

The *ius respondendi* and the Freedom of Roman Jurisprudence¹

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The significance, even the very existence of the *ius respondendi* is one of the many unsolved puzzles of Roman legal history. This is certainly not due to lack of effort, as there has been a continuous stream of literature on the matter from the 1930s to the present².

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² F. DE VISSCHER, *Le "ius publice respondendi"*, RHDFE 15 (1936), pp. 615-650; H. SIBER, *Der Ausgangspunkt des "ius respondendi"*, ZRG 61 (1941), pp. 397-402; F. SCHULZ, *History of Roman Legal Science*, Oxford 1946, pp. 112-118; W. KUNKEL, *Das Wesen des ius respondendi*, ZRG 66 (1948), pp. 423-457; A. GUARINO, *Il "ius publice respondendi"*, RIDA 1.2 (1949); A. MAGDELAIN, *Ius respondendi*, RHDFE 29 (1950), pp. 1-22; D. DAUBE, *Hadrian's rescript to some ex-praetors*, ZRG 67 (1950), pp. 511-518; E. SCHÖNBAUER, *Die Entwicklung des "ius publice respondendi"*, IURA 1 (1950), p. 288; E. SCHÖNBAUER, *Zur Entwicklung des "ius publice respondendi"*, IURA 4 (1953), pp. 224-227; G. PROVERA, *Ancora sul "ius respondendi"*, SDHI 28 (1962), pp. 342-360; U. VON LÜBTOW, *Miscellanea*, in *Studi in onore di Vincenzo Arangio-Ruiz II*, Napoli 1953, pp. 377-378; M. HORVAT, *Note intorno allo "ius respondendi"*, in *Synteleia Vincenzo Arangio-Ruiz 2*, Napoli 1964, pp. 710-716; W. KUNKEL, *Die Römischen Juristen: Herkunft und soziale Stellung*, (reprint of 2nd edition 1967) Köln 2001, pp. 272-299 et passim; F. WIEACKER, *Augustus und die Juristen seiner Zeit*, TR 37 (1969), pp. 331-349; M. BRETON, *Techniche e ideologie dei giuristi romani*, (2nd ed.), Napoli 1982, pp. 241-254;

While scholars have recognised the considerable significance of the institution to the history of law in the Early Principate³, they also lament that there are few problems so beset by controversy and doubt as the *ius respondendi*⁴.

Opinions on the *ius respondendi* are highly divided in recent literature. Some claim that Augustus gave select jurists the right to create law by making their opinions binding on the judges⁵. Others assert that the proud jurists repulsed the encroachment of Augustus into their hallowed territory and the freedom of jurisprudence was maintained⁶. Still others are demonstrating varying degrees of scepticism and making suggestions for compromises⁷.

The purpose of this article is to take a fresh look at the historiography of the problem of Augustus and the *ius respondendi*, not to solve it in any conventional way. As an unsolved puzzle, the *ius respondendi* provides a good indicator on contemporary legal and historical debates. The aim is to subject the research tradition itself as an object of inquiry to reveal the temporality of historical interpretations.

To provide a suitable basis for the examination, first shall be analysed the Roman sources on the *ius respondendi*. Secondly, the history of the institution in Roman legal historiography will be traced. Finally, a new interpretation of the whole tradition shall be presented.

In this way, I wish to present a genealogy of the tradition surrounding the *ius respondendi*, with a special emphasis on the

F. WIEACKER, *Respondere ex auctoritate principis*, in J. A. Ankum et al. (eds.), in *Satura Roberto Feenstra oblata*, Fribourg 1985, pp. 71-94; F. CANCELLI, *Il presunto "ius respondendi" istituito da Augusto*, BIDR 90 (1987), pp. 543-568; R. A. BAUMAN, *Lawyers and Politics in the Early Roman Empire*, München 1989; J. PARICIO, *El ius publice respondendi ex auctoritate principis*, in J. PARICIO (ed.), *Poder político y derecho en la Roma Clásica*, Madrid 1996, pp. 85-105; M. T. FÖGEN, *Römische Rechtsgeschichten*, Göttingen 2002, pp. 199-206.

³ DE VISSCHER, *op. cit.*, p. 615: it is impossible to not recognise the considerable significance of the institution, not only in the history of Roman law, but also in the influence of the emperors to the development of classical law.

⁴ BAUMAN, *Empire*, *op. cit.*, p. xxvii: “The prospects of a *communis opinio* are so remote that one’s first inclination is to put the whole thing in the ‘too hard’ basket and forget about it.”

⁵ Most recently BAUMAN, *Empire*, *op. cit.*

⁶ Cfr. inter alia FÖGEN, *op. cit.*, pp. 205-206.

⁷ See, for instance, O. F. ROBINSON, *The Sources of Roman Law*, London 1997, pp. 11-13.

ideological background and narrative elements they contain. The main theme under scrutiny is the supposed freedom of Republican jurisprudence and the repercussions that this idealised past has had in the history of Roman law.

The main Roman sources on the ius respondendi

As often is the case of Roman legal history, the roots of the enigma lie in Pomponius's introduction to legal history, whose passage about the *ius respondendi* is one the most difficult to fathom.

"Massurius Sabinus was of equestrian rank, and was the first person to give state-certified opinions (*publice respondere*). For after this privilege (*beneficium*) came to be granted, it was conceded to him by Tiberius Caesar. 49. 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 merely begged for but earned and that he [the emperor] would accordingly be delighted if whoever had faith in himself would prepare himself for giving opinions to the people at large. 50. Anyway, 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 and almost fifty" (D. 1.2.2.48-50)⁸.

