

# Michigan Law Review

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Volume 85  
Issue 5 *Issue 5&6*

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1987

## The Birth of the Legal Profession

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### Recommended Citation

Alan Watson, *The Birth of the Legal Profession*, 85 MICH. L. REV. 1071 (1987).  
Available at: <https://repository.law.umich.edu/mlr/vol85/iss5/19>

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# THE BIRTH OF THE LEGAL PROFESSION

*Alan Watson\**

THE RISE OF THE ROMAN JURISTS: STUDIES IN CICERO'S *PRO CAECINA*. By *Bruce W. Frier*. Princeton: Princeton University Press. 1985. Pp. xxiv, 317. \$36.

This is a properly scholarly book, written by Bruce W. Frier, one of the best American historians writing on Roman law. I stress this because this review will be largely critical: I find the book unconvincing in its conclusions. Also, the author attempts to tell more than one story in the book, an approach that seems misguided. Frier begins his preface:

I have two stories to tell. The first is the story of a lawsuit brought more than two millennia ago, and of the remarkable speech delivered during it; the second is the story of how, in the decades preceding and following this lawsuit, the legal profession originated and first rose to influence. My conviction, upon which this book is based, is that these two stories are interlinked, though not in a direct causal way; they are interlinked because neither story is completely comprehensible without the other.  
[p. xi]

In telling these stories the author weaves in a great deal of Roman background. We are told, for instance, of the physical appearance of the court and of how the participants in a lawsuit dressed and conducted themselves (pp. 57-63); and also of modern sociological theory, on subjects such as legitimation through judicial procedure (pp. 236-52).

My uneasiness begins with this opening paragraph and with the title of the book. The main cause of uneasiness is not that telling two stories makes the narrative very complicated, as it does; nor that Frier never demonstrates that he is justified in drawing general conclusions about the rise of the Roman jurists from the individual lawsuit involving Cicero's famous speech, *pro Caecina*. Nor is it that, despite the title of the book, arguments detailing the causes of the rise of the Roman jurists are rather sparse, and almost give the impression that this theme is included as an afterthought (even though Chapter Seven, *Conclusion: The Professionalization of Law*, is devoted to it). The cause of my uneasiness is that, with this focus on one lawsuit, Frier does not take the long historical view of the rise of the jurists. The scene for their rise in fact was set long before the middle of the second

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century B.C., and their rise is incomprehensible unless earlier circumstances are fully taken into account. Frier's approach causes him to fail to address the fundamental question in the rise of the jurists: Why ever did the Roman state allow (or even encourage) private individuals, whose separation as jurists from politics Frier stresses, to have such importance in the making of law? Frier's two stories would have been better kept apart.

In the review that follows I will discuss only his treatment of the rise of the jurists (which ought to be the more important subject). Frier's approach causes him to exaggerate fatally (a) the extent to which Quintus Mucius Scaevola (consul in 95 B.C.) marked a new beginning; (b) the separation of the Praetor (and his Edict) from the authority of the jurists; (c) the uncertainty of the law and the significance of this; and (d) the extent to which the jurists had a common strategy.

Frier writes in his preface:

We know that in the late Republic, more or less during Cicero's lifetime, Roman legal science made important advances. During the second and early first century B.C., the stability of the Roman judicial system had been shaken by two important events: the introduction of important procedural reforms, mainly through the Praetor's Edict, and the emergence of rhetorical advocacy in pleadings. Both events tended to increase legal insecurity. The jurisconsults, Rome's unofficial legal experts, at first reacted slowly and rather tentatively to these challenges. At last, however, in the early first century B.C. a small group of jurisconsults (Q. Mucius Scaevola and his students) sought to counter disintegrative influences on law by reconstructing their ancient craft as a more autonomous and intellectual discipline. Their aim was evidently to secure for themselves and for law a more commanding presence within the Roman judicial system and Roman society generally. In essence, they ceased to be jurisconsults only, and became jurists as well, with major consequences for subsequent Western law. Through these men the legal profession walked for the first time onto the stage of history; the late Republican jurists were clearly "professionals" in that they possessed and exploited specific knowledge and skills which were inaccessible to laymen, and in that they also had at least rudimentary forms of regularized intercommunication, work autonomy, specialist literature, colleague "control," organized education, and even ethics. [p. xiii]

It is on this paragraph and on Frier's remarks connected with it that I wish to center my review.

