

## LAWYERS AND JURISTS

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Alan and I have known each other since before 1966; were it not for him I should never have become a romanist, and indeed I was originally his Assistant. Since then he has propounded, we have argued, I have agreed, and disagreed. I can only describe Alan Watson as *il mio padrone*. I hope he will enjoy this look at the imperial garb.

“We may be surprised, though, that such great legal development could be due to a few jurists chosen from such a small section of the population.”

-Watson, *Law-Making*<sup>1</sup>

Many books on Roman law make very similar statements. There are questions arising from it that have been vexing me for decades. How many jurists were there, ever? How many jurists were there at any one time? (A critical mass is surely needed before there is acceptance by one's peers, before a *ius commune* can be created.) How many aspirants were there? What differences were there in authority between the jurists of the Republic and of the Empire? To find some answers I make use of the leading English textbook on the historical background to Roman law and its legal science,<sup>2</sup> and of the two still indispensable works on the Roman jurists.<sup>3</sup>

The methodological problems in looking for answers to these questions are enormous. Even before we consider the nature of the available evidence, there is the problem of terminology. Certainly in English, but it seems to me also in the other modern European languages, there is a question begged in the very term “jurist.” It is a noun of relatively modern construction. The Romans themselves usually talked about *iuris prudentes* or *iuris periti*, sometimes *iuris consulti*. We use jurist, whether explicitly or implicitly, to mean someone of high reputation, and probably high status, contrasting it with the wider “lawyer,” for which there is no single Latin term.

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<sup>1</sup> ALAN WATSON, *LAW-MAKING IN THE LATER ROMAN REPUBLIC* 109 (1974).

<sup>2</sup> H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (3d ed. 1972).

<sup>3</sup> FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* (1946); WOLFGANG KUNKEL, *HERKUNFT UND SOZIALE STELLUNG DER RÖMISCHEN JURISTEN* (2d ed. 1967).

Then there is the problem of our sources. The one attempt at historical treatment, Sextus Pomponius' *Enchiridion*, is distinctly muddled, whether by the original author or by later misunderstanding, and is by no means reliable.<sup>4</sup> Marcus Tullius Cicero, naturally, was interested in the legal world in which he played a significant part, but he was not particularly interested in the earlier period, and he died in 43 B.C. Law and lawyers were not topics that interested the literary class, so they are as such barely mentioned by the Roman historians. The compilers of the Digest of Roman Law were ordered to select and edit the works of all the *prudentes* of old to whom the emperors had granted authority to compose and interpret the laws, and to ignore books written by others whose writings had not been received or used by any later authors.<sup>5</sup> The latter instruction seems to have been obeyed for, while there are jurists cited in the Digest of whom we know nothing more than these texts and their names, there are no references anywhere to other jurists of the Principate. As to the former order, Republican jurists can hardly have been authorized by emperors, and not all the cited jurists of the Empire can have been so empowered.

Whether in or as from the Twelve Tables of 451–450 B.C., it is the uncontested tradition that a member of the college of pontiffs, all then patricians, was appointed each year to be in charge of private matters, that is, to interpret private law.<sup>6</sup> This was logical because early private law was largely concerned with the family and inheritance, and overlapped with the sacral law in these areas. The pontiffs were not priests in the mystery-religion sense, but were responsible for proper rituals; they were at the same time able to engage in the business of the Senate and hold magistracies, and as such they might also be concerned with public law. Pontifical status seems sufficient to explain their authority, and why no need was seen to make this authority formal. The fact that they were a college meant that debate was possible in new or doubtful cases. The link between the pontiffs and the interpretation of law, although no longer absolute, lasted until well into the third century B.C.<sup>7</sup>

Around 200 B.C. Roman history becomes less remote. Literary sources, such as the plays of Plautus and the agricultural works of Cato and Varro survive from that time. The first jurist whose work has survived, Sextus Aelius Paetus, was consul in 198 B.C. The chief legal figures of the second century were Manlius Manilius, consul in 149 B.C.; M. Junius Brutus, praetor in 142; and Publius Mucius Scaevola, consul in 133. A generation later came P. Rutilius Rufus, consul in 105 B.C.; and Quintus Mucius

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<sup>4</sup> DIG. 1.2.2.35–.53 (Pomponius, lib. sing. eniridii).

