I. LAW AND RHETORIC

1. The topic of today's class is the subject of a couple of recent books, including a very good one by 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 get to 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 his relationship 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 is possible 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 of rheorician 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, it is 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, giving the jurist his unique quality — some sense of it remains among the academic lawyers on the 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 someone referred 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 his and 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 relations between 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. *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's 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. (This is pure CD; I haven't checked this out in the literature; both Roby and Greenidge may say something on this topic.) 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 fifth-century jurist 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. 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. Considering how many Greek trial speeches we have, I can't imagine that he is the first to do it. 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 are the 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 (we'll get to this when we discuss the *De oratore*) 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 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. I'm not, however, going to do more with the *Pro Caecina*, basically because I think it would get us too deep into an area of the law that would take more time than we have to expound, the problem of the possessory interdicts. 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. QUINTILIAN

1. Rather than pursuing the *Pro Caecina* further, I would like to say a word about two treatises, Quintilian's *Institutio oratoria*, written probably in the last years of the 1st century A.D., particularly book 5, where Qunitilian writes on how to argue a legal case, and Cicero's *De oratore*, written around 50 B.C. 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 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 even in Quntilian's day 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 almost certainly had the smarts to do it is suggested by what they were already developing one in Quntilian's time in 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. Quintilian, I would suggest, provides evidence for what the Romans were trying to get out of their system.

3. Cicero, whom Quintilian greatly admired, is more candid about what is going on. He says (*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. 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. They involve very different ideas about the relation of facts to law. (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. Quintilian draws a distinction between artificial and inartifical argument. There are also places (particularly in chapter 14) where he suggests that rhetorical logic is not the same thing as philosophical logic, and certainly some of the examples that he gives of 'syllogisms' are not syllogisms in either the Aritsotelean or the Van Quine sense. One is reminded that Petrus Ramus in the 16th century invented a new form of logic, based on rhetoric, and needless to say, Quintilian played an important role in Ramus's sources.

5. 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.

6. <Move this to the end (it's already there) if we have time for the *De oratore*> 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. Quintilian recognizes a distinction between the kinds of oratory that is appropriate for a court and the kinds of oratory that is appropriate for an assembly considering the passage of a *lex*, but the distinction seems to be based more on the assumed sophistication of the audience than it is on any real difference in kind between the two types of proceeding.

V. 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, both of whom were proscribed by Marius in 85. 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. The debate is too long to quote or even to give the highliights. Perhaps the most important thing about it, however, is that unlike many debates in philosophical dialogues, there's no clear winner. (Can skip from here.) But let's try to give something of the flavor of the argument on both sides. <If in time trouble and can do only one, do the *causa Curiana*, sub i.>

2. Crassus

   a. "Can you then ... account them orators for whom Scaevola, though in haste to go to the Campus Martius, waited several hours, sometimes laughing and sometimes angry, while Hypseaaus, in the loudest voice, and with a multitude of words, was trying to obtain of Marcus Crassus, the praetor, that the party whom he defended might be allowed to lose his suit; and Cneius Octavius, a man of consular dignity, in a speech of equal length, refused to consent that his adversary should lose his cause, and that the party for whom he was speaking should be released from the ignominious charge of having been unfaithful in guardianship, and from all trouble, through the folly of his antagonist?" Explain what this is all about: D.26.7.55.1, Table VIII.20b. The argument, apparently, was that the action on the *condictio* should be allowed to continue against the tutor, which would have, according to D.26.7.55.1 have released the tutor from the obligation to pay double in the action on the XII Tables. That the argument on behalf of the ward was plausible could have been the result of the fact that the tutor did not have the property (another tutor did), and the Digest passage suggests that one action precludes the other.

   b. "Within these few days, while we were sitting at the tribunal of our friend Quintus Pompeius, the city praetor, did not a man who is ranked among the eloquent pray that the benefit of the ancient and usual exception, *of which there is time for payment*, might be allowed to a party from whom a sum of money was demanded; an exception which he did not understand to be made for the benefit of the creditor; so that if the defendant had proved to the judge that the action was brought for the money before it became due, the plaintiff, on bringing a fresh action, would be precluded by the exception *that the matter had before come into judgment*." The argument here apparently is that if the exception (?prescription) is included in the pleading, then further action is allowed, but if it is not the whole action is consumed. <Skip to sub i.>

   c. Other orators who knew the civil law: Publius Crassus Dives, Marcus Cato.