I agree, of course, that the period saw "important procedural reforms, mainly through the Praetor's Edict." But I would not accept that the "stability of the judicial system had been shaken" thereby. Rather, the reforms increased the stability of the system by modernizing it and making it more suitable for a society on the move. Frier does not explain how the stability of the system was shaken.

These procedural reforms, I think Frier would hold, were of two

kinds. One was the replacement through the Praetor of the archaic formal procedure known as *legis actiones* by the flexible *formulae*, which Frier partially attributes (and many would agree) to the *lex Aebutia* (p. 157). The other procedural reform comprised the introduction of new actions. These might be entirely original, such as those for the contracts of sale and hire, which were set out with their *formulae* in the Edict — whether or not the Praetor also issued an edict<sup>1</sup> stating that he would grant an action on a sale or hire. Or they might be actions, such as several controlling succession, that in effect blocked the old civil law rules which may have been set out in the XII Tables.

By controlling legal proceedings, the Praetor in effect changed the law. But if it was a legislative body (which passed the *lex Aebutia*) and the Praetor who were responsible for these procedural reforms that had a profound effect on the substance and modernity of the law, then — and this is the first point I wish to take up from Frier's paragraph — how can it be, as Frier claims, the jurists who got rid of archaic law? Frier says of the jurists: "Their achievement lay in the liberation of Roman private law from its stultifying archaic formalism, in the ascendancy of the quasi-ethical principle *bona fides*, and in the creation of a juristic method for managing legal materials" (p. 193). Yet I cannot think of one example where a jurist *qua* jurist freed private law from archaism: the abolition of the fundamental archaism — from *legis actio* to *formula* — was the work of legislator and Praetor. New remedies were again the creation of the Praetor.<sup>2</sup> Frier in this context also says: "Yet we are told that in conversation Q. Mucius was wont to stress the fundamental importance for Roman law of the concept *bona fides* and the actions *ex fide bona* (Cic. *Off.* 3.70)" (p. 159). Yet where exactly do we find the setting of the words *ex fide bona*? The answer is precisely in the Praetor's Edict, in the *formulae* for actions such as those on sale (*emptio venditio*) or guardianship (*tutela*). Insofar as the jurists are to be given credit for the development of concepts such as *bona fides* it is because the Praetor, responsible for the notion in his Edict, left its working-out in detail to the jurists. The relationship between Praetor's Edict and the development of the law by the jurists is close.

But Frier seems to keep the Praetor and the jurists at arm's length. Thus, he attributes the introduction of the *actio de dolo* — not, as he habitually calls it, *actio doli* — to Aquilius Gallus as jurist, not as Praetor (pp. 148, 262). His argument for this is that the dramatic date — not the date of writing — of Cicero's *De Natura Deorum* (in which the action is mentioned) is 76 B.C. and Gallus became Praetor only in

1. The term "Edict" with a capital letter is used to designate the whole praetorian apparatus setting out *formulae* and clauses promising a remedy, whereas "edict" is used to denote an individual clause of the Edict.

2. Frier shows himself to be not unaware of this. See p. 193.

66 B.C. But this is a weak argument compared with that in favor of Gallus as Praetor, an argument that Frier does not discuss. In the *De Officiis* 3.60, Cicero writes: "Nondum enim C. Aquillius, collega et familiaris meus, protulerat de dolo malo formulas" (For my colleague and friend C. Aquillius, had not yet brought forth his *formulae* on fraud). But the verb *proferre* (used also in *De Natura Deorum* 3.74) is more appropriate for official promulgation than unofficial recommendation. And it is precisely as Praetors in the year 66 B.C. that Cicero and Aquillius Gallus were colleagues! Frier also says: "Other late Republican innovations bear the names of jurists: the *actio Serviana*, governing security for debt and named probably for Servius; the *iudicium Cascellianum*, against contumacious defendants of possessory interdicts, named for A. Cascellius" (p. 262). But if the *actio Serviana* is named for Servius this might be because, as J.M. Kelly argues, he was responsible for it as Praetor, which he was in 65 B.C.<sup>3</sup> Other remedies certainly do bear names which could be those of Praetors not known as jurists: *interdictum Salvianum* (a Salvius was praetor urbanus around 74 B.C.); *actio Publiciana* (Q. Publicius was Praetor around 67 B.C.); *actio Calvisiana* (a Calvisius was Praetor in 46 B.C.).<sup>4</sup>

