I. LAW AND RHETORIC (all of this section was done in the previous class)

1. The topic of today's class is the subject of a couple of recent books, including a very good oneby Bruce Frier called the *Rise of the Roman Jurists*. The topic is the relationship between two of the branches of the legal profession, the jurists and the rhetoricians, or the advocates. The relationship is a complicated one. I'm inclined to think that it has a substantial effect on the achievement of the jurists and that that effect is not altogether a positive one. The way I want to do this is by examining Cicero's speeches *Pro Quinctio* and *Pro Caecina*, but before we getto that a word of caution and some generalities.

2. The word of caution is this. We are best informed about the role of the rhetorician and hisrelationship with the jurist in the last century B.C. when Cicero lived and the first century

   A.D. when Quintilian, who wrote a treatise on rhetoric, lived. But as you already know, most of our juristic writing comes from a later period. Well over half of the *Digest* was written in the early years of the third century and most of the rest was written in the second century. It ispossible that by this time professional roles had changed, though there is nothing in the fragments that we have that would suggest that it had. Indeed, we know that the profession ofrheorician continued well into the later Empire. A number of fathers of the church, for example, Ambrose, Jerome, and Augustine, were trained as rhetorician.

3. The generalities are these:

   a. In three different places Cicero describes for us the function of the jurist: *cavere*, *agere*, *respondere* (*De oratore* 1.48.212; *respondendi*, *scribeni*, *cavendi* (*Pro Murena* 9.19); *respondere*, *instituere*, *cavere* (Id. 9.22) — whatever the meaning of the variable term, itis clear that in Cicero's time it did not include writing books, nor did it include teaching or arguing cases — the first two changed as the jurists became at once more academic and more bureaucratic in the principate, but the last, it is thought, never changed, givingthe jurist his unique quality — some sense of it remains among the academic lawyers onthe Continent — Brandeis as counsel to the situation.

   b. In Cicero's *Topica*, we find the following significant remark: "Nihil hoc ad ius; ad Ciceronem," inquiebat Gallus noster, si quis ad eum quid tale rettulerat, ut de facto quaereretur." "This doesn't pertain to law; go see Cicero, our Gallus used say if someonereferred a matter to him that involved a question of fact. (Our Gallus is Gaius Aquilius Gallus, consul in 66 B.C., and by all accounts the most distinguished jurist of Cicero's time. He's mentioned a number of times in the *Pro Caecina*.)

   c. Servius Sulpicius Rufus was a friend of Cicero's D.1.2.2.43 (Pomponius Handbook): "Servius Sulpicius, when he held the chief place in pleading cases, or at least second to Marcus Tullius (Cicero) is said to have gone to Quintus Mucius (the *pontifex maximus*, and in many ways the first real Roman jurist) to gain advice on the case of a friend of hisand when the latter had responded to him on the law, Servius understood little; again he asked Quintus and he was answered by Quintus Mucius, nor did he yet understand, and so he was reproached by Quintus Mucius; for he said that it was disgraceful that a patrician and a noble and a pleader of cases was as ignorant of the law in which he was employed. Servius, struck by this insult, we may say, paid attention to the *ius civile* and recieved a great deal of instruction from those we have

mentioned, taught by Balbus Lucilius, instructed most, however, by Gallus Aquilius."

4. These texts have been used over and over again to make general statements about the relationsbetween the two professions. I'm not saying that the texts are wrong, but I would suggest that even a casual reading of the *Pro Caecina* and the *Pro Quinctio* would suggest a much more complicated story.

II. CICERO, *DE ORATORE*

1. Now let me turn specifically to Cicero's *De oratore* with these ideas in mind. The *De oratore* is written in the form of dialogue. The main characters in the first book are Lucius Licinius Crassus and Marcus Antonius, the two most celebrated orators of the generation before Cicero. Crassus died in that year. Antonius was proscribed by Marius in 85, and was assasinated in that year. Quintus Mucius Scaevola, the augur, not the Quintus Mucius of whom we have spoken much in this course, but his cousin, also plays a role, reperesenting the juristic viewpoint. A large part of the first book is devoted to a debate between Crassus and Antonius about the necessity for an orator to know the law. Crassus thinks that it's essential. Antonius has his doubts.