<sup>5</sup> CONST. DEO AUCTORE § 4.

<sup>6</sup> DIG. 1.2.2.5.

<sup>7</sup> JOLOWICZ & NICHOLAS, *supra* note 2, at 88–91.

Scaevola, son of Publius, consul in 95. We then come to Cicero and his generation. Leading figures were C. Aquillius Gallus, of equestrian family, praetor with Cicero in 66 B.C.; Servius Sulpicius Rufus, consul in 51, friend of Caesar; A. Ofilius, a lifelong *eques* and another friend of Caesar; A. Cascellius, born an *eques* but in office as quaestor before 73 B.C.; C. Trebatius Testa, protégé of Cicero and friend of Caesar and made an *eques* by Augustus who consulted him on codicils; Q. Aelius Tubero, a Pompeian senator reconciled with Caesar; and P. Alfenus Varus, consul in 39 B.C. It is notable that most of this last group were born into equestrian, not senatorial, status, even Servius Sulpicius Rufus.<sup>8</sup>

Even with the advantage of Cicero's evidence, romanists such as Schulz, Kunkel, and Jolowicz have managed to list remarkably few names for the 180 or so years of the period before Labeo, who lived under and disagreed with Augustus' supremacy. Schulz has c. 46 names dating from Aelius Paetus,<sup>9</sup> and Kunkel has 36 from Quintus Mucius Scaevola, the augur, consul in 117 B.C.;<sup>10</sup> the numbers are vague because dates are uncertain. These numbers may be further skewed as some of those identified as jurists should be classed primarily as orators, while others are very obscure.

Is this a sufficient number of jurists to do all the development work of Late Republican Roman law, remembering that civil wars occupied much time? If not, where are we to look for other creators and interpreters of the law?

The obvious place is among the scribes.<sup>11</sup> As Schulz pointed out, "the aristocrat has in general little inclination for routine work." The pontiffs and magistrates were supported by a subordinate staff of secretaries and copyists. "Sometimes these secretaries styled themselves jurists, and quite rightly. Their contributions remain unrecorded . . . but we should at least remember their existence."<sup>12</sup> Scribes seem to have been free-born, and often of some social standing; they formed an *ordo*, which Cicero treated respectfully.<sup>13</sup> G. Cicereius, praetor in 173 B.C., started his public career as a *scriba*.<sup>14</sup> Status varied among the scribes themselves, but the quaestorian scribes, who served the same higher magistracies as the quaestors, might well become

<sup>8</sup> *Id.* at 91–94.

<sup>9</sup> SCHULZ, *supra* note 3, at 46–48.

<sup>10</sup> KUNKEL, HERKUNFT, *supra* note 3, at 14–34.

<sup>11</sup> For relatively recent articles on this topic, see E. Badian, *The Scribes of the Roman Republic*, 71 *Klio* 582 (1989); Cynthia Damon, *Sex. Cloelius, Scriba*, 94 *HARV. STUD. CLASSICAL PHILOLOGY* 227 (1992); Nicholas Purcell, *The Apparitores: A Study in Social Mobility*, 51 *PAPERS BRIT. SCH. ROME* 125 (1983); see also A.H.M. Jones, *The Roman Civil Service (Clerical and Sub-Clerical Grades)*, 39 *J. ROMAN STUD.* 38 (1949).

<sup>12</sup> SCHULZ, *supra* note 3, at 12.

<sup>13</sup> *E.g.*, CICERO, IN *VERREM* 3.182–85.