The reason for this distancing of jurist and Praetor lies, I believe, in Frier's belief that the rise of the jurists in part results from their response to the increase in legal insecurity caused by the growth of the Edict. He makes much of this supposed legal insecurity resulting from the Edict. This brings me to the second point I wish to take up from the paragraph quoted from Frier's preface. Frier stresses that the jurists of the last century of the Republic were no longer senators but were from the lower ranks of *equites*, a fact that he believes needs explanation (pp. 256-60). The *equites*, many of whom were involved in banking, trade, or public contracting, would be interested in calculating the legal consequences of their acts, and would be keen on legal security (pp. 257-58). But Frier himself implicitly admits that one cannot prove that the *equites* actively sought legal security (p. 258). Nor can one show — I don't think Frier even tries to show — that the jurists sought to give legal security. One can show that the jurists interpreted the Edict and the civil law; one cannot show that the jurists thereby sought to give greater legal security, since in fact it is a marked characteristic of the jurists that they frequently disagreed in their opinions. Different interpretations may increase legal insecurity. And in the absence of a juristic attempt to secure unanimity, one cannot without evidence claim a policy of the jurists to promote security.

Nor is it really clear that the growth of the Edict would contribute

3. Kelly, *The Growth-Pattern of the Praetor's Edict*, 1 IRISH JURIST 341, 347 (1966).

4. See A. WATSON, LAW MAKING IN THE LATER ROMAN REPUBLIC 32 (1974). The identifications are not secure.

to legal insecurity, though it certainly would contribute to legal development, including the making of law favorable to commerce. Certainly it is true that the clauses of the Edict are brief, technical, and, on their face, incomprehensible to the layman. But the conclusions are not, and cannot be, those drawn by Frier. Take, for example, one of the two model *formulae* for the consensual contract of sale (*emptio venditio*), that which was available to the buyer:

Whereas AA bought from NN the slave on account of whom the action is brought, whatever on that account NN ought to give to or do for AA in accordance with good faith, in that amount, judge, condemn NN to AA. If it does not appear, absolve him.

This praetorian innovation as it stands will not tell a lay purchaser much: not what the requirements are for a valid contract of sale, not what the seller's obligations to him are, not what his own duties are, not what damages will be due for any default. But we should not conclude therefore that in creating the contract of sale and so developing the law the Praetor was deliberately or negligently increasing its insecurity, hence giving rise to the need for a new class of jurists who would remedy his deficiencies. Rather the implication must be that the Praetor could afford to be so brief because those people who might get involved with a lawsuit in whatever capacity had some idea of the nature of the contract and of their rights and duties under it. As with almost all "legislation," details of interpretation are left to be worked out later.

But where does this general knowledge of the law come from? The extreme brevity of edictal clauses makes sense only on the assumption that such knowledge exists: it does not come from public officials; it comes too late in the course of a dispute if it comes from judges (who, in any event, are laymen). In Roman circumstances it can only come from persons like jurists who, we know, existed, and who wrote and gave opinions about law, and whose views were treated with high regard. In other words, it was not insecurity of law caused by the growth of the Praetor's Edict — whose clauses were, on their face, obscure — that brought about the rise of the jurists. Rather, it was the existence of persons learned in the law that enabled the Praetor to issue such brief, apparently uninformative, edictal clauses.<sup>5</sup> Moreover, this development suggests a certain closeness, even cooperation, between Praetor and jurist. The former had no qualms in allowing the law largely to be developed by the latter; the latter was happy with the task he voluntarily and gratuitously took upon himself. But what is further instructive about the example just chosen from *emptio venditio* is precisely that that contract came into being at least a century before,

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5. But leaving the scope of the *formulae* to be determined by subsequent juristic opinion does make for some ambiguity. See A. WATSON, SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY 20-21 (1984).

on Frier's approach, the rise of the jurists. It is hard to believe that a century later, but not before, a small group of jurisconsults sought to counter disintegrative influences resulting from such *formulae*. In addition to what has gone before, I should also say that Frier nowhere produces any evidence to support the use of the word "sought": there is no evidence of any common purpose among the jurists.