2. Unlike many debates in philosophical dialogues, there's no clear winner in this debate. There are those who think that Crassus was winner. There are some a priori reasons for thinking that he was not. Cicero puts Antonius' arguments second. He also gives Antonius the leading role in the book that follows. He does say in the *Brutus* that Crassus may have been the best orator who ever lived ranking him just ahead of Antonius and Cicero himself. (Modesty was not Cicero's long suit.) Also, Crassus, not Antonius, was Cicero's teacher. A paper given in this class previously suggested that there was no clear winner because the debaters pass each other like ships in the night. They really don't address that same points. The debate is too long to quote or even to give the highlights. But let's try to give something of the flavor of the argument on both sides.

3. We also noted that Crassus argument is divided into two parts. In the first he excoriates orators who are too arrogant or lazy to learn the law, and make fools of themselves by arguing cases without understanding the legal background. In the second, he argues that a knowledge of the law is essential to understanding what we would call the constitution, indeed for understanding what we would call morality. Let us take two passages, out of many that we might take, to illustrate these points:

[ch. 39] "But what shall I say of that great cause betwixt Manius Curius and Marcus Coponius, that was lately pleaded before the Centumviri, and a vast multitude in court, all curious to know the event? When Q. Scaevola, my equal and colleague, the man in the world who is best acquainted with the practice of the civil law, of the quickest discernment and, genius; his style remarkably smooth and polite; and, as I used to say, of all great lawyers, the most of an orator, and of all great orators the most of a lawyer; when such a man as he defended the validity of wills from their letter, maintaining, that unless the posthumous child expressed in the will of the deceased was born, and then dead before he was of age, that the person named in the will as succeeding to the posthumous child, who should thus be born and die, could not be the heir. I pleaded for the intention of the will; and that the meaning of the deceased testator must have been, that if he had no son come to age, then Manius Curius was the heir. Did not we in this cause persist in quoting authorities, precedents, disputing upon the nature of wills, I mean the essential part of the civil law?"

[ch. 46] "It requires no very long explanation to show why I think the public laws also, which concern the state and government, as well as records of history, and the precedents of antiquity, ought to be known to the orator; for as in causes and trials relative to private affairs, his language is often to be borrowed from the civil law, and therefore, as we said before, the knowledge of the civil law is necessary to the orator; so in regard to causes affecting public matters, before our courts, in assemblies of the people, and in the senate, all the history of these and of past times, the authority of public law, the system and science of governing the state, ought to be at the command of orators occupied with affairs of govern ment, as the very groundwork of their speeches. For we are not contemplating, in this discourse, the character of an every-day pleader, bawler, or barrator, but that of a man, who, in the first place, may be, as it were, the high-priest of this profession, for which, though nature herself has given rich endowments to man, yet it was thought to be a god that gave it, so that the very thing which is the distinguishing property of man, might not seem to have been acquired by ourselves, but bestowed upon us by some divinity; who, in the next place, can move with safety even amid the weapons of his adversaries, distinguished not so much by a herald's caduceus, as by his title of orator; who, likewise, is able, by means of his eloquence, to expose guilt and deceit to the hatred of his countrymen, and to restrain them by penalties; who can also, with the shield of his genius, protect innocence from punishment; who can rouse a spiritless and desponding people to glory, or reclaim them from infatuation, or inflame their rage against the guilty, or mitigate it, if incited against the virtuous; who, finally, whatever feeling in the minds of men his object and cause require, can either excite or calm it by his eloquence." The passage begins by making the public-private distinction and seems to suggest that the civil law is on the private side, but then goes on to suggest an exalted role for the orator that does not seem make the distinction.