⁸ *Massurius Sabinus in equestri ordine fuit et publice primus respondit: posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi concessum erat. Et, ut obiter sciamus, ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant: neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant, aut testabantur qui illos consulebant. Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit. Et ideo optimus princeps Hadrianus, cum ab eo viri praetorii*

The evaluation of Pomponius's text has followed roughly two paths: text criticism, which has sought to uncover the true uncorrupted form of the text, and source criticism, which examined Pomponius's position and his reliability as a historical source.

Text critique arose from the evident fact that the text has a number of contradictions and irregularities, such as whether Augustus or Tiberius was the first to grant the *ius respondendi*, which prompted scholars to correct and amend the text⁹. The modern editors of the Digest, for example Mommsen and Ferrini, attempted to rectify the text by different punctuations and some added words¹⁰.

The interpolation phase of the text criticism meant removing parts that which were deemed unclassical repetitions caused by Late Antique scribes who knew nothing of the original situation. Siber eliminated and removed parts of the text that he thought were unnecessary repetitions, Schulz recognised four different hands that had worked on the text, some of them post-classical, and additional glosses spread around the text¹¹.

Kunkel and Wieacker professed their scepticism about the credibility of such extensive changes in the text. They claimed that the

peterent, ut sibi liceret respondere, rescripsit eis hoc non peti, sed praestari solere et ideo, si quis fiduciam sui haberet, delectari se <si> populo ad respondendum se praepararet (praestaret, praebaret - Mo.). Ergo Sabino concessum est a Tiberio Caesare, ut populo responderet: qui in equestri ordine iam grandis natu et fere annorum quinquaginta receptus est. (D. 1.2.2.48-50, MOMMSEN-KRÜGER) Translation by D. N. MACCORMICK in MOMMSEN-KRÜGER-WATSON (ed.), *The Digest of Justinian*, Philadelphia 1985.

⁹ Already U. ZASIUS lambasted the text: "Hic textus in omnibus quos vidimus libris, ita fuit corrupte scriptus, ut non solum nulla sermonis elegantia, sed nec ullus vel sensus, vel intellectus, quin poti monstrosa barbaries nostro Iureconsulto minime digna consciiperetur." U. ZASIUS, *Scholia in l. II. ff. de orig. iuris, in Singularia responsa sive intellectus juris singulares*, Basel 1541, p. 283. See, DE VISSCHER, op. cit., p. 619; SIBER, op. cit., p. 401; KUNKEL, *Wesen*, op. cit., p. 429; HORVAT, op. cit., pp. 712-713; BAUMAN, *Empire*, op. cit., p. 3. Generally on Pomponius's *Enchiridion*, see BRETONE, op. cit., pp. 211-254; D. NÖRR, *Pomponius oder zum Geschichtsverständnis der römischen Juristen*, ANRW II 15 (1976), pp. 497-604.

¹⁰ DE VISSCHER, op. cit., pp. 616-617; SIBER, op. cit., pp. 397-399.

¹¹ SIBER, op. cit., pp. 399-401, followed by GUARINO, op. cit., pp. 404-409. In the proposal by SCHULZ, op. cit., pp. 115-116, the sequence of the hands is: 1st hand (classical, with glosses): *Et ita Ateio...* 2nd hand (postclassical addition): *Massurius Sabinus...* 3rd hand (classical, with glosses): 49. *Et ut obiter...* 4th hand (postclassical addition): *[Et ideo] optimus princeps...* 1st hand (classical, with glosses): *Sabino concessum...*

text should be analysed as a whole and urged not to use unfounded textual criticism merely to solve problems by removing inconsistent parts of the text as later interpolations. This view has since become dominant, although opinions vary on how much the text of Pomponius has been corrupted¹².

Source criticism has revolved around two questions: how much Pomponius actually knew about the *ius respondendi* and how much of that has been transmitted to us. The difference is significant, as it determines how much of the text (and the errors) can be ascribed to Pomponius himself. Pomponius's credibility as a source was strengthened by Wieacker, who thought that Pomponius is stylistically poor, but tolerably well informed, and later by Bauman, who thinks Pomponius is rather accurate¹³.

Opinions have also differed about the transmission of the text. Schulz was probably the most vocal in the condemnation of the present state of the text, which he calls apocryph, post-classical and corrupted¹⁴. Later scholars have given more balanced judgements. The currently prevailing view is that the text in the Digest is actually a poorly preserved abridgement of the original, but it contains more or

¹² According to KUNKEL, interpretations such as SCHULZ's are, despite their ingenuousness, extremely improbable. Although the text does contain inaccuracies from different manuscripts, the compilers of the Digest should not be accused of alterations without cause, since there was hardly a motive to change history. KUNKEL, *op. cit.*, pp. 432-436. See also WIEACKER, *Augustus*, *op. cit.*, pp. 337-340; BAUMAN, *Empire*, *op. cit.*, pp. 3-4; PARICIO, *op. cit.*, pp. 89-95. SCHÖNBAUER, *Die Entwicklung*, *op. cit.*, p. 288 tried to restore the text to its original form by adding material he felt was omitted. Wieacker generally dismisses text criticism and conjectures as elegant but worthless guesswork: "Soweit sich die Kritiker nicht nur von sachlogischen Kriterien leiten ließen, sondern auch von ihren jeweiligen Vorstellungen über das *ius respondendi*, veranschaulichen ihre Rekonstruktionen nur ihre eigenen Thesen, wie besonders die von Schönbauer oder F. Schulz' "vier Hände". Auch Konjekturen, die sich durch Eleganz oder Ökonomie zu empfehlen scheinen, haben bei einem so uneleganten Autor geringere Überzeugungskraft." WIEACKER, *Augustus*, *op. cit.*, p. 340.

