

Legal Argument in the *Pro Milone*: A Losing Philosophy

Throughout much of his career, Cicero's rhetorical prowess seems to have compensated for the apparent disconnect between his personal philosophy of law, which placed a premium on the *ius naturae*, and the more traditional Roman view of jurisprudence, which adhered more strictly to the precedence of the *ius civile*. In *de Legibus* 2.9-10, Cicero argues that the *leges* of the *ius civile* and the *edicta* of the *ius honorarium* are not true representations of the philosophical idea of law; rather, the law is something eternal and unchanging, and importantly, unwritten. His most explicit technical application of this philosophy is in the *Pro Milone*, in which he uses Stoic philosophy in an attempt justify murder – a crime unequivocally criminal by the standard of the *ius civile*. However, his reliance in the *Pro Milone* on a philosophical understanding of the law, and his apparent disregard for the technicality of the law may have contributed to Milo's conviction. Regardless of the attendant political circumstances, I argue here that Cicero's performance in the *Pro Milone* failed mainly as a result of his unorthodox legal approach. This understanding of the *Pro Milone's* argument and its resulting failure, may help to clarify the reasons Cicero had for publishing the speech, namely that it was intended to stand as part of his philosophical corpus, rather than his legal corpus.

The defense took two approaches, first, to establish that Clodius Pulcher's death was the result of self-defense, permissible under the *ius civile*, and second, to portray Clodius as a tyrant deserving of death by right of the *ius naturae*. Although many scholars have noted Cicero's use of this philosophy in his legal argumentation, I interpret his choice of argument as Cicero's consciously preferment of the philosophic argument embodied in the unwritten *ius naturae* to the accepted judicial standard of the *ius civile*. Clark and Ruebel (1985) claim that the philosophical

arguments were later additions, never heard in court. Forschner (2016) attempts to reconcile the problem with a technical reinterpretation of *silent enim leges inter arma*, but this presumes Cicero's commitment to his argument of self-defense, which seems dubious. In fact, Cicero clearly states what he feels is the root of the problem in the voice of Titus Annius (*Mil. 77*), arguing that because the laws of the Romans were insufficient to bring Clodius to justice, [Milo] had to resort to the *lex naturae* to preserve the sanctity of the Republic and to effect justice.

Most scholars hold that this philosophical argument was an acceptable route for Cicero's defense to take, and that it was due mainly to the political situation that the panel of judges was left unconvinced. This interpretation, however, is predicated upon the imperial jurists' understanding of Cicero as an accurate representative of Roman legal philosophy and technically applied jurisprudence. On the contrary, the consistency with which Cicero dismisses the socially accepted hierarchy of laws seems to indicate that Cicero's legal philosophy was, in fact, at odds with the standards of the day. Cicero's use of the 'Stoic tyrant' threatening the Republic, and the successive justification of the tyrant's murder as a moral good, justified by the *ius naturae*, could have succeeded only if Cicero had first made the case that Milo killed Clodius in self-defense – the only attendant circumstance justified under the *ius civile*. However, Cicero devotes little attention to discussing the conditions for self-defense, and his explanation of the circumstances of the attack is notoriously obscure. This is not a failure of Cicero's oratory, per se, but the natural result of Cicero's belief that such explanations and legal justifications are unnecessary in light of the righteousness of Milo's actions under the *ius naturae*.

Bibliography

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