4. We will skip Antonius' arguments this year, but we will refer to him below.

II. *PRO QUINCTIO*

1. *Pro Quinctio* All of these "facts" come from Cicero's speech, and he may have been coloring some of them, but here's how he lays out the story. Sextus Naevius had been the partner of Publius Quinctius deceased brother Gaius. We don't know the full extent of the partnership but the principal asset and business of the partnership seems to have been the management of substantial lands in Gallia Narbonensis, a province in southern Gaul, the capital of which was the modern city of Narbonne. After Gaius's death, Publius, as Gaius's heir apparently renewed the partnership with Naevius (who was related to the Quinctii by marriage). Publius needed to pay some of his deceased brother's debts, and he apparently proposed to sell some property that was not part of the partnership to do so. Naevius persuaded him not to do this, but offered instead to advance him the cash. A settlement was reached with the creditors, and Quinctius turned to Naevius for the money, who refused to provide it unless he, Quinctius, settled a large claim that Naevius said he had against the partnership. They could not agree on the amount owed (or even whether anything was owed), and a lawsuit ensued.

2. Efforts at settlement proved fruitless, and in the meantime Quinctius had to go to Gaul to look after his affairs. While he was in Gaul, Naevius applied to the praetor for a *missio in possesionem* of Quinctius's goods on the grounds that Quinctius had failed to appear at a date fixed by a *vadimonium* that they had entered into, a *vadimonium* that Quinctius later denied had ever happened. The praetor *ex parte* ordered the *missio*. Quinctius' Roman agent, Alfenus, resisted the *missio*. A complicated series of maneuvers occurred, almost certainly affected by the politics of the time, and no sale of the goods ever resulted. Indeed, other than the posting

of the notices (which Alfenus tore down) and the seizure of a slave, whom Alfenus recovered, the only actions on the *missio* that Cicero mentions was the expulsion by force of Quinctius from the partnership property in Gaul. The provincial governor disapproved of this expulsion, though the precise content of his orders on the topic is not stated. Quinctius returned to Rome. Some time passed. Naevius then appeared before the praetor and requested that Quinctius be required to post security as one whose goods had been possessed for thirty days in accordance with the edict. Quinctius denied that this was the case, and the praetor had him enter into a *sponsio* with Naevius on this matter. (This is "judicial bet" that is involved in the *Pro Caecina* and a number of other cases.) Trial on the *sponsio* took place before a single judge, Gaius Aquilius Gallus, a distinguished jurist, and three assessors. There were apparently further proceedings before the praetor in which the praetor attempted to limit the scope of the trial, and which Gallus, to some extent, resisted.

3. Cicero's argument is divided into three parts: (1) Naevius had no grounds for applying to the praetor for a *missio*. (2) The *missio* was not properly granted. (3) Naevius never had possession of the goods, and hence Quinctius need not give security. Lurking in the background is the fact of which Cicero never ceases to remind us that one who had undergone a *missio* was thereby rendered *infamis*. This, Cicero alleges, is the reason why Quinctius refused to post the security. It would have involved an admission that he had undergone the *missio* and hence was *infamis*. Whether the consequences were quite as serious as Cicero makes them out to be is a matter about which we may have some doubt.

4. Be that as it may be, Cicero's arguments are worth some analysis. That the third argument is different from the first two is clear enough. The security was required from those whose goods had been possessed by creditors for thirty days. At least that's the way that Cicero describes it. It was not enough that the praetor had ordered it; it must actually have happened. More troublesome is the distinction between the first two arguments. One would have thought that if there were no grounds for the *missio*, then the *missio* would not have been properly granted. In fact, Cicero considers quite different arguments under the first heading from what he considers under the second. Under the first heading Cicero makes three arguments:

    a. Naevius has no claim. He is, in fact, not owed any money from the partnership. How does Cicero know this? Because at no time in the eighteen months prior to the bringing of the lawsuit had Naevius made any claim against Quinctius. Indeed, Cicero suggests, there were substantial reasons to believe that Naevius owed the partnership money. As a legal matter, of course, this is not a good argument. The issue here is not whether the lawsuit has any basis; the issue is whether Quinctius failed to appear when he should have to answer the charges.

    b. There was no *vadimonium*. In fact, Quinctius was not even in Rome when the *vadimonium* was supposed to have been made. This is, of course, a factual claim, one that needs to be supported by evidence, and this speech is apparently an opening statement. Evidence, Cicero tells us, will be forthcoming.

    c. Naevius should not have asked for a *missio* even if there had been a *vadimonium*. Here Cicero appeals to common decency, what people normally do under these circumstances. I find Cicero's claims here plausible. It's legal relevance is another matter.

