In a certain sense the Romans began producing legal literature the moment they began writing down their law, which means when they compiled the XII Tables, and from this modest beginning they built up a voluminous literature extending over a period of a thousand years. The most important segment of this period covers some three-and-a-half centuries, from about 100 BC to 250 AD. This segment, the flowering third of the millennium, witnessed the birth, growth and maturity of classical Roman jurisprudence, and in particular of the systematic treatise. Where previously responsa prudentium had, if written down at all, been simply collected as delivered with little attempt at system or arrangement, such responsa now began being worked into treatises, and although the casuistic character impressed on the literature by the responsum was never lost, it was in the systematic treatise that the great creative literary work of the jurists was done.

The purpose of this paper is not to describe classical jurisprudence in its mature state, that is, from about Hadrian to the mid-third century, but to discuss the period of germination, the period leading up to and culminating in the full flowering. Two distinct phases will be discussed – the late Republic and the early Principate.

Many scholars have assumed that the jurisprudence of the Republic was a rigid technical discipline preoccupied with the private law, with the ius civile and the ius honorarium, and insulated not only from public and sacral law but from all contact with other disciplines, whether philosophy, history, rhetoric or otherwise. This clinically sterilised and clinically detached jurisprudence is, however, an illusion. In its natural state the responsum was no doubt terse and unadorned, but to suppose that it remained in that condition when it was

incorporated in a treatise is virtually to deny the emergence of a literary genre altogether. It is proposed to argue that the private legal literature of the late Republic was in fact so closely connected not only with public and sacral law but also with other disciplines as almost to form an integral part of the general literature of the time.

The originator of systematic jurisprudence was Q. Mucius Scaevola, cos. in 95 BC and pontifex maximus from 89 until his death at the hands of Marius’ son in 82. The last of the great pontifical jurists, he wrote a treatise on the *ius civile* in 18 *libri*. He is said by the legal historian Pomponius to have been the first to arrange the civil law *generatim*, according to kinds, and he thus stands identified as the author of the first systematic work. His methodology obviously betrays the influence of Greek dialectics, with which he is thought to have become familiar through his membership of the Scipionic circle, although one feels that some credit for his skill in classification and arrangement is due to his father, P. Mucius Scaevola, who as pontifex maximus was responsible in about 123 for the monumental codification of the *Annales Maximi* in 80 books.

Q. Scaevola’s decision to apply the dialectical method to the civil law may have been prompted by something more than his general desire to promote his discipline. Scaevola appeared against L. Crassus, ‘the best lawyer amongst the orators’, in the well-known *Causa Curiana*, in which Scaevola’s plea for the strict interpretation of a will was defeated by the more liberal interpretation urged by Crassus. Scaevola’s father had laid down a rigid canon of interpretation – witness his rejection of what would have been the first *s.c. ultimum* in 133 –, and according to Cicero the son followed that canon in the *Causa Curiana* and had a good deal to say *de conservando iure civili*. This notion that the law stood in constant need of protection was destined to recur throughout Roman legal history, culminating in Justinian’s entrenchment of the law within

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2. *Dig.* 1.2.2.41. *Dig.* 1.2.2, the historical introduction to Pomponius’ *Enchiridion*, will henceforth be cited as 'Pomp.'.

3. On Q. Scaevola see Schulz, o.c. pass.; Jolowicz, o.c. pass.; Guarino, o.c. 289f; Kunkel, *Herkunft* 18; Gundel & Medicus, *KLPl.* 3.1444f; Schanz-Hosius, 1.239f. – There are some difficulties in Pomponius’ assertion that Q. Scaevola’s *ius civile* was the first of its kind. Three previous works on the *ius civile* are known. The authors were M. Iunius Brutus, Manius Manilius and Q. Scaevola’s father, P. Scaevola, in Pomponius’ words the three founders of the civil law. *Pomp.* 39. The three *libri* of Brutus were in the form of a dialogue, possibly the first of its kind in Roman literature (cf. Schanz-Hosius, 1.238); this indicates a methodology vastly different from that of Q. Scaevola, and Brutus’ challenge to his primacy is not serious. Of Manilius’ *Monumenta* not much is known. The difficult case is the *decom libelli* of P. Scaevola, a work of comparable length to that of the son and written by a master of method. The saving clause may be Pomponius’ description of the work as *libelli* rather than *libri*, for this suggests brief pamphlets on particular topics rather than a systematic treatise. Cicero *De Ora*, 1.240 speaks of P. Scaevola’s *libri*, but the very uniqueness of Pomponius’ expression is something of a guarantee.


the Digest as if behind a rampart. The first such entrenchment may have been constructed by Q. Mucius Scaevola following his defeat in the Causa Curiana.