   d. The singular case of Marcus Antonius. The laziness of orators who undertake cases in the centumviral courts without being informed about the details (principally of the law of things). The analogy to navigation.

   e. The case of the supposedly dead soldier.

f. The case of the Marcelli and the Claudii.

g. The case of the foreign exile in Rome who has a patron and dies intestate.

h. The sale of houses subject to a servitude.

i. *The inheritance case of Manius Curius. (Important.) "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?" This case is referred to in the *Pro Caecina*. It is generally taken to indicate the different positions of orators and jurists. In fact, Antonius points out later in the dialogue that the jurists were divided on the issue, and the tension between the two positions is well evidenced in juristic writing.

j. The absence of right of *postlimium* of one whom the chief herald (who he?) had given up to the Numatines.

k. Case of liberty: a slave entered in the *census* is free immediately or only upon completion of the *lustrum*?

l. The case of the bigamous Spaniard.

m. "The attainment of no science seems to him (Q.M.) to be more easy."

n. The necessity for system as in the other sciences.

o. The learning of Caius Aculeo.

p. The pleasure of learning the civil law, and the attraction of the antiquity of the XII Tables.

q. The civil law teaches virtue as well or better than philosophy.

r. The superiority of Roman law to Greek.

s. The distinction of the Roman jurists as opposed to the *pragmatici* of the Greeks.

t. The nobility of Sextus Aelius Paetus.

u. Crassus's intention to spend his declining years as a jurist.

v. The distinction of Quintus Mucius Scaevola Pontifex.

w. The importance of public laws as well as private for the orator.

3. Antonius

a. The orator is one "who can use words agreeable to hear, and thoughts adapted to prove, not only in causes that are pleaded in the forum, but in causes in general." It is quite different from skill in government. Neither Q.M. nor M. Scaurus is an orator but the Senate listens to them because they have judgment in affairs. Many people have more than one skill and we must separate the skills. Pericles was both an orator and a statesman. Publius Crassus was both an orator and a jurist. Empedocles was a great natural philosopher and also a poet. This is not to say that an orator doesn't need to know a lot of stuff to adorn his speech, but he need not be a specialist in them.

b. Nor need an orator know philosophy, though he must know the common passions of men. Philosophy is to be confined to books in one's country estate.

c. Illustrates the point with a quotation from one of Crassus's speeches.

d. In fact, the philospher (Stoic) Publius Rutilius Rufus criticized the speech, just as he criticized the appeal to the passions in the speech in self-defense of Servius Galba. Indeed, Rutilius refused to do it in his own defense (in which Q.M. participated) and as a result was exiled to Asia, whereas if Crassus had defended him he would have gotten off, as he should have.

e. Indeed, Rutilius behaved just like Socrates.

f. You say that a man may be a jurist without eloquence but deny that a man can be a lawyer without being a jurist.

g. In the cases of Manius Curius, Mancinus, and the boy born of the second wife the jurists were not agreement. Even Publius Crassus was talked out an opinion by Galba, not by law but by eloquence. (I think that's the point here. This is the lunch theory of jurisprudence.)

h. Indeed, causes where the law is clear are not tried. But where the law is not clear, then we have a case like that of Manius Curius. You were really arguing against AS THE TONGUE HAS DECLARED.

i. It's not laziness among the orators. We need not read Mago the Carthaginian in order to tell our steward how to plant the field.

j. All kinds of knowledge are necessary for the orator, but one need not be Roscius in order to deport one's self in the forum. Go find a *pragmaticus* as an assistant.

k. Certainly law may be an appropriate occupation in old age, but that's not oratory.

l. All we need be is one who can speak in a manner adopted to persuade.

4. So what does it all boil down to? The fact that Cicero puts Antonius argument second suggests perhaps some preference for it. 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. Quintilian recognizes a distinction between the kinds of oratory that is appropriate for a court and the kinds of oratory that is appropriate for an assembly considering the passage of a *lex*, but the distinction seems to be based more on the assumed sophistication

of the audience than it is on any real difference in kind between the two types of proceeding. Quintilian learned much from Cicero, and where we can smoke out a general idea in Quintilian, we are probably seeing something that he got from Cicero. 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.