5. Under the second heading Cicero considers a quite different set of arguments, arguments based on the wording of the edict. The translation does not do full justice (nor does Cicero's

Latin) to the wording of the edict which can be reconstructed from other sources. Aside from the person who has no heir (which only applied in the case of someone who was dead) and the voluntary exile (which is clearly not the case here), there are two possibly relevant provisions: The praetor will grant a *missio* against someone "hides for the sake of fraud and is not defended by the judgment of a good man" and one who "absent from a trial (*iudicio*) is not defended." (Lenel, *Edictum Perpetuum*, p. 415). I'm not sure that Cicero came up with the best legal argument here. As I read the edict, two situations are contemplated. One where there has not been a *litis contestatio* and the defendant is evading the *in ius vocatio* or the agreement on the formula, the praetor can order a *missio*, if no one shows up to defend the man. After the *litis contestatio* where the matter is *apud iudicem*, no absences will be authorized unless the defendant sends someone to defend his case. There's no evidence that the second stage had been reached (indeed substantial evidence that it had not), and I'm not sure why Cicero based his argument on the actions of Alfenus, because it's not at all clear that he was defending the case as he ought to have. A better argument might have been that there was no evidence that Quinctius was evading the *in ius vocatio* or the agreement on the formula.

6. Our understanding of Cicero's third argument is hampered by a *lacuna* in the text. What we have of it suggests that Cicero first quoted the edict (Lenel, p. 423). The thirty-day possession was a somewhat limited kind of possession. If the creditor could keep the things in *custodia*, he was supposed to do that. Only if he could not, was he authorized to take them away. Further, the unwilling owner could not be ejected (*detrudere*, a somewhat strange word for this). Cicero first argues that the expulsion of Quinctius from the Gaulish estates violated this clause. Cicero then goes on to make an argument (reported in a fifth-century rhetorician Julius Severianus) that Naevius had not taken possession of the whole of Quinctius's goods because he only took possession of some of them. This argument may be connected to the complicated Roman notion of possession. Later authors were to see an analogy here to *pignus*, pledge or pawn, where possession was transferred to the creditor but ownership remained in the debtor. It is not at all clear that any of the classical jurists made this analogy. I'm not sure that what we have from Julius Severianus allows us to say whether Cicero was playing with the complicated notion of possession or whether he was using the word in a more colloquial sense. It seems pretty clear that Naevius took possession of very little, and if we accept Cicero's notion that the beneficiary of the *missio* had to get as much as he could, Naevius clearly fell short.

7. We don't know how the case came out, and the fact that the *iudex* was the most distinguished jurist of his day probably certainly makes the arguments more legal than they might otherwise have been. The fact that with two thousand years to think about it we can think of a better legal argument in one place does not make the arguments actually made any less legal. The way that Cicero combines law and fact is certainly typical of trial advocacy today. I'm not sure that the *Pro Quinctio* can be used to support a notion that the division among the professions in Rome made for any substantial differences in the way that the process worked.

III. *PRO CAECINA*

1. Cicero's speech on behalf of Caecina was delivered, sometime between 71BC and 69BC, probably in 69BC, when Cicero was in his mid-30's. It's a complicated story, but the gist of it seems to be that in an auction of land that had belonged to Caesennia's husband that was being sold to settle the estate of their son, Aebutius bid in at the auction on behalf, Cicero says, of

Caesennia. Caesennia then died leaving her estate, for the most part, to her new husband Caecina, and giving Aebutius but a small fraction. Aebutius challenged Caecina's right to take under the will and also claimed that he had bought the land at auction for himself. In order to set up the litigation to try these issues, Aebutius and Caecina agreed that the latter would be formally ejected from the land. But when Caecina went to the land for this purpose he was prevented from entering by an armed gang that Aebutius had assembled. Caecina obtained an inderdict *de vi armata*. Aebutius returned the interdict as performed. *Sponsiones* were entered into which were tried before the *recuperatores*. The issue that the *recuperatores* were to try was whether Aebutius owed Caecina money on the *sponsio* (which was essentially a bet on the outcome of the litigation), because he had not, in fact, complied with the praetor's order to "restore" Caecina, or whether he had complied, in which case Caecina owed Aebutius money on a counter-*sponsio*. It was open to Aebutius in this litigation to challenge the validity of the praetor's order (the interdict).