In a certain sense Scaevola was using the Greeks to fight the Greeks. The libera interpretatio, the interpretation according to equity, contended for by Crassus reflects the influence of Greek rhetoric on the substance of Roman law, especially the influence of Hermagoras of Temnos and his status theory.6 This provoked a strong reaction from Scaevola, for status ran counter to the traditional Roman methods of interpretation and was thus a grave threat to the ius civile. But in the matter of structure, as distinct from substance, Greek methods could safely be applied.

Scaevola was thus able to present the law more effectively while keeping its substance on the archaic level to which a treatise on the ius civile inevitably gravitated. There could be no discussion of the ius civile without the XII Tables, and to deal with any legal rule emanating from that venerable source meant a small core of juristic material proper, embedded in a dense layer of history, anecdote and fiction. This was common enough in public and sacral law, but it is precisely on this account that those genres are contemptuously dismissed as lacking the scientific character of the private law. In fact, however, a similar phenomenon can be observed in the private law. For example, in order to illustrate the private law process of vindicatio in servitutem Pomponius regales us with the legend of Appius Claudius and the maid Virginia in all its gory detail, and although his account is shorter than Livy’s it is not significantly more ‘juristic’.7 Pomponius almost certainly goes back to late Republican sources,8 but the assumption that those sources were antiquarian rather than juristic is quite gratuitous. Those who postulate an antiquarian source tend to be propelled towards Varro, and this makes their position far from secure, for Varro happens to be credited with 15 books de iure civili. The work is attested only by Jerome’s catalogue, but in fact there is nothing against its existence except the reluctance of some to see the comfortable dividing-line between antiquarians and jurists threatened by the imposing figure of Varro.9 Varro’s


8. The alternative is a tract belonging to the Gerichtsrhetorik of late antiquity. See M. Breton, ‘Motivi Ideologici dell “Enchiridion” di Pomponio’, Labeo 11 (1965), 7ff. See also Schulz, o.c. 169. Cf. n.9 below.

9. Schulz, loc. cit., following Sanio and Täubler, regards Pomponius’ use of Varro’s ius civile as probable, but adds that Pomponius also reflects Cicero’s Brutus, De Oratore and De Repúlica. See however below on the direct conflict between the Brutus and Pomponius as to whether dialectic was first used by Q. Scaevola or by Servius Sulpicius Rufus.
ius civile was the only work of its kind between Q. Scaevola and the early Principate, and much of Varro's material will have been drawn from Scaevola.

There are other examples of rules of the ius civile being discussed in historical or quasi-historical settings. One thinks of the impoverished centurion and nexum, K. Quinctius and vadimonium and Canuleius and conubium. These are known only through the annalists, but it is a safe assumption that they were discussed by the jurists as well.

Thus far we have inspected only circumstantial proof of the inclusion of public and sacral law material in Scaevola's ius civile, but there is some direct evidence. Laelius Felix, a contemporary of Pomponius in about Hadrian's reign, wrote a commentary Ad Q. Mucium in at least two libri. Aulus Gellius quotes material from the first book of the work, from which we learn that it dealt inter alia with the comitia calata, the lex Hortensia, the tribunes, the comitia curiata, the comitia centuriata and the comitia tributa. It may reasonably be supposed that Laelius' commentary reflects matters dealt with in Scaevola's own work, and the latter will thus have discussed the ius publicum at some length.

So far so good, but difficulties arise when we turn to the other great Republican figure, Servius Sulpicius Rufus. Servius, the orator who rivalled Cicero in the courts before becoming a jurist, held the consulship in 51 and after his death in 43 was honoured by a statue erected by the Roman people. In his Brutus Cicero pronounces Servius the superior of Scaevola as a jurist, on the grounds that although Scaevola had great practical knowledge of the civil law, only Servius made an art of it; and that art, according to Cicero, was dialectic. This outright challenge to Scaevola's primacy points to an acute controversy in the late Republic, with Varro perhaps pressing the claims of Scaevola and Cicero those of Servius.

