli sicut pacis iura*], and we have learnt to use them justly no less than bravely.[92]

Here the translation of *iura* is ambiguous, and one could certainly make the case that Camillus is referring to 'the laws of war and of peace'.[93] But since Camillus is arguing that there are some *actions* that can be lawfully undertaken (such as fighting against armed combattants, or *armatos*), translating *iura* as 'rights' also makes sense, even though these rights would supposedly have been bestowed by natural law. Either way, the more important point here concerns 'the fellowship which nature has implanted' (*societas . . . quam ingeneravit natura*). The *ius belli*, like *ius gentium*, is grounded in *ius naturae*, as Cicero and other Roman jurists held. To this juristic definition, Livy here introduces a Stoic, cosmopolitan understanding of the natural human *societas* that precedes and surpasses any voluntaristic human society.

Of course, the term Livy used to designate this cosmopolitan community was a distinctly Roman one: like Cicero, he called it a *societas*. Interestingly, in Livy, too, we can detect the same sense of a *ius societatis* at work in his conception of how human communities distribute rights. For instance, when Livy discusses Servus' electoral reforms, he underscores the original equality of all votes: 'manhood suffrage, implying equality of power and of rights, was no longer given promiscuously to all, as had been the practice handed down by Romulus and observed by all the other kings'.[94] While this equality was destroyed by Servus, Livy provides an indication here that the default assumption for the Roman state had been equal shares for all, as in a commercial *societas*.

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[92] Livy, *History* 5.27.6.

[93] D. Spillan's 1857 translation, also on Perseus, opts for 'laws'; Roberts goes with 'there are rights of war as there are rights of peace'.

[94] Livy, *History* 1.43.10.

## VI
## Preliminary Conclusions

The picture emerging forces us to acknowledge that at least Cicero, with his metaphor of the partnership and the underlying concept of subjective rights, does seem to accept that there must be some natural, or at the very least pre-political, rights that are prior to the terms of the particular partnership entered into and necessarily precede it conceptually.[95] There is an obvious tension between, on the one hand, the notion of popular sovereignty as contained in Cicero's idea of the state as a *res populi*,[96] and Cicero's concept of a natural jural order that contains rights, on the other. The way Cicero dissolves this tension is subtle, but it necessarily involves the idea of rights that are justified, not by reference to the political framework, but to higher-order natural law, or *ius gentium*, which for Cicero are equivalent.

While for Atkins, the rights contained in Scipio's account in the *Republic* are essentially political, civil rights, we think it can be shown quite clearly that at least some of these rights are necessarily prior to civil society, and of course the *ius* that governs Cicero's partnership (the *ius societatis*) was part of the *ius honorarium* and was thought to derive, not from statute, nor from some Burkean tradition as Atkins has it, but from humankind's natural reason. It's just that the state makes those rights stick, which is why we need it.[97] When Cicero says that private property rights are not natural, he means that they are not primordial, but that there was a kind of negative community in the state of nature. However, there certainly are, according to Cicero, Hohfeldian liberty rights to take and occupy property in the state of nature, and, once occupied, the occupation generates property rights that are pre-political. Indeed, Cicero in a key passage of *De Officiis* (which seems to come straight from Locke) writes that it is the guarantee and protection of such property rights that is the very purpose of the state.[98]

One might add that even rights which are indeed essentially political, such as the Roman due process right of *provocatio ad populum*, or rights such as the *ius commercii*, which allowed certain non-citizens to engage in commercial transactions with Roman citizens, had their ground of validity not ultimately in statutory law (*lex*), but were justified by reference to higher-order



[95] Note that here we part company with Jed Atkins' interpretation.

[96] For Cicero's concept of popular sovereignty, see Schofield, 'Definition'.

[97] We have states *qua* legal orders *iustitiae fruendae causa*: Cic. *Off*. 2.41. This is why Hobbes, otherwise not overly enthusiastic when it comes to citing ancient authors, enlisted Cicero's *Pro Caecina* for his purposes in the *Leviathan*: see Straumann, *Crisis and Constitutionalism*, pp. 186 f.