2. The wording of the interdict can be reconstructed from the speech (it had a slightly different wording in Julian's redaction): *Unde tu aut familia tua aut procurator tuus illum ui hominibus coactis armatisue deiecisti, eo restituas*. (Lenel, *Edictum perpetuum*, p. 467). "From that place from which [that's a lot to jam into *unde*, and, as Cicero points out, it's not the only way that we can read that word] you or your *familia* or your *procurator* [roughly "agent"] ejected [*deiecisti*, literally "threw down"] him [i.e., the complainant], with men gathered together or armed, to that place you should restore [him, understood]." Virtually every word in the interdict could be made issue in this lawsuit, and virtually every one was. Piso's (Aebutius's counsel) strategy apparently was to concede the use of armed men but to argue that the interdict had not been violated as a matter of law.

3. If he hoped thereby to get Cicero to focus only on the legal points and not to tell his client's sympathetic story, he was disappointed in his hopes. Cicero begins the speech by telling the *recuperatores* that the issue is essentially a legal one, but then he says, but let me tell you how it all came about, and he's off and running. Two things stand out to me in his recitation of the facts: (1) Aebutius is a sleaze bag, and (2) Aebutius's own witnesses testify to the use of force.

4. The first is, of course, is quite irrelevant to the question of whether Aebutius violated the interdict. It is, however, critically important to the underlying grounds of the case. Either Aebutius insinuated himself into the newly-bereaved Caesennia's confidences, and then betrayed her, in which case Caecina's underlying claim is solid, or he did not, in which case Caecina's case is weak indeed. Piso probably made a big mistake in not arguing the facts (of course, we don't know that he did not, but Cicero does not feel it necessary to rebut any of Piso's factual arguments). Had I been arguing the case for Piso, I might have wanted to suggest that Aebutius is not the only person in the case who insinuated himself into a newly-bereaved widow's confidences. After all, Caecina married her, a rich widow who may have been quite a bit older than Caecina (it's not only that she died first but also that she had an adult son; we don't know Caecina's age, but he appears later in Cicero's correspondence, and there's nothing to suggest that they were not approximately the same age, and Cicero was in his mid-thirties at this point). Cicero's character-assassination of Aebutius is not matched by an equally strong building up of Caecina's character, about whom he is quite vague and general. It may be that Cicero did not want to go too deeply into the other side of the comparison.

5. Establishing facts on the basis of the other side's witnesses is, of course, classic advocacy. Cicero does it well. The question is why does he take such pains to establish propositions that everyone seems to concede? I would suggest that it is connected with Cicero's key move: He wants to argue that the law is on his side. He knows that the interdict can be read not to apply to his case. Hence, his appeal is to policy (what he calls "equity"). This kind of use of force is not acceptable in civilized society (the chaos of the Sullan period was still very much in people's minds; Sulla was less than ten years dead). And, Cicero is very firm on this point, no other remedy is available to Caecina. (This may not be right; there was a *lex Plautia de vi*, which might have allowed Caecina to prosecute Aebutius criminally, but the scope of the law is uncertain [it applied only to *vis publica*] and it may not have been in existence at the time.)

6. So what were Piso's arguments about the interdict?

   a. No force (*vis*) was used because no one got hurt. It's hard to imagine that Piso relied much on this argument. Its rebuttal is easy, and Cicero has some fun doing it. Notice, by the way, how he's proceeding from Piso's weakest argument to his strongest.