Frier emphasizes the role of Q. Mucius Scaevola as the founder of this movement. For instance, he discusses Q. Mucius' strategy to raise the intellectual content and authority of the civil law as expounded by the jurists, to defend the civil law from the disintegrative influences of the rapidly evolving Praetor's Edict, and to give the jurists a firm base to exert and increase their influence on the courts (pp. 168-71). This brings me to my third point on the quotation from Frier's preface, namely that although one must not downplay Q. Mucius' importance as a jurist (and I think I am not in danger of doing so)<sup>6</sup> he does not fit into Frier's scheme of development. To begin with, as Frier is certainly aware and indirectly shows (p. 253), Q. Mucius was not an *equus* but a senator, with even two consular ancestors.<sup>7</sup> Hence, intentions ascribed by Frier to jurists because they were *equites* cannot without more ado be attributed to Q. Mucius, the leader of the group! But Frier seems not to address the issue.

Nor can I see anything in Q. Mucius' work on the civil law that would justify a claim that with it he was seeking to counter disintegrative influences on law. It seems to be simply a commentary on law, the first to set out the civil law *generatim*; a good commentary at that, which served as a model for later works and which certainly raised legal writing to a higher level. Frier, surprisingly perhaps, in the body of his text nowhere attempts to demonstrate what further aims Q. Mucius might have had. To modern eyes Q. Mucius' books have defects, especially omissions,<sup>8</sup> and it is precisely in these that one might try to spot his ultimate aims. The work is archaic; matters not provided with a proper action by the later third century B.C. are omitted. But there is in these omissions no sign of any hostility to the Edict; as Frier notes, praetorian actions, such as those on sale or partnership, that can be attached to older institutions are discussed (p. 160). Others are omitted. But so are whole subjects of the civil law that were important, such as marriage, divorce, dowry, *cura*, and slavery. My own tentative suggestion for Q. Mucius' omissions would be as follows. He cannot have made a conscious decision to omit all subjects that had no proper action by the later third century B.C. Apart from the obvious absurdity of any such course of behavior, he would

6. See A. WATSON, *supra* note 4, at 143-58.

7. See especially W. KUNKEL, *HERKUNFT UND SOZIALE STELLUNG DER RÖMISCHEN JURISTEN* 18 (1952).

8. See, e.g., pp. 159-60; A. WATSON, *supra* note 4, at 143-58.

have lacked historical knowledge to date the emergence of law. Rather, he was a traditionalist and was following some older, now unknown, model whose roots lay in the distant past and which concentrated on actions. Certainly it is only in this way that one can explain omissions from the much later Sabinus' commentary on the civil law; in his turn Sabinus was relying on the model of Q. Mucius.<sup>9</sup> Q. Mucius' work is not a new beginning; even if it were, it certainly does not provide evidence that he was seeking to counter disintegrative influences on civil law.

In emphasizing the "quantum leap in legal science" (p. 163) made by Q. Mucius, Frier claims that "Q. Mucius also begins to deploy loose canons for interpretation" (p. 162). Now, in the absence of direct information on previous legal interpretation, it would be impossible to prove that earlier interpretation was always narrow; and Frier produces no evidence for his assertion. But in fact it is possible to show indirectly that wide interpretation was used before Q. Mucius. Thus, *mancipatio* was originally a formal conveyance of certain kinds of important property known as *res Mancipi*. The ceremony conveyed the thing at once. Yet even before the XII Tables of the mid-fifth century B.C. the unofficial practice had grown up of using the ceremony to make a will which would have future effect, even for the disposition of things that were not *res Mancipi* and even for the appointment of guardians. This practice was given official recognition by the XII Tables.<sup>10</sup> Likewise, at some early date, though after the XII Tables, *mancipatio* came to be used to permit adoption.<sup>11</sup> And further similar examples can be adduced. None of this could have occurred unless there was already a very flexible attitude to the use made of law, and this must have extended to canons of interpretation.