[98] Cic. *Off*. 2.73. See Straumann, *Crisis and Constitutionalism*, ch. 4. For Cicero's influence on Locke, see *ibid*., pp. 316–19; Marshall, *John Locke*; Phillip Mitsis, 'Locke's Offices', in *Hellenistic and Early Modern Philosophy*, ed. J. Miller and B. Inwood (Cambridge, 2003), pp. 45–61.

*ius* — the kind of jural order that qualified violations of due process rights as unjust wrongdoing.[99]

Similarly, in Livy, we can find the notion of a pre-political *ius naturae* that functions as the normative framework of humankind, conceived along Roman jural lines as a *societas*. With this *societas* come (subjective) rights of the *socii*, no less than in Cicero. If we seek to unearth a political theory implicit in Livy's first decade, we would do well to attend to the many instances in which Livy talks of rights, both political rights and pre-political ones. We might then find, or so we hypothesize, an underlying idea of justice expressed as a jural conception of equal rights, presented as the historical achievement of the conflicts that brought about the constitution of the early Roman republic.

The central role of the *societas* in these theories of subjective rights imprints a distinctly Roman character to them. At first glance, it might seem that *societas* simply translates *koinōnia*, the term that Aristotle famously used to define the state ('Every state is as we see a sort of partnership').[100] But *koinōnia* did not have the same close connection with commercial partnerships as *societas*. In his seventh letter, for instance, Plato refers to the 'community of liberal studies' (*eleuthéras paideías koinōnían*).[101] This non-commercial sense also informs Aristotle's use of the term. In book 3 of the *Politics*, he briefly considers the possibility that men might have 'formed a community to enjoy wealth' (*ton ktemáton chárin ekoinōnesan*), before rejecting such a 'community' as insufficient. The state is not just about 'preventing mutual injury and exchanging goods' (*adikein sphas autoùs kaì tis metadóseōs chárin*), but the true 'object of a state is the good life' (*tò eu zen*). Members of a *koinōnia* must be motivated by friendship (*philía*), Aristotle insisted.[102] No such moral requirement attended the Roman concept of *societas*. As we noted in the introduction, it was the lack of this eudaemonistic underpinning that makes Roman rights talk so distinctive.

Finally, this analysis leads us to an alternative view of republican liberty and its place in Roman republican thought from the one to which we have been accustomed by scholars of the neo-republican revival. Roman republican liberty, on Cicero and Livy's view, is to a large degree dependent on legal rights. These rights are seen by our Roman authors as necessary and sufficient to achieve liberty from an arbitrary will, or what recent neo-republicans have

[99] See, e.g., Cic. *Dom.* 33 (protection of property rights); Cic. *Dom.* 43 (due process); Cic. *Rep.* 2.63. For discussion, see Straumann, *Crisis and Constitutionalism*, chs. 2 and 3.

[100] Aristotle, *Politics*, trans. Rackham, 1.1252a1.

[101] Plato, *Letters*, 7.334b. Richard Kraut argues that *koinōnia* does apply to commercial relationships: see *Aristotle: Political Philosophy* (Oxford, 2002), p. 355. We don't deny this point; but unlike *societas*, *koinōnia* does not have a *primarily* commercial sense. What's more, Aristotle restricts its general meaning to rule out this commercial model for the state.

[102] Aristotle, *Politics*, 3.1280a27, 3.1280b31–39 (revised trans.). On *philía* and *koinōnia*, see also Plato, *Gorgias*, 507e.

come to call 'liberty as non-domination'.[103] But Cicero would not have agreed with neo-republicans that non-domination simply amounts to justice. Rather, on his view, justice and the rules we can know her by are prior to liberty and thus distinct,[104] and justice is not exhausted by non-domination. For these Roman authors themselves, then, justice was prior to liberty. This conception of justice required subjective rights and a kind of political rule that could only be exercised when it assumed the form of law — but when it did assume that form, live up to requirements of legality, and guarantee rights, then it could be said to be non-arbitrary and hence non-dominating.