   b. Caecina was not "ejected" from the farm because he never got there. Cicero makes the argument absurd: Supposing, he tells Piso, that a group of armed men prevented you from entering your house as you returned from the forum? Would you not be able to avail yourself of the interdict *de vi armata*? (This argument should be connected with Cicero's very personal appeal to the *recuperatores*: It is not only Caecina's interests that are at stake here, it is all of our interests, because it is in all of our interests that we be allowed to enjoy our property peaceably, free from armed force.) We don't know quite how Piso made this argument. He may well have taken a quite conservative position on the meaning of *deiecisti*. This leads Cicero to that wonderful display of fireworks about how the wording of the interdict can't be taken literally (e.g., *familia* means more than one person; suppose I arm my only slave and have him drive you out? suppose I use more than one *procurator*?). Underlying this is something that we know was a huge debate at the time, the distinction between literal and equitable interpretation, known as the distinction between *scripta* and *voluntas* (what is written versus will or intention). There is, of course, a big distinction between the hypothetical case that Cicero puts to Piso and Caecina's case: There's no question that Piso in the hypothetical case is in possession of his house, even though he is temporarily absent in the forum. There was a big question whether Caecina was in possession of the farm. Now we're not going to get much help from Cicero on this, because it's his weakest argument, and he's going to try to fudge it. He's got basically two arguments:

      i. the interdict *de vi armata* does not require possession

      ii. Caecina was in possession

      That the interdict *de vi armata* differed in its wording from that *unde vi* is generally conceded. The latter required possession by its very wording; the former did not. Having made the argument that we can't rely on the precise wording of the interdict, Cicero now has to argue that we should pay careful attention to the wording here. But this wording argument, of course, supports his basic policy argument about the purpose of the interdict *de vi armata*. It would certainly seem odd that the praetor (two years' previously) should have added a new interdict to the list, if that interdict was already covered by the wording of *unde vi*. There is, however, another difference. *Unde vi* could not be used where the

complainant himself possessed *vi* (by force), *clam* (secretly), or *precario* (tenancy at will) from the one who ejected him. Ulpian argues in D.43.16.1.23 that the complainant must possess (however wrongfully he came by his possession). One can certainly see why he makes this argument. One can imagine a legal system in which someone who was lawfully possessed of property would nonetheless not be able to resist being evicted by a wrongdoer by using armed force. There is, however, no indication that the Romans ever went that far (with the possible exception of the criminal *vis publica*). The most obvious way to distinguish this situation from the one in which *vis armata* is forbidden is to say that the complainant must himself be possessed, however wrongfully he came by his possession. Unfortunately, that may focus too much on the complainant and not on the person who uses armed force. While Caecina's possession was dicey (unlike some legal systems Roman law did not generally regard the possession of the testator to be continued in the heir, at least not the testamentary heir, and the evidence that Caecina had collected rents was by no means clear), Aebutius had no claim to being possessed at all. Cicero may have gone too far in arguing that the complainant need have no colorable claim to possession, but he surely has a point in arguing that we need to balance the respective claims to possession of the complainant and the one against whom the interdict is sought. I am inclined to think this is a good piece of advocacy, a proposition that I could illustrate further if we went deeper into the arguments.

7. Much has been made of the fact that Cicero argues a rather technical point about the interdicts that is the opposite of what Ulpian tells us the law is. The more radical critics say that Cicero simply ignored the law and that this was what orators always did. I think that the story is a lot more complex than that. Even if the law was clear around 200 A.D. when Ulpian wrote, that is no guarantee that it was clear in 69 B.C. when the Caecina's case was argued. This is even more likely when we consider that the interdict in question *de ui armata* had only been in existence for two years. It is even possible that Ulpian's view was not the only one that was possible in 200 A.D., for Ulpian is vitually our only source about the later law on the topic.

IV. JURISTS vs. ORATORS

1. So what is the difference between the jurists and the orators? Some of what I will say these concluding remarks is derived from Quintian's treatise on rhetoric, which was written in the last years of the 1st century AD, but I think we can also see it if we rely only on Cicero. Perhaps one way to get at this is to pose a question about the Roman judicial system of the Republic and for most of the Principate. The fact-finders were non-professional, either a single *iudex* or a group of them, as in the so-called jury courts. Lay finders of fact, one might argue, are at least acceptable and may be politically desirable particularly in criminal cases, but only if they are tightly controlled. They must be shielded from hearing prejudicial matter (even if it is relevant, and certainly if it isn't relevant); they are not to be allowed to draw inferences from evidence that is less than the best (hence a whole bunch of probative evidence, that is not totally probative is to be excluded); they must be carefully guided by professional state employees to see to it that they are told what the law is (and they are to be told in no uncertain terms that they are to follow it, even though we know that sometimes they don't). These are, of course, the assumptions that guide our use of juries. The question is how the Romans managed to do without all these controls, and it may be that there were some countervailing features, like the class of the judges and their experience, but that when all was said and done, the rhetoricians had found ways to get around most of the controls and the system ended up by