The fourth and final point which I wish to take up is the issue of "autonomy of law," which is the concern of the second half of the quotation from Frier's preface. Frier discusses this issue in various places and in various ways. He says, for instance:

"Autonomous law" is less a systematic doctrine of law than a loose bundle of characteristically juxtaposed ideas, which together constitute a sort of "ideal type." Among these ideas are

- (1) strong separation of law from politics, and a consequent emphasis on the independence of the judicial system from political influence as well as on the division between legislative and judicial functions of government;
- (2) a conception of law as a self-consistent body of rules that are applied in individual cases and that, because of their existence, both limit

9. See A. WATSON, *supra* note 4, at 144-45. For tentative acceptance of my explanation of omissions from Q. Mucius, see E. RAWSON, *INTELLECTUAL LIFE IN THE LATE ROMAN REPUBLIC* 208 (1985).

10. See A. WATSON, *ROME OF THE XII TABLES, PERSONS AND PROPERTY* 52-70 (1975).

11. See *id.* at 42.



the discretion of the judicial system and help to prevent it from intruding into politics;

(3) an emphasis on procedural regularity and fairness (formal justice) as the primary end and competence of a judicial system; and

(4) a belief that "fidelity to law" means primarily obedience to established rules of positive law and, likewise, a conviction that changes in law (at any rate, major changes) must be channeled through the political process. [pp. 188-89; footnote omitted]

And he regards "autonomous law" as largely the creation of, and the result of the work of, the late Republican jurists (pp. 191-92, 258, 259-60, 281).

Now the nature of the autonomous law is clear in the works of the late Republican jurists. But it is also an integral part of law in Western systems and is always prominent, at least when law is not being used in the forefront of political revolution. It existed long before the late Roman Republic, although the scarcity of evidence does not admit of much detail. Whether the notion of autonomy is expressed or not or is fully developed in theoretical writings, it exists wherever there is recognition that law operates as a separate entity in society, with its own standards for correctness, its own methods of reasoning toward a solution, and as being authoritative in its own right. In other words, a procedure or decision is "right" precisely because it is in harmony with approaches to legal thinking, and not because of other societal concerns.<sup>12</sup> But then the autonomy of law in Frier's terms is already very obvious in the ancient dodges and devices to give further scope to an institution such as *mancipatio*. Originally, as I have said, a formal conveyance, *mancipatio* was used even before the XII Tables to make a will and to give a husband power (*manus*) over his wife in the ceremony of *coemptio*; and at some early date to create servitudes over land, as a form of real security in *fiducia*, to adopt a son by *adoptio*, and to release a son from paternal power by *emancipatio*. The validity of such devices<sup>13</sup> is accepted in practice because they correspond to recognized standards of legal reasoning,<sup>14</sup> their acceptance is by the judicial system, they are independent of direct political influence,<sup>15</sup> and they are treated as valid not just in one instance but generally.

Frier's main point is, of course, that the autonomy of law is a particularly marked feature of late Republican law (and was actively sought by the jurists). It was indeed a particularly marked feature of late Republican law, but one need see in that no more than a reflection of the fact that by that time law had come to be highly developed.

12. See, e.g., A. WATSON, *THE EVOLUTION OF LAW* 67-74 (1985).

13. On dodges and devices, see especially Daube, *Fraud No. 3*, in *THE LEGAL MIND* 1 (N. MacCormick & P. Birks eds. 1986).

14. If the results simply corresponded to societal notions of rightness, independently of law, there would be no need to cloak the devices in the form of a *mancipatio*.

15. Political intervention has no need of "devices."

Having disagreed so much with Frier, I feel it incumbent on me to provide a more plausible alternative and sketch out my own views on the role of the jurists in Republican legal development, on their relationship to the Praetor's Edict, and on why in the last century of the Republic the jurists were predominantly *equites*.