¹³ WIEACKER, *Augustus*, *op. cit.*, p. 340; BAUMAN, *Empire*, *op. cit.*, pp. 287-288. BAUMAN, *Empire*, *op. cit.*, p. 293, says that Pomponius is accurate with regards to historical details. The common assertion (perpetuated for instance in FÖGEN, *op. cit.*, p. 203) that Pomponius was an ignoramus because he supposedly did not know that before Augustus there were no *principes* Bauman rejects by pointing out that Pomponius might have also meant the *principes civitatis* of the Republic.

¹⁴ SCHULZ, *op. cit.*, p. 116 and *passim*.

less what Pomponius wrote. Some, especially Bauman, are more optimistic and think that we have in essence what Pomponius wrote¹⁵.

Traditionally, the second main source of the *ius respondendi* is a *passus* of Gaius explaining the sources of the law.

“Juristic answers are the opinions and advice of those entrusted with the task of building up the law. If the opinions of all of them agree on a point, what they thus hold has the status of an act; if, however, they disagree, a judge may follow which opinion he wishes. This is made known in a written reply of the Emperor Hadrian.” (G. 1.7)¹⁶.

Gaius’s passage on the *responsa prudentium* has been frequently seen as a confirmation of Pomponius’s account of the *ius respondendi*¹⁷. Indeed, Gaius seems to confirm that there was a group of people licensed to give *responsa*, and that their opinions, if unanimous, had the force of law. Sceptics have nevertheless emerged. Krüger claimed that Gaius probably meant a simple *communis opinio* of the jurists, not the *ius respondendi*. Schulz condemned also this text as post-classical, only to be again rebuked by Kunkel¹⁸. Provera agreed that Gaius confirmed the *ius respondendi*, though only on account of judicial *responsa*. Wieacker found the whole passage uncomfortable, beginning from meaning of *sententia et opiniones*. Rather than understanding it as every uttering of the licensed jurist,

¹⁵ WIEACKER, *Augustus*, *op. cit.*, pp. 338-340; BRETONE, *op. cit.*, pp. 211-223; BAUMAN, *Empire*, *op. cit.*, pp. 287-288.

¹⁶ *Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. quorum omnium si in unum sententiae concurrunt, id quod ita sentiunt, legis vicem optinet; si vero dissentiunt, iudici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur* (Gaius Inst. 1.7). Translation by W.M. GORDON and O.F. ROBINSON, *The Institutes of Gaius*, New York 1988. During the interpolation debate even Gaius was suspected of having postclassical glosses. Siro SOLAZZI, *Glosse a Gaio*, in *Studi in onore di Salvatore Riccobono*, Palermo 1936, p. 95, claimed that the phrases *et opiniones* and *si vero... sequi* are both glosses. This view was not shared by later scholars.

¹⁷ KUNKEL, *Wesen*, *op. cit.*, pp. 442-443; BAUMAN, *Empire*, *op. cit.*, p. 1; A.M. HONORÉ, *Gaius*, Oxford 1962, pp. 121-122.

¹⁸ Paul KRÜGER, *Geschichte der Quellen und Litteratur des Römischen Rechts* (2. Aufl.) München und Leipzig 1912, p. 124; SCHULZ, *op. cit.*, p. 115: “The fact that Gaius, unlike Pomponius, puts the *responsa prudentium* among the sources is in itself suspicious, but more than this, the whole section reflects post-classical ideas so completely that it cannot be genuine.” KUNKEL, *Wesen*, *op. cit.*, pp. 442-443. To VON LÜBTOW, *op. cit.*, p. 377, it is the work of a postclassical Pseudogaius.

Wieacker saw it as jurist's law in its written form, which at Gaius's time began to be included among the sources of law¹⁹. Similarly, Cancelli challenged the whole link between G. 1.7 and the *ius respondendi*, by saying that Gaius does not refer to any specific licence but to the actions of lawyers in general²⁰.

However, an analogous passage appears in the Institutes of Justinian, that seems to refer to *ius respondendi* more directly.

"The answers of those learned in the law are the opinions and views of persons authorized to determine and expound the law; for it was of old provided that certain persons should publicly interpret the laws, who were called jurisconsults, and whom the Emperor privileged to give formal answers. If they were unanimous the judge was forbidden by imperial constitution to depart from their opinion, so great was its authority." (Inst. Just. 1.2.8)²¹.

The fact that the reference to *responsa* is conveniently in the past tense has not escaped scholars²². Though it has been seen as needed confirmation of the *ius respondendi*, the value of the text has often been questioned on the basis of its post-classical date²³. Schulz says

¹⁹ PROVERA, *op. cit.*, pp. 349-350; WIEACKER, *Respondere*, *op. cit.*, pp. 77-80. WIEACKER thought that Gaius and Pomponius as Sabinians had a special interest in the privilege, which was first given to the head of their school. BAUMAN has questioned the common assertion that Pomponius was Sabinian, see BAUMAN, *Empire*, *op. cit.*, p. 288.