being a kind of free-for-all. It's no wonder that in the first century AD we get references to a much more tightly controlled *cognitio extrordinaria*, and this ultimately became the Romans preferred procedural system.

2. These assumptions are quite common in the literature (the formulary system we are told in shocked tones had no rules of evidence; how did they possibly manage?), but I think that they are anachronistic. The question is not whether the Romans could have designed a system much more like ours. (That they had the smarts to do it is suggested by the fact that they ultimately developed the *extrordinaria cognitio*.) The real question is why they didn't. The answer to that question must be that they did not regard the function of the system as being like ours.

3. Cicero is quite candid about what is going on. He says in the *De Republica* (1.59) that the *bonus iudex* ought to swayed more by force of argument than by the evidence of witnesses. In the *De Oratore* (2.178) he says that persuasion occurs mainly through the hearer's "mental impulse or emotion" than through his "judgment or consideration." I think that Cicero may have believed that, and if he did, that suggests that we're dealing legal system that has assumptions that are quite different from ours. Smoking out what those assumptions are is not easy.[1] They involve very different ideas about the relation of facts to law. Bruce Frier suggests that the jurists had a quite different idea about fact/law relationship than did the orators. Cicero clearly has an idea that there are rules of law; so does Quintilian. On the other hand, at least Quintilian seems to suggest that in any real case both the facts and the law are contestable. All is subject to argument.

4. It is easy to caricature the rhetoricians idea of the legal process. At times it looks like the lunch theory of jurisprudence run amok. But at its best it's not that. It captures some of the insights of legal realism and critical legal studies and even post-modernism, but it's not any of those things either. It's very hard to get it out of Qunitilian because he doesn't pretend to be writing philosophy or jurisprudence. He's writing a how-to-do-it book for orators, but I think if we work on it we can see a vision of a world shaped by the orator. There are, Q. admits, bad cases. The only way that you can defend Verres is by saying that he did a good job against the pirates, and Q. clearly regards that as a bad argument. There are rules of law; the heir named in the will who is also the sole son of the testator should succeed. But I think what Q. is saying is that interesting cases, and indeed the majority of cases, are ones in which there is ambiguity as to what Verres did and whether what he did counts as peculation. Here the range of possibilities is very broad indeed. Antonius makes the same point in the *De oratore*, when he says that cases in which the law is clear do not get litigated. We would agree (and I think that he would have too) that if the law is clear, you shouldn't argue the law, but the facts may still be unclear.

5. Perhaps the crucial distinction between the orators view of the legal process and our own (and perhaps the jurists') lies not in different views about the law/facts distinction, as Prof. Frier has argued, although there is certainly something to that, but in different views about the law/politics distinction. If one does not see a sharp distinction between the two law, of course, becomes more political, but the political also becomes more legal.

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[1] Bruce Frier's *Rise of the Roman Jurists* (ch. 5, pp. 197–234) contains one of the best attempts that I know of to get at what these assumptions were.

6. This may be what Crassus (and perhaps Cicero) is trying to say in his last remarks in book 1 (c.46 in the standard chapter numbers). If this is right, let me return to an offhand remark that I made at the beginning of the class. If the legal realists taught us anything, they taught us that the lawyer ignores politics at his peril. It's possible that the western legal profession, which in many ways modelled itself on the jurists and not on the orators, fell into its apolitical fallacy as a result of that fact.

   Let me spell out that remark just a bit more because it will serve as a summary of the entire course. We began with an outline of the various constitutions of the Romans into which we integrated their various procedural systems. Starting with these topics and combining them showed a legal realist bias: If you don't understand the politics, you can't understand the law and if you don't understand the procedure, you can't understand the law. Both these points are very much legal realist points.