The fundamental question is why jurists — private individuals — were allowed to give opinions that were important for creating legal rules. Closely allied to that is the second question, why men of status found it worthwhile to give legal opinions for no direct financial remuneration, and why their prestige — social or political — was enhanced by such activity. In the western world this has happened neither before nor since. The answers are revealed if we begin at the beginning, long before Cicero or his speech *pro Caecina*.

Pomponius, a jurist of the second century A.D., tells us that after the promulgation of the XII Tables authoritative interpretation of the law and of the conduct of actions at law was in the hands of the College of Pontiffs.<sup>16</sup> This was entirely appropriate. To be effective, law must be interpreted. The pontiffs did not belong to a specific caste of priests, nor did they devote their whole time to religious observance. They were men of substance, successful in public life, and, until 300 B.C., patricians. They were close to the men who ruled the city and were, in addition, an organized group whose talent was recognized. They had in fact many of the attributes that Frier associates with a "profession" (p. 157).

Each year, so Pomponius goes on, one of the College of Pontiffs was appointed to preside over private citizens. The chosen man would then give the opinion of the College on the interpretation of the law, and his declaration would be authoritative. Reasonable as this was from the point of view of the government, it had an interesting consequence. Patricians, members of the College of Pontiffs and aspirants thereto, wished to be learned in the law. Advancement to the College would be helped thereby, their prestige among their colleagues in the College and other patricians would be increased, and so would their reputation among the populace at large.

Eventually the College of Pontiffs lost its monopoly of interpretation. As a result, juristic interpretation lost its legitimacy, and legal authority its unitary voice.<sup>17</sup> But cultural tradition, once established, dies hard. A high reputation still resulted from the giving of good legal opinions, and men of the highest rank continued to want to increase their prestige through legal expertise. Anyone might, in theory, give a legal opinion, but the worth of any opinion was still largely

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16. DIG. 1.2.2.6 (Pomponius, Libro Singulari Enchiridii). Frier refers to this history on p. 157.

17. See A. WATSON, *supra* note 5, at 2-3.

determined by the status of the person who gave it; in practice the dominant juriconsults continued to be from society's highest ranks.

Change came, however, with the development of the Praetor's Edict, especially when the Praetor began to issue edicts — not just the *formulae* for new actions — that had the effect of substantially changing the law. Only around 100 B.C. did it happen that Praetors could issue edicts creating totally new actions on substantive law.<sup>18</sup> This greatly affected the juriconsults. They were in active cooperation with the Praetor. They could suggest new edicts or *formulae*, and the Praetor was generally content to leave the interpretation of the Edict to them. But in this cooperation the role of the Praetor dominated. He was under no compulsion to follow the jurists' recommendations, and, if he did not favor their interpretation of an edictal clause, he could change the wording to tilt it to his intent. And the wording of edictal clauses often was changed.<sup>19</sup> The role of the juriconsult was only that which the Praetor was willing to allot him. This held true even for interpretation of the civil law, for if a Praetor did not like what was happening there, he was at full liberty to issue an edict amending the law. The role of juriconsult was no longer a suitable one for a senator. The way was open for lesser mortals, *equites*, who gained in prestige through their association with the Praetor. These jurists necessarily worked harder at law than their predecessors. The value of their legal opinions did not come from their social position. Rather, their social position came from the worth of their legal expertise. They continued to give legal opinions, but they were more likely to be noticed by their fellow jurists, Praetors, and prominent citizens if they published books, whether collections of *responsa* or legal commentaries. It was every jurist for his own reputation. There is nothing here akin to Frier's description: "This is the tacit bargain that Q. Mucius and his students offered to the Romans: increased security in private law in exchange for the greater prestige of legal experts" (p. 191).

The rise of the "profession" of jurists in the late Republic was the result of the increased importance of law at that time. Frier stresses that the impact of jurists' law on the Roman judicial system was profound because of external factors, and of these he gives pride of place to the dramatic increase in the number of citizens (p. 273). This is to turn things upside down. Any impact from the huge increase in the citizen body would have been directly on the judicial system and the Praetor's Edict, and thus indirectly on the development of jurists' law.

Of course, it remains a question why Roman law developed then as thoroughly as it did. Part of the answer is that this development was simply one aspect of the quick expansion of high culture at Rome then

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18. For this argument, see A. WATSON, *supra* note 4, at 31-62.