<sup>14</sup> VALERIUS MAXIMUS 3.5.1; 4.5.3. The *Fasti* show that he was elected in 173.

equestrians, and hold prefectures. Pontifical scribes were classed as minor pontiffs.<sup>15</sup> An undated inscription records “. . . nus iuris prudens scr[iba] aed[ilium] cur[ulium] v[ixit] a[nnis] LIII.”<sup>16</sup> Badian reconstructs convincingly the career of Q. Cornelius, who was *scriba* under Sulla and then quaestor under Julius Caesar, and was also described as *pontifex minor*; he is to be identified with the teacher and friend of C. Trebatius Testa.<sup>17</sup> Schiller argues that “most of the jurists [in the Late Republic] were of equestrian rank.”<sup>18</sup> The senior *scribae* were men who knew their law and the intricacies of its practice and administration. Their status permitted friendship with senators.<sup>19</sup>

Cicero, speaking through the orator Antonius, required that, for someone to be named a *iuris consultus*, he should have knowledge of the laws and custom used by citizens in their private affairs, and be skilled in giving legal opinions,<sup>20</sup> in appearing in court, and in the drafting of legal forms for such things as wills or contracts<sup>21</sup> (*ad respondendum et ad agendum et ad cavendum*).<sup>22</sup> However, during the second century B.C. specialist orators largely replaced the lawyers as advocates, although it is to be remembered that for the Romans tertiary education was rhetoric, and the gap between lawyers and orators was never an abyss. Furthermore, advice on drafting wills or contracts may have become less important as models were established and then published in writing. The giving of opinions remained the quintessential function of the man skilled in law. Teaching in this period was incidental, by apprenticeship as audience and follower.<sup>23</sup>

It seems likely that in the archaic period, that is roughly before 200 B.C., Roman society was small enough for clientage to be the normal route for a small man to get legal aid and advice from a specialist. Great men were expected to provide such advice, at any level of technicality, whenever they could be accosted, as part of their *noblesse oblige*. Of course it also won

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<sup>15</sup> See LIVY'S HISTORY OF ROME 22.57.3 (“scriba pontificius quos nunc minores pontifices appellant”).

<sup>16</sup> CORPUS INSCRIPTIONUM LATINARUM VI, at 1853 (“. . . nus [a name], jurist, scribe of the curule aediles, lived 54 years.”).

<sup>17</sup> Badian, *supra* note 11, at 586–89.

<sup>18</sup> A. ARTHUR SCHILLER, ROMAN LAW: MECHANISMS OF DEVELOPMENT 311 (1978).

<sup>19</sup> Badian, *supra* note 11, at 593–95.

<sup>20</sup> CICERO, DE ORATORE 1.48.212. The opinions were given to magistrates, particularly the Praetor, to advocates, to *iudices* (lay judges), and to private persons, whether or not actually involved in litigation.

<sup>21</sup> Around 200 B.C. Varro, in his *de re rustica*, proposed various forms of warranty, including those concerned with the sale of nanny-goats. WATSON, *supra* note 1, at 105. A more important example is the *stipulatio Aquiliana* of Aquilius Gallus; although he was praetor in 66 B.C., this was seemingly put forward in his private capacity.

<sup>22</sup> CICERO, DE ORATORE 1.48.212.

<sup>23</sup> See SCHULZ, *supra* note 3, at 57 (discussing Cicero's education).

*gratia*, favour, a most important component of Roman Republican political life, where money was not requested but obligations were planted.

But as Rome grew, there must have been many more seeking aid and advice, and the great men were becoming more involved in their own power struggles. It seems likely that for many matters, for many people, consulting the *scribae* would satisfy their legal needs; moreover, through their very jobs, the *scribae* gave advice to magistrates. The *scribae* were essentially based in Rome, and as a permanent body, with written resources, were in a good position to provide model documents and formulae. Indeed, there is no reason to doubt that they produced some legal books, since the use of *vicarii* or deputies would give them the time to write.