²⁰ CANCELLI, *op. cit.*, pp. 545-549. CANCELLI notes that it is possible that the passage is an interpolated reference to the Law of Citations. Cfr. VON LÜBTOW, *op. cit.*, pp. 377-378. CANCELLI's interpretations of G. 1.7 are: 1) *responsa* refers to juristic activity in general, 2) *sententiae* and *opiniones* are modes of *responxae*, 3) *eorum* is a paraphrase of jurists without distinctions, 4) *permissum est* is a reference to those who habitually exercise it, i.e. the jurists. 5) *condere iura* refers to those with an ability to do so, i.e. the jurists, 6) Hadrian merely wrote that in conflict situations the judge should have freedom of choice.

²¹ *Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum erat iura condere. nam antiquitus institutum erat, ut essent qui iura publice interpretarentur, quibus a Caesare ius respondendi datum est, qui iurisconsulti appellabantur. quorum omnium sententiae et opiniones eam auctoritatem tenent, ut iudici recedere a responso eorum non liceat, ut est constitutum.* (Inst. Iust. 1.2.8) Translation by J. B. MOYLE, in J. B. MOYLE, *The Institutes of Justinian*, (5th ed.) Oxford 1955.

²² G. F. PUCHTA, *Cursus der Institutionen*, (8. Aufl.) Leipzig 1875, p. 324; GUARINO, *op. cit.*, pp. 401-402.

²³ MAGDELAIN 1950, 4; WIEACKER, *Respondere*, *op. cit.*, pp. 76, 80-83: Inst. Iust. 1.2.8 is the only direct evidence available for the *ius respondendi*.

that the post-classical authors did not understand the meaning of the *ius respondendi* and thus interpreted it as a right to make law²⁴. Cancelli claims that Theophilus, the likely compiler of this text, merely interpreted Gaius as he himself understood it at the time when all law emanated from the emperor²⁵. Besides the relativisation caused by the late origin, few challenges have been made to the reliability of the text²⁶.

The main Roman sources, Pomponius, Gaius and the Institutes of Justinian, give an authoritative basis for the *ius respondendi* despite their disparity. However, the criticism that has been presented against these sources that Pomponius is confused and incoherent, that Gaius is talking about something else and that the Institutes are a reflection of Late Antique understanding of the sources of law, makes one wish for some corroboration from other sources.

The ius respondendi in other Roman sources

In order to examine systematically the historical background of the *ius respondendi*, we should also examine the question of other contemporary sources that might attest to the privilege. If the *ius respondendi* was a privilege given by the emperor to individual lawyers, as the traditional view claims, one might expect to find some mention of this in other sources, such as contemporary literature and epigraphic material.

This is by no means a new observation in itself. The fact that the legal sources give us such a meagre quantity of material on the *ius respondendi* proper has led historians of Roman law to search for sources that could attest once and for all that some jurist had the *ius respondendi* and he had used it to give *responsa* with the authority of the emperor.

²⁴ SCHULZ, *op. cit.*, p. 114: "In post-classical times there was no clear conception of the Augustan system of authorization of *responsa*, nor was it known which of the jurists had been authorized and which not. The pre-conceptions of a bureaucratic age led to the belief that Augustus and his successors had empowered the jurists *iura condere*, and all the jurists of the Principate whose writings had survived were assumed to have been so empowered."

²⁵ CANCELLI, *op. cit.*, pp. 560-562. The underlying logic is that the codification is full of references to emperors who mention juristic *responsa*.

²⁶ PARICIO, *op. cit.*, p. 99.

The most straightforward method is to find out whether the words *ius respondendi* are mentioned in the literature. Already Helssig found three occurrences of *ius publice respondere* in the literature, but this led to no concrete proof of the existence of the institution. Gellius writes that Labeo gave advice publicly to those who consulted him on legal questions, Ulpian states that Nerva the Younger was said to have given opinions on law in public, and Pliny describes an amusing scene in a poetry recitation session involving Iavolenus Priscus, who, despite his questionable sanity, responded publicly in law. As is evident, it is difficult to establish whether the *publice* here means simply to the general public or with a special authorisation²⁷.

One of the texts frequently discussed is a passage in Eunapius's (346-414 A.D.) *Lives of the Sophists*. In the biography of his master Chrysanthius, he mentions Chrysanthius's grandfather Innocentius, who in addition to reaching fame and fortune, received from the emperor the task of compiling legal statutes, which he did in Latin and Greek. However, Eunapius makes no mention of whether Innocentius was given the *ius respondendi* or simply the task of making a compilation of legal material²⁸. Schulz expressed his doubt that Eunapius's text really refers to the *ius respondendi* with the words "uncertain and improbable", whereas Bauman considers it "possible"²⁹.

²⁷ R. HELSSIG, *Die römische Rechtswissenschaft im Zeitalter des Augustus*, in V. Gardthausen (ed.), *Augustus und seine Zeit 1.1*, Leipzig 1891, 901; Gell. 13.10: *Labeo Antistius iuris quidem civilis disciplinam principali studio exercuit et consulentibus de iure publice responsitavit*; Ulpian D. 3.1.1.3: *qua aetate aut Paulo maiore fertur Nerva filius et publice de iure responsitasse*; Plin. epist. 6.15.3 *Est omnino Priscus dubiae sanitatis, interest tamen officii, adhibetur consiliis atque etiam ius civile publice respondet...* CANCELLI, *op. cit.*, p. 554, says that *publice* actually means just publicly or to the state, in contrast to 'privately', to friends and clients.

²⁸ Eunapius, *Vitae sophistarum* (rec. Ioseph Giangrande), Roma 1954, Chrysanthius, p. 91, (Boissonade 500).