Pomponius says that Servius wrote some 180 libri, but the only works of which we know the names are a liber de dotibus, a commentary on the edict in two libri under the title of Ad Brutum, a de sacris detestandibuis probably in two books and the Reprehensa Scaevolae Capita of unknown length. The bulk of this material was on the ius civile: the monographs on dowries and adrogation speak for themselves, and so does the Reprehensa Scaevolae Capita, an attack on Scaevola's work and the only known instance of the use of the polemical form in Roman legal literature—occurring, significantly, in an age in which invective was a feature of general literature. The only

10. Livy 2.23, 3.11ff, 4.1ff.
11. Gell. 15.27.
13. On Servius see Münzer & Kübler, RE 4A, s.v. Sulpicius No. 95; Schulz, o.c. pass.; Jolowicz, o.c. pass.; Guarino, o.c. 290; Kunkel, Herkunft 25; Schanz-Hosius, 1.593ff.
14. Pomp. 43. See also the passages in Lenel.
15. One thinks not only of Ps.-Sallust In M. Tullium Ciceronem Oratio and Ps.-Cicero In Sallustium Crispum Oratio, but also of the general tone of the literature of the age. Cf. Tac. Ann. 4.34.7.
work not on the *ius civile* is the two volume sketch on the *ius honorarium* known as *Ad Bruttum*. This work is noted by Pomponius as the first commentary on the edict, but he criticises its brevity and credits Aulus Ofilius, a pupil of Servius, with the first substantial work on the subject.\(^\text{16}\) The brevity of Servius' treatise does not of itself rule it out as the vehicle for his dialectical innovations, but Cicero specifically says that Servius made an art of the *ius civile*, not of the *ius honorarium*. This leaves the polemic against Scaevola as the only likely candidate, but the trouble is that Servius presumably followed Scaevola's arrangement, in which case he added nothing new to the methodology. Nor does it help to postulate an unknown work of Servius as the dialectical innovation, for it is scarcely conceivable that the name of so important a work could have dropped out of the tradition.

Pomponius does not mention Servius' methodology in his fairly full notice of Servius, unlike his observation in his much shorter notice of Scaevola, and we might be inclined to dismiss Cicero's claim as an attempt to do his friend a service by denigrating Q. Scaevola, the man who had sharply upbraided Servius for his ignorance of the law when the latter was still an orator. But the summary dismissal of Cicero is too facile, and a further attempt to validate his attestation should be made.

Let us return to Cicero's statement about Servius having made the *ius civile* into an art. Cicero goes on to say that Servius not only used his knowledge of the law but also availed himself of the art of analysing his material into parts, of defining, interpreting and clarifying, and of distinguishing. Cicero also credits Servius with having applied his knowledge of literature and with having employed an elegant style.\(^\text{17}\) It cannot be thought that Servius' literary and stylistic skills were used merely for rhetorical purposes in actual court situations, for Cicero expressly describes these two attributes as civic and forensic skills used by Servius *ad tuendum ius civile*\(^\text{18}\) — again the theme of entrenching the law.

Cicero's remarks about Servius should be compared with his own proposals for systematising the civil law. These were worked out in detail in Cicero's treatise *De Iure Civilii In Artem Redigendo*,\(^\text{19}\) and although that work is lost it is possible to gather the import of Cicero's method from the outline which he gives in *De Oratore* 1.190. The goal of the *ius civile*, says Cicero, is to conserve a methodology based on equity in interpreting both statutory and customary law; a few general categories, or *genera*, should be formulated, and each *genus* should be subdivided into *partes* or *membra* having something in common but also being capable of differentiation; all *genera* and *partes* should then be

\(^{16}\) Pomp. 44.

\(^{17}\) Cic. Brut. 152f.

\(^{18}\) B. 155.

\(^{19}\) On this work see Schanz-Hosius, 1.526f. The remarks of Schulz, o.c. 69 are not persuasive. What reason is there to think that Cicero's treatise was 'immature and inadequate' and vastly different from the similar works of 'the jurists'?
defined, and the result will be a complete system of the civil law, a *perfecta ars iuris civilis*.