With the coming of the Principate, Augustus took pains to ‘restore the Republic’ as far as externals went; nevertheless, as he himself stated, his *auctoritas*, his effective authority, was pre-eminent. Kunkel argued that Augustus wished to restore the prestige of the lawyers.<sup>24</sup> I see no reason to follow Kunkel’s view, for why should Augustus bother when it was not a governmental issue? However, there was a gap to be filled, something to replace the political ambitions of senators when in Rome. Law was a respectable and traditional way to keep in the public eye, to preserve social esteem. This is sufficient to explain why senatorials seem to dominate the legal scene in the early Principate. This was to change under the Flavians, at a time when emperors came to rely less on their own private families of slaves and freedmen and more on men born into the equestrian class to run their administration with (not for) them. Equestrian status was no bar to serving on the imperial *consilium*; examples are Ulpus Marcellus, Tryphoninus, Arrius Menander. Permanent offices were established, based on function rather than functionaries, and in particular, for legal purposes, the offices of the *a libellis*, the *a memoria*, and the *a cognitionibus*. Papinian and Ulpian were each chiefs of the *a libellis*, on their routes to the Praetorian Prefecture. Furthermore, we hear of salaried *adseorsores*, *consilarii*, *studiosi iuris*, men clearly of some legal expertise, and often, it seems likely, holding such offices as part of a career pattern, almost as training grades. Papinian was *adseorsor* to the Praetorian Prefect, as was Ulpian, and also Paul, who became chief of the *a memoria*.<sup>25</sup>

Now, there were some sixty-four jurists listed for the 250 years or so from Labeo to Modestinus;<sup>26</sup> it is surely possible to add the office chiefs, and maybe their immediate deputies. I think one may safely give them an average career of at least twenty years. This gives a distinctly better ratio of

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<sup>24</sup> WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 107–08 (2d ed. 1973).

<sup>25</sup> JOLOWICZ & NICHOLAS, *supra* note 2, at 391–93.

<sup>26</sup> Roughly the end of the first century B.C. to the mid third century A.D.

men to years than the Republican period, particularly if one takes the figures Lenel gives for Republican jurists;<sup>27</sup> moreover, it was a more peaceful time. It seems likely that we do have an approximate idea of the numbers of imperial jurists, and that there will always have been at least half a dozen around at any time, enough for ideas to be debated. Jurists as we know them were steadily brought into the imperial service, but their standing as jurists seems always to have depended on peer esteem. When they lost that independence, they cease to be called jurists, however much they were fulfilling the same functions. It is surely significant that, although we know nothing of the careers of Plautius, Pomponius, Venuleius Saturninus, Gaius, Papirius Justus, Florentinus, Callistratus, and Tertullian (since I do not accept that he was identical with the theologian), they were cited by their fellows, with the exception of Gaius.

The final issue I wish to consider in this rapid survey of the identity and role of jurists is a particular aspect of their authority. This is a problem raised by the case of Sabinus, a celebrated jurist who survived into the reign of Nero.<sup>28</sup> Pomponius stated that “Massurius Sabinus was of equestrian rank, and he first gave opinions on behalf of the public. For after this privilege came to be granted, it was conceded to him by Tiberius Caesar.”<sup>29</sup> “To Sabinus the concession was granted by Tiberius Caesar that he might give opinions to the people at large. He was admitted to the equestrian rank when already of mature years, almost 50. He never had substantial means, but for the most part was supported by his pupils.”<sup>30</sup> The repetition is clearly an example of Pomponius’ muddled exposition, but what it says is quite clear: Tiberius gave Sabinus a special privilege. Raising men to equestrian rank as adults was certainly not unknown, for example Trebatius Testa. Living off one’s students was not disgraceful, although it might imply worldly incompetence. If this is all we had, we might well think it comparable to the double salary awarded to Julian in his quaestorship by Hadrian.<sup>31</sup> And indeed this is what I do think.<sup>32</sup>

However, the waters have been very thoroughly muddied for generations of romanists by the intermediate sentence in Pomponius’ account:

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<sup>27</sup> OTTO LENEL, *PALINGENESIA IURIS CIVILIS* index II at 1246–47 (1889).

<sup>28</sup> He was also head, whatever that meant, of the Sabinian School. On Sabinians and Proculians, see JOLOWICZ & NICHOLAS, *supra* note 2, at 378–80.

<sup>29</sup> DIG. 1.2.2.48 (“Massurius Sabinus in equestri ordine fuit, et publice primus respondit: posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi concessum erat.”).

<sup>30</sup> DIG. 1.2.2.50 (“Ergo Sabino concessum est a Tiberio Caesare, ut populo responderet: qui in equestri ordine iam grandis natu et fere annorum quinquaginta receptus est. huic nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustentatus est.”).