²⁹ SCHULZ, *op. cit.*, p. 114; BAUMAN, *Empire*, *op. cit.*, p. 2. The division is possibly the result of BAUMAN's translation of Eunapius's words ὃς γε νομοθετικὴν εἶχε δύναμιν παρὰ τῶν βασιλευόντων ἐπιτετραμμένος as *cui iura condere ab imperatoribus permissum erat*. In contrast, J. F. BOISSONADE, *Eunapii vitae sophistarum*, Paris 1849, p. 500, translates this to Latin as *et cui condendarum legum arbitrium et auctoritas imperatorum consensu commissa erat*. In W. C. WRIGHT, *Philostratus and Eunapius: the lives of the sophists*, London 1912, p. 541, the English translation reads "... inasmuch as the emperors who reigned at that time entrusted to him the task of compiling the legal statutes."

A more popular line of argument proceeds from Inst. 1.2.8, which said that those with the *ius respondendi* were called *iuris consulti* (*quibus a Caesare ius respondendi datum est, qui iurisconsulti appellabantur*). This led Kipp and Krüger to believe that only the privileged jurists had the title of *iuris consultus* as a sign of the *ius respondendi*³⁰.

Schulz rejected the connection between *iuris consultus* and *ius respondendi*. *Iuris consultus* was according to him simply a reference to a responding jurist. The *ius respondendi* was at odds with the imperial council, which is why no reference to the privilege can be found in the epigraphical material, such as the honorary inscription of *Salvius Julianus*³¹.

Magdelain responded to Schulz's disbelief and sought to provide indisputable historical evidence of the connection between *iuris consultus* and *ius respondendi*. The fact that evidence is scarce he ascribed to the nature of the privilege as a *beneficium* and not a part of the official *cursus honorum*. Magdelain claimed to have evidence for Capito, Nerva, Cassius Longinus, Celsus, Julian, Neratius, Pactumeius Clemens, Maecianus, Scaevola, Ulpian and Modestinus as recipients of the *ius respondendi*. Their professional authority, political position and their status in the Digest shows beyond any doubt that they had the privilege³². As Magdelain's collection of evidence from legal, literary and epigraphic sources seems to have convinced at least one researcher³³, it is therefore necessary to examine closer the evidence presented.

If we take a general view of the evidence provided by the proponents of this view, it is remarkably clear that they provide a good argument that *iuris consultus* and the other legal titles were labels used by the jurist's profession³⁴. However, there is no evidence

³⁰ Theodor KIPP, *Geschichte der Quellen des Römischen Rechts*, Leipzig 1909, 111: “*Juris consulti* war die offizielle Bezeichnung der autorisierten Juristen, und man geht im allgemeinen wenigstens nicht fehl, wenn man annimmt, daß, wo Juristen als Autoritäten mit den Ausdrücken *prudentes*, *iuris auctores*, *auctores* u. ä. genannt werden, jetzt nur die Autorisierten gemeint sind.”; KRÜGER, *op. cit.*, p. 125.

³¹ SCHULZ, *op. cit.*, p. 114; *CIL VIII.24094*.

³² MAGDELAIN, *op. cit.*, pp. 4-5, 18: In late classical usage, the term *iurisconsultus* no longer means the *ius respondendi*, but refers to classical jurists in general.

³³ PARICIO, *op. cit.*, p. 99.

³⁴ The other titles used by jurists in the legal sources are *iuris auctores* (D. 22.1.32pr; D. 37.14.17pr; D. 44.4.4.14; C. 7.18.1.1; C. 7.7.1pr, C. 7.7.1.1b etc.), *legum auctores*

(besides Inst. 1.2.8) clearly and indisputably links together *iuris consultus* and *ius respondendi*.

The term *iuris consultus* is mentioned in the Digest in connection with Papinian and Nerva by Paul³⁵. In the Codex of Justinian, Ulpian is referred to as *praefectus annonae*, *iuris consultus* and *amicus*, whereas Modestinus is just *iuris consultus*³⁶. The Codex Theodosianus mentions Scaevola as *prudentissimus iuris consultus*³⁷. In the non-legal literature, *iuris consultus* is connected with Ateius Capito, Cassius Longinus, Juventius Celsus, Salvius Julianus and Neratius Priscus in the works of Suetonius and Spartianus³⁸. However, none of these few references imply that the title of *iuris consultus* is anything other than a simple professional title.

An argument for the link between *iuris consultus* and *ius respondendi* could be provided if it could be proved that these titles were used exclusively by jurists who had the *ius respondendi*. Because it has been clearly shown that in the Digest and Codex jurists were called by several different titles, not just *iuris consultus*, evidence should be found elsewhere.

For this purpose a list of juristic titles used in epigraphical material was compiled. Under no circumstances is this list comprehensive, but it covers roughly 90% of the published material³⁹. Therefore if a title

(C. 6.26.10pr), *legis latores* (C. 1.14.12.4; C.1.17.2.20; C. 4.5.11pr.; C. 4.18.2.1a; C. 8.47.10.5), *legum conditores* (C. 6.37.26pr), and *iuris peritus* (D. 27.1.30pr). See also KIPP, *op. cit.*, p. 111; KRÜGER, *op. cit.*, p. 125.

³⁵ Paulus, D. 20.2.9 *et derisus Nerva iuris consultus, qui per fenestram monstraverat servos detentos ob pensionem liberari posse;* Paulus, D. 12.1.40pr *Lecta est in auditorio Aemilii Papiniani praefecti praetorio iurisconsulti cautio huiusmodi.*

³⁶ C. 8.37.4 (Alexander Severus) *Secundum responsum Domitii Ulpiani praefecti annonae iuris consulti amici mei ea;* C. 3.42.5 (Gordianus) *merito tibi a non contemnenda auctoritatis iuris consulto Modestino responsum est.*

³⁷ C. Th. 4.4.3.3 *Nec si quid ex munificentia morientis fuerint consecuti, infructuosum subscriventes facient testamentum, quum hoc auctorem prudentissimum iurisconsultorum non sit ambiguum Scaevolam comprobasse.* dat. xii. kal. april. Arcadio iv. et Honorio iii. aa. coss.