Cicero’s prospectus is on all fours with the methodology that he postulates for Servius. It is the orator’s recipe for the civil law, the use of status theory as the foundation of a system and not merely as a liberal interpretative device for individual rules. Q. Scaevola wanted to conserve the *ius civile*, but Servius and Cicero had a different goal—*aequibilitatis conservatio*, the conservation of equitable interpretation, and hence the refashioning of the *ius civile* according to the principles of equity. Scaevola had only used dialectics *generatim*, that is, for the first stage of the system outlined by Cicero, the stage which gave structural reinforcement without affecting substance; but Servius was prepared to employ dialectics much more radically, he was prepared to admit Greek methodology not only into the skeleton of the system but also into its very veins and arteries. In this form the jurisprudence of the late Republic was very much part of the general literature of the period. It was a branch of philosophical writing, and that is precisely what Cicero himself asserts in *De Legibus* 1.17, when he has Atticus declare that the science of law, *iuris disciplina*, is not to be drawn from the praetor’s edict or from the XII Tables, but from the innermost depths of philosophy, *penitus ex intima philosophia*.

After Servius the jurisprudence of the late Republic was able, by means of dialectics, to rise to even greater methodological heights. Aufidius Namusa, a pupil of Servius, is credited with the compilation of a digest of the works of eight pupils of Servius in 140 books,²⁰ and it was because of the degree of sophistication achieved by methodology that Caesar, who counted Servius’ pupil Ofilius amongst his closest friends, was able to start making plans for the codification which, if he had lived to complete it, would have reduced the *ius civile* to fixed limits and confined the best of the *leges* within a few slender volumes²¹—a project that was to prove too much for Theodosius II and was not to be attempted successfully until Justinian.

The one genre in which there may have been a move away from composite juristic-antiquarian content towards the detachment of the classical period is the commentary on the edict, as exemplified by Servius’ sketch and Ofilius’ treatise. Ancient paradigms were scarcely possible for a lawmaking process which had not been known until the Punic Wars, nor did the edict provide many springboards for digressions on public or sacral law. But in the realm of the *ius civile* the old tradition remained. For example, when we find Ofilius probably producing a *De Legibus* in 20 books²² we infer that the bulk of the work may

²⁰. *Pomp.* 44.
²¹. *Pomp.* 44; *Suet.* *Caes.* 44.2.
²². This is the best emendation of the *de legibus vicensimae primus concrbit* of *Pomp.* 44. Cf. Lenel, 2.50 n.2; Schulz, *o.c.* 91. Contra Wenger, *o.c.* 484, but it is unlikely that a *familiarissimus* of Caesar was still writing in the last decade of Augustus when the inheritance-tax law was passed; moreover, *legibus vicensimae* cannot be right, for we know of only one Augustan law and have no reason to suspect a Republican predecessor.
not have been on the private law at all, for the public leges were never a major contributor to the development of private law. A strong archaising tendency was also exhibited by Q. Aelius Tubero, the pupil of Ofilius whom Pomponius criticises for his use of *sermo antiquus* in his writings on both public and private law.\(^{23}\)

Our second period, the early Principate, ought to be dominated by the *ius respondendi*, also known as the *ius publice respondendi*, but this question is presently in considerable disarray. On the optimum view the *ius respondendi* represents a fundamentally new direction for jurisprudence, since the patented jurists made law. On another view the innovation by Augustus merely consisted in his authorising certain jurists to respond on his *auctoritas* instead of on their own, as in the Republic, without the *responsum ex auctoritate principis* having any more binding force than other *responsa*. A third view makes the technical *responsum* binding and deprives the *responsa* of the non-patented jurist of all force. There are other views, but these sufficiently illustrate the extent of the crisis.\(^{24}\)

Those who believe that only patented jurists could give binding *responsa* also have Augustus restrict the *ius respondendi* to senators, in an attempt to restore the pre-eminence in jurisprudence which the senatorial order had surrendered to equestrian jurists in the last decades of the Republic.\(^{25}\) This view has much to commend it, but it requires the difficult assumption that Augustus gratuitously administered a slap in the face to the order (‘the flower of Italy’) with which his rise to power had been so closely identified. And in any case the exclusion of the *equites* is ruled out by C. Trebatius Testa, the jurist who was active both in the late Republic and under Augustus. He was of equestrian status and never advanced beyond it, but in about AD 4 Augustus relied heavily, on the question of codicils, on the advice of Trebatius, *cuius tunc auctoritas maxima erat*.\(^{26}\) Trebatius must have possessed the *ius respondendi*, for no *auctoritas* could be *maxima* independently of Augustus.