<sup>31</sup> INSCRIPTIONES LATINAE SELECTAE 8973.

<sup>32</sup> I have taken a less radical line in my *THE SOURCES OF ROMAN LAW: PROBLEMS AND METHODS FOR ANCIENT HISTORIANS* 11–13 (1997).

To clarify the point in passing, before the time of Augustus the right of stating opinions at large was not granted by emperors, but the practice was that opinions were given by people who had confidence in their own studies. Nor did they always issue opinions under seal, but most commonly wrote themselves to the judges or gave the testimony of a direct answer to those who consulted them. It was the deified Augustus who, in order to enhance the authority of the law, first established that opinions might be given under his authority. And from that time this began to be sought as a favor. As a consequence of this, our most excellent emperor Hadrian issued a rescript on an occasion when some men of praetorian rank were petitioning him for permission to grant opinions; he said that this was by custom not just begged for but earned, and that he would accordingly be delighted if whoever had faith in himself would prepare himself for giving opinions to the people at large.<sup>33</sup>

Was there ever a *ius respondendi, publice* or otherwise? Our sole evidence is this corrupt text from Pomponius. The only other direct classical comment on juristic authority comes from Gaius:

The opinions of the jurists are the views and advice of those to whom it has been permitted to build up the law. If all their opinions agree, then what is so held has the force of law, but if they disagree, the judge may follow whichever view he wishes; and Hadrian indicated this in a rescript.<sup>34</sup>

The only crux is the force of “permitted”; does it have to mean imperial grant? Or is it simply imperial leave to carry on in the ordinary way? Otherwise Gaius is simply saying that jurisprudence is a source of law. Justinian, as already mentioned,<sup>35</sup> seems to have believed that jurists must be specifically authorized to give *responsa*, but there are in the Digest plentiful texts from both Pomponius and Gaius, who did not, according to many modern romanists, issue *responsa*.

Some have argued that the so-called *ius respondendi* means that Augustus gave certain jurists binding authority in their opinions. This is hardly possible; neither Augustus nor Tiberius was blatant in his use of power, and this would have been a huge break with Republican practice. And to what end? Secondly, even if it was some sort of official approval, which would

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<sup>33</sup> DIG. 1.2.2.49.

<sup>34</sup> G. INST. 1.7. I think Gaius' text unimpeachable here.

<sup>35</sup> CONST. DEO AUCTORE § 4.

indeed be likely to enhance the authority of a particular jurist, why do we never get any reference to it in the juristic writings? Jurists quote each other frequently enough, and they clearly had full freedom to disagree with each other. Linked with this is the point that certain issues had remained undecided until Justinian's own day, technical issues such as whether a legacy with an impossible condition should be held invalid, or the condition struck out;<sup>36</sup> this and other matters, as Gaius shows, remained in dispute. Thirdly, we have the full and clear inscription recording Julian's career (cited above), and there is no mention of any such privilege. This is negative evidence, and it is just possible that there was some privilege for jurists which was abolished by Hadrian and so not mentioned in the inscription, but Schulz is probably right in saying that if Hadrian had done something so specific we should have some record. In Schulz's eyes "A *ius respondendi* existed no more than a right to breathe."<sup>37</sup>

If, as I have been arguing, our concept of "jurist" in the Later Republic is inflated, if equestrians, and men below that rank, had such a considerable role in making law, what was so special about Sabinus? And really special, because the only other text which can remotely be held as an explicit reference to a *ius respondendi* is the Greek passage cited by Schulz, which refers to a certain Innocentius of the time of Diocletian.<sup>38</sup> Sabinus must have been given some special authority, of which the precise nature must remain unknown, perhaps because he had done some favor for Tiberius, but more likely in connection with his work as the head of one of the Schools. Indeed, a *ius respondendi* existed no more than a right to breathe.

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<sup>36</sup> G. INST. 3.98.

<sup>37</sup> SCHULZ, *supra* note 3, at 113.

<sup>38</sup> *Id.* at 114 n.6. He held a law-giving power – νομοθετικὴν δύναμιν – conferred on him by the rulers of that time.