³⁸ Suet. gramm. 10.2 *hunc Capito Ateius, notus iuris consultus;* Suet, Nero 37.1 *Cassio Longino iurisconsulto ac luminibus orbato;* Hist. Aug. Hadr. 18 *Cum iudicaret, in consilio habuit non amicos suos aut comites solum sed iuris consultos et praecipue Juventium Celsum, Salvium Julianum, Neratium Priscum aliosque, quos tamen senatus omnis probasset.*

³⁹ This is a rough estimate, included in the survey were the indexes of the Corpus Inscriptionum Latinarum (CIL) and L'Année épigraphique (AE), and the Epigraphische Datenbank Heidelberg.

is used exclusively as a professional title, that should show clearly in this data.

The term *iuris consultus* was found in 15 instances⁴⁰. Of those, two were mentioned by Magdelain: the honorary inscriptions to Pactumeius Clemens, which have *iurisconsulto* in the list of titles⁴¹, and the honorary inscription to Maecianus, which is only a fragment, containing the letters VLTO⁴². The complete picture is, however, much more varied. We have an honorary inscription which was erected by the city of Tyre in honour of Ulpian, which includes *iurisconsultus* in the list of his titles⁴³. There are also four honorary or funerary inscriptions of *iuris consulti*. The first is an honorary inscription to Annius Namptioius, *iuris consultus* and *magister studiorum*, from the senate of Thuburbo Maius in 361 AD⁴⁴. The second is a funerary inscription from Rome dated in 348 AD with the title of *iuris consultor*⁴⁵. The third is a fragment of an equestrian titulature in an honorary or a funerary inscription with the letters IS CONSU, which has been interpreted as *iuris consultus*⁴⁶. The fourth and last is a modest funerary inscription from Githi for a certain Iunius Urbanus, *carissimus filius* and *ius consultum*⁴⁷. There is also a testament that has been ascribed to L. Dasumius Tuscus, which contains among its legataries a *[Pro]culo iurisconsulto*⁴⁸. The term *iuris consultus* is also mentioned without referring to a certain person

⁴⁰ The raw material was the bulk of index references to the term *iuris consultus*: *CIL VI*, 1422; *CIL VI*, 1534; *CIL VI*, 10229; *CIL VI*, 10525; *CIL VI*, 12133 (= *ILS* 8365); *CIL VI*, 33865; *CIL VI*, 41294 (= 1628 = *ILS* 1456); **CIL VIII*, 2220 (cf. 17614, 17714); *CIL VIII*, 7059 (= *ILA*g. 2, 645 = *ILS* 1067); *CIL VIII*, 7060 (= *ILA*g. 2, 646); *CIL VIII*, 7061 (= *ILA*g. 2, 647); *CIL VIII*, 10490 (= **CIL VIII*, 11045); *CIL X*, 4919 (= *ILS* 7750); *CIL XIV*, 175add.; **CIL XIV*, 5348; *AE* 1963, 73; *AE* 1988, 1051; *ILA*fr. 273 (*ILPBardo* 357 = *AE* 1916, 20bis = *AE* 1916, 87 = *AE* 1916, 88). Fragmentary or otherwise uncertain texts are marked with an asterisk.

⁴¹ *CIL VIII*, 7059 (= *ILA*g. 2, 645 = *ILS* 1067); *CIL VIII*, 7060 (= *ILA*g. 2, 646); *CIL VIII*, 7061 (= *ILA*g. 2, 647). The first is the most complete and has the whole title. MAGDELAIN, *op. cit.*, pp. 4-5.

⁴² *CIL XIV*, 5348.

⁴³ *AE* 1988, 1051.

⁴⁴ *ILA*fr. 273 (*ILPBardo* 357 = *AE* 1916, 20bis = *AE* 1916, 87 = *AE* 1916, 88).

⁴⁵ *CIL VI*, 33865.

⁴⁶ *CIL VI*, 41294 (= 1628 = *ILS* 1456).

⁴⁷ *CIL VIII*, 10490 (= **CIL VIII*, 11045).

⁴⁸ *CIL VI*, 10229. Even if the conjecture is correct, this is not the Proculus in the Digest; see also KUNKEL, *Herkunft*, *op. cit.*, p. 126.

in three inscriptions, of which the first points out that the will has been written without a jurist⁴⁹, while the two funerary inscription express a wish that bad will and lawyers stay away⁵⁰. The final five inscriptions do not contain the words *iuris consultus*, they are a collection of overstretched conjecture⁵¹.

It is difficult to establish how the link between *ius respondendi* and the title *iuris consultus* could be proven or rejected, even if the material were more extensive. Does proving Magdelain's theory right require that all those mentioned as *iuris consulti* be credible recipients of the *ius respondendi*? If it does, then the varied occurrences of the term make it most likely that *iuris consultus* was simply a general term for a lawyer, alongside *iuris magister*, *iuris peritus*, *iuris prudens*, *iuris studiosus*, and others⁵². Magdelain remarks that because *ius respondendi* was just a *beneficium*, the title *iuris consultus* was not a part of the *cursus honorum*, which explains its rarity⁵³. Nevertheless, if we accept that the linkage existed in official use and that the term was merely misused by lower classes and provincials who lacked expertise in legal terminology, we make a premiss that enables only the outcome we are looking for and gives us free rein in choosing our evidence. Therefore, we must conclude that the credibility of the theory cannot be proven with epigraphic material.