The view that Augustus deprived the *responsa* of non-patented jurists of all force is hazardous. One of the two leading jurists of the Augustan age was M. Antistius Labeo, a pupil of Trebatius who wrote 400 *libri* and exercised considerable influence on later literature: his commentary on the edict in at

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least 30 books is cited extensively, and after his death some 40 of his libri were published under the title of Posteriore. Labeo stands out as an implacable opponent of the regime, and if the new privilege had flaunted the emperor's auctoritas or threatened the autonomy of the jurists it would hardly have been countenanced by the man who refused Augustus' offer of a suffect consulship. It must therefore be supposed either that the ius respondendi was less offensive to Republican sentiment than would appear and was acceptable to Labeo, or that he managed to be the leading jurist of the day without it. 27

The other leading Augustan jurist was C. Ateius Capito, a supporter of the Principate who was advanced to the suffect consulship by Augustus in AD 5, ahead of time, in order to enable him to outstrip Labeo. His known literary output was less than Labeo's. We know of four works: a de iure pontificio in about six libri, compared with the much larger work on the same subject by Labeo; the Coniectanea, a collection in about nine libri of problems of the ius publicum; a possible collection of epistulae; and a possible liber de officio senatorio. There is no work on the ius honorarium, that hallmark of the more specifically juristic approach, despite the fact that Ofilius was Capito's teacher. Capito is criticised by Pomponius as having been conservative by comparison with Labeo; the latter, says Pomponius, did not hesitate to make innovations. The differences between the two jurists were given concrete expression by their foundation of two different schools, duo diversae sectae, which are the schools later known as the Sabinians (or Cassians) and the Proculians. If these were two schools of thought they would profoundly influence our view of the literature of the early Principate, but it is equally possible that they were teaching establishments or meeting-places. 28

Capito's conservatism is strikingly confirmed by the two extant citations of the liber de iudicis publicis which formed part of the Coniectanea, for both these citations are concerned with iudicia populi in the Middle Republic rather than with the iudicia publica or the late Republic. 29 Oddly enough, however, Labeo is by no means immune from a similar criticism. He is specifically accused by Capito, in a letter preserved by Aulus Gellius, of having been prepared to accept nothing unless it was sanctioned by ancient Roman law. 30 Gellius also tells us that Labeo was well acquainted with other liberal arts besides the ius civile, including grammar, dialectics, early literature and Latin etymology; three books of Labeo's Posteriore, he says, were devoted to

27. On Labeo see Pomp. 47; Tac. Ann. 3.75.2. See also Lenel, s.v. M. Antistius Labeo; Schulz, o.c. pass.; Jolowicz, o.c. pass.; Guarino, o.c. 369, 378f; Kunkel, Herkunft 114; Bauman, Acta Classica ix (1966), 140.

28. On Capito see Pomp. 47. See also Schulz, o.c. pass.; Jolowicz, o.c. pass.; Guarino, o.c. 369f, 378; Kunkel, Herkunft 114f. On the two schools see Schulz, o.c. 119f; Jolowicz, o.c. 388f; Guarino, o.c. 369f; A. M. Honoré, Gaius, Oxford, 1962, 18f; Kunkel, Herkunft 340ff; K. M. T. Atkinson, 'The education of the lawyer in ancient Rome', SALJ LXXVII (1970), 31ff.

29. Gell. 4.14.1, 10.5.4.

linguistic information. This is a strong pointer to what a later age may have seen as an unscientific propensity on Labeo's part, for we recall the legal friend of Aulus Gellius who refused to discuss the meaning of antiquated words in Ennius or the XII Tables on the grounds that he was a lawyer, not a grammarian. Having regard to Labeo's work on pontifical law and to his production of what was probably the first commentary on the XII Tables since the early second century BC, we may be inclined not to see him as significantly progressive in any field except the ius honorarium.

The overall picture of Augustan legal literature is not impressive. It depends almost entirely on Labeo and Capito, for Trebatius wrote little and the four or five other Augustan jurists of whom we know are tenuous and negligible. Indeed it could hardly have been otherwise. It is a fair assumption that one of the reasons for creating the ius respondendi was to cater for the juristic needs of the regime, and it so happens that the Augustan administration's greatest need was in public law, in matters like tribunicia potestas and imperium, and also in the area of the great criminal code, the lex Julia iudiciorum publicorum, and the individual criminal leges. Some intricate juristic reasoning went into such measures, and we may well imagine that Ateius Capito, the author of the earliest work on the iudicia publica, was as prominent in the counsels of Augustus in these matters as he was to be under Tiberius.