19. See *id.* at 33-34.

and in the succeeding Principate, which is seen also in sculptured portrait busts, architecture, and various genres of literature. And for many modern scholars the period of true classical law, as of the apex of some other aspects of culture, is restricted to the Principate. Another part of the answer is simply that no full answer can be given to the question why one area of culture rather than another develops at a particular time and place. Why, one might ask without the hope of a complete answer, the interest in philosophy, of all things, in ancient Greece?

If one insists on knowing why jurists' law was so important in the late Republic, then the answer on one level is that, as I have tried to show, the machinery for the importance of juristic law was in place long before, and the increasing complexity of the society simply caused the wheels of this machinery to turn ever faster. On another level, the answer lies in the nature of a state's need for legal rules regulating the behavior of individuals among themselves. Such rules are needed to inhibit unregulated conflict. But provided the money required for governmental expenditure is made available and breaches of the state's peace are controlled, the central organs of government need be little concerned with the content of much of private law. It is this, as I hope to show elsewhere,<sup>20</sup> that explains much of the evolution of English common law. Much of law was under the control of other courts before the rise of the king's courts. And much of law could be left to the control of these other courts. Kings and their ministers have no need to care about what happens before such courts, provided the king's peace is kept and the tax money rolls in. Kings and politicians have more fun things to do with their time. Likewise at Rome. In Rome, though, there was no need to raise tax money through the judicial system. And it can scarcely be overemphasized that the jurists' role was almost entirely confined to private law — therein lies the key to their success. So long as the Praetor kept his eye on the broad development of the law and on the jurists, and so long as the jurists were willing to undertake for free the chore of developing private law and making it more systematic, the politicians would have been crazy not to let them just get on with it. The content of most rules of private law is of little significance for rulers provided there is someone to give substance to the rules.

Though I disagree greatly with the arguments and conclusions I have discussed, I find this to be a stimulating book. And I have said nothing about the excellent bringing to life of the lawsuit for which Cicero wrote his speech on behalf of Caecina. The divergence of our conclusions on the rise of the jurists and related matters follows in large part from a fundamental difference in the approaches of Bruce

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20. A. WATSON, *FAILURES OF THE LEGAL IMAGINATION* (forthcoming book arising from the Julius Rosenthal lectures to be delivered at Northwestern University School of Law in 1987).

Frier and myself to an understanding of how law develops in society. Frier takes the approach favored by those interested in sociology of law. A period of time is selected, and contemporary changes in the law and legal system are explained with reference to the conditions then prevailing. To me, this approach is excessively limited and distorts the vision. Of course, contemporary conditions affect legal development, and sociological study has its role to play in understanding legal change. But law has its own traditions in which it is deeply rooted, and to a profound extent its development is dictated by the culture of the legal elite.<sup>21</sup> The role of the late Republican jurists cannot be explained so much by the context of the commercial interests of some of the class of *equites* to which they belonged as by the role given to the College of Pontiffs centuries before.

But a subsidiary part of my disagreement with Frier comes from the fact that he is not rigorous enough in his use of the sociological approach. It is instructive to list the weaknesses in his deductive chain:

(1) Frier assumes but does not attempt to show that the *equites*, some of whom had commercial interests, would actively seek legal certainty. Indeed, he admits in effect that he cannot demonstrate this.

(2) Frier assumes but does not attempt to show that jurists who were *equites* would work in the interest of those *equites* who were involved with commerce.

(3) Frier asserts but never produces any evidence that the jurists who were *equites* were interested in legal certainty.

(4) Frier asserts but never produces any evidence that the jurists who were *equites* had some common goal and strategy.

(5) Frier never attempts to show why, if his theory is valid and the rise of the jurists is to be explained by their status as *equites* seeking to further the commercial interests of other *equites*, the prime mover in this rise was Quintus Mucius Scaevola who was no *equus* but a prominent member of the senatorial order.

Failure to establish any one of these five propositions — and Frier fails to establish every one of the five — entails a failure to establish Frier's thesis of the rise of the jurists.

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21. See Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983).