If this makes Cicero look less republican than we have come to expect, this may well be due to the fact that Cicero, writing under the impression of the crisis and collapse of the Roman republic, was pushed to formulate ideas of public law, legality and institutional closure[105] that were very much concerned with the instability and eventual loss of the largest and longest-lived republic the world had hitherto known. Cicero, one might say, was driven in a somewhat Hobbesian direction due to his concern for the loss of the republic and the civil wars that ultimately proved his own undoing, and what he thought he was proposing was a juridical remedy to violent social disagreement — the state of nature — and the loss of republican government. His early modern readers, beginning with Bodin, understood him in that way, and we too might find interesting a thinker who thought that instability and injustice were causally linked.

If Cicero first formulated this theory of liberty at the moment of the republic's demise, however, Livy reinscribed it at the very origins of the republic.[106]



[103] For this argument, see Atkins, 'Non-Domination and the *libera res publica*'. It is by no means clear, however, whether the idea of non-domination can be given a specifically republican sense; for doubts, see David Dyzenhaus, 'Critical Notice of *On the People's Terms: A Republican Theory and Model of Democracy*, by Philip Pettit, Cambridge University Press, 2012', *Canadian Journal of Philosophy*, 43 (4) (2013), pp. 494–513. Non-domination, understood as a consequentialist theory that may positively *require* interference of the right kind — the kind proposed by Philip Pettit that 'tracks interests' while disregarding mere preferences — may be somewhat in line with Cicero's views. After all, Cicero does conceptualize a distinction between interest and mere wants (*utilitas* and *voluntas*), while giving the former far more weight when it comes to what government should take into account: Cic. *Rep*. 5.8; *Sull*. 25. But for Cicero, as opposed to some present-day republicans, interests may never outweigh the rules of justice that provide for rights of due process, property and political participation. Too risky are the assumptions which would also have to hold for interests to outweigh the rules of justice. See Benjamin Straumann, 'Justice and Republicanism', in *The Oxford Handbook of Republicanism*, ed. Frank Lovett and Mortimer Sellers (Oxford, forthcoming).

[104] The two can certainly come apart: Cic. *Rep*. 1.43.

[105] Cf. Lars Vinx, 'Constitutional Indifferentism and Republican Freedom', *Political Theory*, 38 (6) (2010), pp. 809–37, on the problem of institutional closure.

[106] Livy may in part have been following Cicero's own lead: see the latter's account of the early Roman Republic in *De re publica*, 2.57.

Indeed, the greatest difference between the monarchy and the republic, he tells us, was that in the latter every citizen enjoyed the same right (*tum aequato iure omnium*).[107] It was this condition that distinguished 'liberty' from 'licentiousness', another favourite Ciceronian opposition (with Greek roots).[108] But the law which granted all citizens their rights was not one to which they had necessarily contributed. The source of the law (who had made it) was, in this regard, irrelevant: what mattered was that the law was the same for all, and that all obeyed its commands (*leges rem surdam, inexorabilem esse*).[109] This understanding of liberty would deeply influence Machiavelli and Rousseau.[110] Its inclusion in one of the most canonical passages of Livy's *History*, and placement at the founding moment of the Roman Republic, points to a rival theory of Roman liberty, one grounded in the equality of rights, rather than non-domination.[111]

*B. Straumann* UNIVERSITY OF ZURICH
NEW YORK UNIVERSITY

*Dan Edelstein* STANFORD UNIVERSITY



[107] Livy, *History* 2.3.3.

[108] For Cicero, see René de Nicolay, '*Licentia*: Cicero on the Suicide of Political Communities', *Classical Philology*, 116 (4) (2021). This distinction was central to Aristotle's definition of liberty in *Politics*, e.g. 5.1310a, 6.1317b; see also Plato, *Republic*, 8.557b.

[109] Livy, *History* 2.3.4.

[110] The history of the reception of this idea is something we hope to examine in future work. In his *Discourses on Livy*, Machiavelli returns repeatedly to the idea that liberty depends on equality before the law (with an explicit reference to the 'gilded youth' story at 1.16.4). Rousseau's case is more complicated, but see the 'Dedication' to the second *Discourse*, and *Social Contract*, 1.6, 2.4.

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