Private law jurisprudence fared somewhat better in Tiberius' reign, largely because of Masurius Sabinus, the impecunious law teacher who lived on the fees paid by his pupils, eventually received the ius respondendi and was, when nearly fifty, admitted to the equestrian order. The grant of the ius respondendi to Sabinus is described by Pomponius as the first of its kind, but most scholars accept Mommsen's emendation whereby Sabinus will have been merely the first eques to receive the privilege; a minority view holds, however, that Pomponius means what he says, that this was the first grant of the fully-fledged ius publice respondendi as opposed to the Augustan right to respond ex auctoritate principis. There are difficulties with the minority view, but one reason for preferring it is that if Sabinus was merely the first equestrian possessor of a right created by Augustus, the position of C. Trebatius Testa once more becomes impossible.

31. Ib. 13.10.1f.
32. Ib. 16.10.
33. They are Fabius Mela, Vitellius, Blaesus, Cartilius and Tertius, of whom the last-mentioned is known only to Schanz-Hosius, Zweiter Teil, 385f.
34. On Sabinus see Pomp. 48, 50. See also Schulz, o.c. pass.; Jolowicz, o.c. pass.; Guarino, o.c. 379; Kunkel, Herkunft 119f; Schanz-Hosius, 2.763f. Mommsen's reading of Pomponius is Sabinus in equestri ordine [fuit et] publice primus respondit. The minority view – see Guarino, RIDA 1 (1949), 405ff – reads Sabinus [in equestri ordine fuit et] publice primus respondit. This is an attempt to avoid the tautology of the references to Sabinus' equestrian status in both par. 48 and par. 50 of Pomponius, but if par. 48 is simply considered as it stands no emendation is necessary. However, a substantial difficulty beside those enumerated by Guarino is Gell. 13.10.1: 'Labeo Antistius . . . consulentibus de iure
Sabinus stands out as the complete professional, the legal teacher and writer who had very few aspirations outside his profession. His three *libri* on the *ius civile* formed the focus of the *Ad Sabinum* genre on which one of the three great rubrics of classical jurisprudence was based, and it was he, rather than Capito, whom a later age saw as the definitive founder of one of the schools. It is possible that Sabinus enjoyed the patronage of Sejanus, if the Vitellius of Sabinus’ *libri ad Vitellium* is the P. Vitellius who was a friend of Sejanus, and Sabinus’ stature becomes even more pronounced when he is compared with his contemporary, M. Cocceius Nerva, who succeeded Labeo as the head of the other school, for Nerva’s literary activity was so slight that not a single title of any work that he may have written has survived.

The most puzzling feature of Sabinus’ three volume work on the *ius civile* is its brevity by comparison not only with Q. Scaevola and Varro but also with the commentaries *Ad Sabinum* of the second century. This has led some to conclude that Sabinus wrote an elementary text-book of the *Institutes* type. It is certainly a fact that Sabinus’ successor, C. Cassius Longinus, wrote at least ten *libri* on the *ius civile*, and in the later first century it was Cassius’ work that attracted attention, being the subject of 15 *libri ex Cassio* by Javolenus and of the *Notae Ad Cassium* of Aristo, while Sabinus’ work languished. But in the second century interest in Cassius declined and the great commentaries on Sabinus by Pomponius, Paul and Ulpian made their appearance. Sabinus would not have had such a revival if he had written an elementary work, and he must be credited with the ability to compress material of high academic quality into a small compass. This presupposes an advance in methodology, and from a statement in Persius’ fifth satire it may be inferred that Sabinus made extensive and effective use of the division of each book into titles under rubrics. He also wrote works on sacral law and antiquities which were used by the elder Pliny, Aulus Gellius and Macrobius, and such works remind us that the Republican mixed genre was still alive. But Sabinus happens to have been the very last writer on sacral law; as for the *ius publicum*, no one was inclined to discuss current constitutional realities, and although the criminal law was still open for discussion its systematic development did not get under way until much later.