The efforts Magdelain and others have put into proving the existence of the *ius respondendi* have not elicited much comment from recent authors. Wieacker wrote that besides Pomponius and Gaius there are no sources that could be linked to the *ius respondendi*.

⁴⁹ CIL X, 4919 (= ILS 7750).

⁵⁰ CIL VI, 10525; CIL VI, 12133 (= ILS 8365).

⁵¹ CIL VI, 1422; CIL VI, 1534; CIL VIII, 2220 (cf. 17614, 17714); CIL XIV, 175add.; AE 1963, 73 (probably a fake).

⁵² *Iuris magister*: CIL VI, 1602 (= X, 8387 = ILS 7748); CIL VIII, 12418. *Iuris peritus*: CIL V, 1026add. (= Inscr.Aq. 705); CIL VI, 1621; CIL VI, 9487 (= ILS 7743); CIL VI, 33867; CIL VI, 41307; CIL VIII, 8489a; CIL VIII, 20164 (= 10899); *CIL VIII, 27505; CIL X, 6662 (= ILS 1455 cf. 3163); CIL XIV, 2916; AE 1975, 793; AE 1980, 35; ILAlg. 1, 1362 (= AE 1903, 319 = AE 1904, 58 = AE 1904, 81 = ILS 7742^c); IRT 647. *Iuris prudens*: CIL III, 14188^{2er} (bilingual, also νομικὸν); CIL VI, 1853. *Iuris studiosus*: CIL III, 2936; CIL VI, 33868 (= ILS 7742); CIL VI, 38585; CIL VIII, 18348; CIL X, 569; CIL XII, 3339; CIL XII, 5900; AE 1908, 35; *Corpus de Inscriciones latinas de Andalucía*, IV: Granada, 131. Others: νομικὸν: CIL III, 14188²; CIL VIII, 15876 (= 1640), *iura peritus* AE 1926, 29, and *forenses* ILAlg. 1, 3064; *ILAlg. 1, 3071.

⁵³ MAGDELAIN, *op. cit.*, pp. 4-5.

He was convinced that the link between the *ius respondendi* and *iuris consultus* was formed only by Late Antique jurisprudence⁵⁴. Likewise, Cancelli wondered why not a single source besides Pomponius and the Institutes of Justinian mentioned the *ius respondendi*, as it is not likely that it would have been so regular or so uninteresting that nobody would mention it. A number of Roman authors, such as Vitruvius, Tacitus, Quintilian and Gellius, depict Roman jurists and their relationship with the emperors, which means that there would have been numerous possibilities for such a statement. Cancelli sees the silence as evidence for the non-existence of the *ius respondendi*⁵⁵.

The activities of jurists were described on numerous occasions throughout the field of literature. Vitruvius mentioned how it is necessary for an architect to be familiar in nearly all sciences, including the opinions of the jurists⁵⁶. Seneca said that the opinions of a jurist are valid even without reasoning⁵⁷. Quintilian noted how the interpretation of the *responsa* of *iuris consulti* relied on the interpretation of the words and the discrimination between good and bad⁵⁸. Suetonius added the jurists in the long list of professions that were persecuted by Caligula, who threatened to put them out of business by demanding that they would not be allowed to give advice contrary to his wishes⁵⁹. Even Isidore observed in his etymologies that *responsa* were the opinions of the jurists⁶⁰. Lactantius referred to the writings of the jurists as *disputationes iuris peritorum*⁶¹. Simply said, all points to the fact that opinions were simply a mode of communication of the jurists, without any distinction having been

⁵⁴ WIEACKER, *Respondere*, *op. cit.*, pp. 80-83.

⁵⁵ CANCELLI, *op. cit.*, pp. 544, 546.

⁵⁶ Vitr 1.1.3 *responsa iurisconsultorum noverit*.

⁵⁷ Sen. *epist.* 94.27 *Sic quomodo iuris consultorum valent responsa, etiamsi ratio non redditur.*

⁵⁸ Quint. *Inst.* 12.3.7 *consultorum responsis explicantur aut in verborum interpretatione sunt posita aut in recti pravique discriminē.*

⁵⁹ Suet. *Cal.* 34.5 *De iuris quoque consultis, quasi scientiae eorum omnem usum aboliturus, saepe iactavit se mehercule effecturum, ne quid respondere possint praeter eum.*

⁶⁰ Isid. *orig.* 5.14. *Responsa sunt quae iurisconsulti respondere dicuntur consulentibus.*

⁶¹ Lact. *inst.* 5.11.18.

made between different kinds of *responsa* or any opinions seeming to be in any way privileged⁶².

Fögen points out that in the Digest not a single jurist speaks with the authority of the emperor. The word *auctoritas* is mentioned 228 times, especially with regard to tutors, but also Plato, old jurists and some magistrates had authority⁶³.

A general survey of the Roman sources does not result in a confirmation of the historicity of the institution. The use of the words *ius respondendi* in the literature does not correspond to the theory of an imperial privilege. The oft-proposed link between the title *iuris consultus* and the *ius respondendi* is likewise not justified by either literary or epigraphical sources. Similarly, the use of the word *responsum* in the literature does not indicate a difference of rank between *responda* given by different jurists, let alone that a jurist would have given opinions under imperial authorisation.