   We then sketched out the system of Roman private law as Gaius understood it in the mid-2d century. This sounds like the exact opposite of legal realism. It turns out that it was not because Gaius' system though it looks on the surface like abstract rights and duties in fact, even in Gaius, was grounded in the formulary procedural system.

   We then turned to the XII Tables and the archaic law. What we discovered was that there is much that we don't know but in the area of persons, and succession, the latter perhaps broadened to include all of property, what we saw not only made sense in terms of what we know about the society and that one could without too much speculation trace much of what was in the XII Tables into the later law.

   In the final section of the course we looked at particular areas of the law developed by the jurists, and to some extent the emperors, and asked how it fit into what we know about the society. We came to no conclusion about whether the society was shaping the law or the law the society or whether the law was developing independent of the society. We might pursue that insight further into something more theoretical, but I don't think that we will. There is, I would suggest, evidence of all three phenomena: the society shaping the law, the law shaping the society, and the law going off on a juristic tangent of its own.

   So at the very end we did something else. We turned from the jurists to orators, and when we did we found a lot of things that we think are important for law and lawyers that we did not find in the jurists at least not without a lot of looking.

V. SOME CONCLUDING REMARKS

1. Now what does all this tell us about the juristic acheivement? about law and society? I just suggested that there are three views of the general issue:

   a. Law proceeds, at least private law, on the basis of an autonomous set of rules and ideas. This can be broken into a jurisprudence of concepts (Begriffsjurisprudenz) or Watsonian irrational conservatism.

   b. The results if not the rules are determined by the social situation. This in turn breaks down into a naturalistic functional notion (law and economics school) or into a jurisprudence of interests (Interessenjurisprudenz) which in turn can be viewed as more or less consciously manipulative (some versions of CLS).

c. Some form of compromise eclecticism which tries to see limited areas of autonomy, sometimes overlapping, for each sphere.

2. Now much of what we have said about the jurists has emphasized the limitations society put on them.

a. In the area of the family they were limited by a social situation quite exogenous to their scheme of ideas. The Augustan marriage legislation was a failure and may not even have been a juristic effort.

b. In the area of commerce social structures dominated which they probably wisely made only minimal efforts to control.

c. The 'housing problem' of urban Rome (a problem that we did not get to) was not only beyond their ability to control but probably beyond their interest in controlling as well.

d. Roman society had large amounts of vertical distance. Those at the top had large amounts of autonomy; those at the bottom did not.

3. Clearly too there is a darker side to juristic activity. Many modern judges and lawyers would not see much value in preserving the interests of investors in real estate. A tort law which focuses on damage to property rather than personal interests can only be regarded as bizarre (think of the injury to the free worker). Much oppression was clearly possible in the procedural system. The juristic emphasis on ownership and wills can certainly be seen as a conscious or unconscious reflection of the interests of the ruling class.

4. When all of this is said, however, the body of ideas with which they worked and the way with which they worked with them is impressive:

a. Not only were they firmly committed to principled decision-making, a remarkable achievement in a world where principle may not have played too great a role in many actual decisions, but they showed an uncanny sense for balance in the way they derived their principles.

b. A body of values which put a trust in the individual and individual intitative. This accords with our own basic moral views, despite the increase of ideas of social morality. Liability for fault not for accident, a marriage law which emphasized the free volition of the parties, a landlord and tenant law which balanced interests.

c. A notion that an adherence to precedent rather than radical change preserves a sense of stability; the stultifying effects of the past can be removed without losing our sense of identitiy.

d. A keen sense of their own limits and of the limits of law. What we can change, what can't be changed. In this they may have erred on the side of conservatism.

5. There's something inelegant about all of this. It doesn't have the attraction that more reductionist theories tend to have, but maybe what I'm saying it that when you are dealing with an eclectic model neat predictive theories are hard to come by. We can study the complexities of reality; we can arrive at partial generalizations about what forces produced a given result, but at least at this stage of our knowledge we can't completely tie it down; maybe we'll never be able to; maybe that's what a humanistic approach to law means.