It should be possible to see Sabinus as the definitive starting-point for the

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36. So Schulz, o.c. 156.
37. No one ever thought of writing a commentary on Gaius, for example.
38. Pers. 5.89f: ‘iusit quodcumque voluntas, excepto siquid Masuri rubrica vetabit?’ The contrast between *voluntas* and *Masuri rubrica* is suggestive.
mature classical jurisprudence, but there is a distinct break in the development under the later Julio-Claudians. Caligula threatened to see to it that the jurisconsults gave no *responsa* except in accordance with his wishes, thus in Suetonius' opinion virtually threatening to abolish their discipline altogether, and in *Apocolocyntosis* Claudius' death is regretted only by a few *causidici*, while the half-starved jurisconsults emerge joyfully from the shadows. Caligula seems to have contemplated, and Claudius to have actually created, the monopoly for patented jurists which some would attribute to Augustus. The Claudian measure will have been part of his known procedural reforms, and it will have favoured pleaders against jurisconsults — thereby, oddly enough, favouring the liberal tradition of Servius and Cicero against the conservatisms of Scaevola. It must presumably be supposed that Nero reversed this policy, although his relations with the jurists were not always good.

The final transition to the mature classical jurisprudence coincides, broadly speaking, with the Flavian period. The most important figure of the age is Javolenus Priscus, head of the Sabinian school and holder of numerous offices, especially under Domitian. His literary output compares with that of Sabinus in volume, but it was strictly confined to works of a private law character. Domitian was as interested in a religious revival as Augustus had been, but where the latter had inspired Labeo, Capito and Sabinus with a renewed interest in sacral law, the jurisprudence of Domitian's day had moved decisively away from such interests. And this despite the fact that Javolenus was, as a pontifex, one of the judges who condemned the Vestal Cornelia to the ancient punishment of being buried alive.

Javolenus, the first of his family to reach the senate, was an unequivocal career jurist. His co-operation with the regime was manifested in a rather unusual way. His works included epitomes of Labeo's *Postiores* and of a work of Plautius, both Proculians, and this unique instance of a Sabinian honouring the rival school suggests that Javolenus was endeavouring to bring the Proculians into the fold, to iron out whatever differences divided the schools and to reconcile the profession to the centralist regime of Domitian. Perhaps even the mysterious exoneration of Juventius Celsus, head of the Proculians, on a charge of *maiestas* was due to the influence of Javolenus.

The conciliatory policy of Javolenus was inherited by his pupil and successor Salvius Julianus, who flourished under Hadrian, Antoninus and Marcus, and

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40. C. Cassius Longinus, Sabinus' successor, was exiled in 65. Kunkel, *Herkunft* 130ff. It is also possible that the Proculus who succeeded Nerva was P. Sulpicius Scribonius Proculus, one of Nero's victims in 67. Cf. Kunkel, o.c. 127.
41. On Javolenus see the closing lines of *Pomp*. See also Schulz, o.c. pass.; Kunkel, *Herkunft* 138ff.
43. Gsell, o.c. 320.
in whose day such philosophical and doctrinaire differences as had existed between the schools were finally resolved. This was accompanied by a considerable increase in literary output. The productivity curve of the early Principate displays a high level at the beginning, in the shape of Labeo and Sabinus. The curve drops sharply in the mid Julio-Claudian period, the output of Cassius and Proculus being barely half that of Labeo and Sabinus. With Javolenus and Juventus Celsus the graph returns to the same level as at the beginning of the period: Javolenus produced four works, none of which probably exceeded 15 libri, and his survival is gauged by 240 excerpts and citations by later writers; Celsus also wrote four works, including the Digesta in 39 books, but his excerpts and citations are not significantly greater at 279. Then suddenly there is Julian with his massive Digesta in 90 books and three other works, generating 928 excerpts and citations in all. Julian's contemporary, the egregious Pomponius, does even better, being credited with eleven works, including a commentary on the edicts in perhaps 150 libri and two commentaries on the ius civile, the Ad Q. Mucium in 39 books and the Ad Sabinum in about 35; his excerpts and citations total 861. When regard is also had to Julian's codification of the edict, to Hadrian's absorption of jurisconsults into his consilium and to the same emperor's possible reform of the ius respondendi by making it no longer a beneficium but a mark of merit to be awarded by the emperor in his discretion, it becomes apparent that by about the second decade of the second century Roman legal literature had severed its last links with general literature and had entered upon the period of its greatest brilliance and productivity.

44. On Julian see Schulz, o.c. pass.; Jolowicz, o.c. pass.; Guarino, o.c. 383ff; Kunkel, Herkunft 157ff. For a good account of what can be made of the differences between the schools see Honoré, o.c. 18ff.

45. The statistics that follow are derived from Lenel.
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