Ius respondendi in historiography

Because the sources are so scarce, the story of the *ius respondendi* is a very good indicator of the general trends of the relationship between Augustus, jurists, and law. In the following shall be presented the interpretations of the *ius respondendi* throughout the development of Roman legal history, concentrating on the controversies of different eras. The main focus shall be on the images of Rome and Roman jurists imbedded in the various interpretations and their evolution. The aim is to uncover the amount of preconceptions needed to reach the basic propositions of nearly every solution proposed.

The emergence of the *ius respondendi* in Roman legal historiography comes with the commentaries on Pomponius's *Enchiridion*. One of the first to give it a lenghtier treatment was U. Zasius, to whom the *ius respondendi* resembled a college of doctors created to prevent brash outsiders from speaking with the authority of the emperor. Zasius's ideal was the Ciceronian learned patrician jurist who assiduously gave his opinions with knowledge and skill, not motivated by greed, incitement, pleasure and the drinking cup, as some scholars of his age did. Zasius's interpretations are very

⁶² CANCELLI, *op. cit.*, p. 550-551.

⁶³ FÖGEN, *op. cit.*, pp. 205-206.

individual: he hesitantly explains *pro beneficio* as a reference to jurists who worked more for glory than for gold. The issue he is clearly addressing here is the vice of unlearned jurists who lacked practical expertise and of ignorant schoolmasters who had reached their positions by soliciting letters of recommendation and the like⁶⁴.

Jacobus Cuiacius reflected Zasius's views in his commentary on the Digest and Institutes, where he simply noted how during the Republic, authority was rested in lawyers who frequented the forum, whereas during the Empire it came when the emperor granted permission to contend and interpret the law. The purpose of the institution was to subdue lawyers of higher learning⁶⁵.

Ulrich Huber described in his inaugural lecture in 1665 similarly how Augustus corrupted the noble legal profession in his quest to sideline the praetors. He also wanted to eradicate the memory of the Republic, when the stern profession of law was still dignified, by encouraging endless litigation, sectarian disputes and general sweet indolence among the population⁶⁶.

Christian Thomasius included the *ius respondendi* as the birthmark number twenty of Roman jurisprudence: "Jurisprudence suffered the gravest damage when Augustus conceded the right to respond as a privilege and made it impossible for the judges to deviate from the response of the jurist"⁶⁷. Thomasius viewed the privilege as if Augustus himself would be giving the *responsa*, which consequently had the force of law. He echoed ZASIUS and others in his view that

⁶⁴ ZASIUS, *op. cit.*, pp. 283-285.

⁶⁵ Iacobus CUIACIUS, *Opera quae de iure fecit I*, Frankfurt 1623, p. 4, commentary on the Inst. 1.2.8, *quorum omnium: non quorumcumque sede eorum tantum qui a principe contendi & interpretandi iuris potestatem accepissent l. I. c. de vet. iu. enucl. l. ult. c. de leg. id est, qui a principe iurisconsulti iurisve interpretes pronunciati essent. In Rep. prudentium auctoritas ea tantum valuit, quae in foro usu frequenti recepta erat*. CUIACIUS, *De origine iuris et iuris auctoribus...*, in *Opera II*, Frankfurt 1623, p. 102, commentary on D. 1.2.2.48-49: *superiores sine beneficio, ut subijcit, fiducia doctrine, iuxta illud, Qui sibi sidit dux, regit examen*.

⁶⁶ Ulrich HUBER, *Oratio inauguralis habita Franekeræ... exhibens historiam juris Romani*, in *Opera minora et rariora I*, Utrecht 1746, p. 109.

⁶⁷ Christian THOMASIUS, *Naevorum jurisprudentiae romanae antejustiniane libri duo* (2nd ed.), Magdeburg 1707, p. 67: *Naevus XX: Maximum damnum Jurisprudentia passa est, quod Augustus facultatem respondendi per modum beneficii concesserit, & iudicibus necessitatem imposuerit, ut ne a responsis JCtorum recederent*

the *ius respondendi* corrupted the legal profession as greed for money and power overtook certain lawyers⁶⁸.

J. G. Heineccius and J. A. Bach continued along the machiavellian tones, writing that Augustus wanted to use the dignity and respect enjoyed by the jurists to assert and stabilise his power. Heineccius accepted Huber's view that Augustus wanted to eliminate the power of the praetors, while Bach accepted that the authority of the law had been damaged during the turbulent years of the Republic⁶⁹.

Throughout the literature, there is a marked distrust of Augustus's intentions. With the exception of Bach, Pomponius's explanation about elevating the authority of the law did not convince jurists. Gibbon thought that the emperors had used the *ius respondendi* to take control over the *ius civile* under the pretence of securing the authority of the law⁷⁰. Christian Glück imagined in his commentary on the Digest that Augustus wanted to control the judges by making them dependent on the "Oracles of law", the jurists he had appointed, because of his political aims⁷¹. Gustave Hugo wrote in his Roman legal history that the *ius respondendi* changed the nature of jurisprudence by making *responsa* one of the sources of law. Hugo was clearly doubtful about the true nature and significance of the institution⁷². It was only some years later, in 1816, when the discovery

⁶⁸ THOMASIUS, *op. cit.*, pp. 68-70.

⁶⁹ J. G. HEINECCIUS, *Historia Iuris Civilis Romani et Germanici*, Geneva 1747, pp. 100-101; Johannes Augustus BACH, *Historia Jurisprudentiae Romanae*, Lucca 1762, pp. 217-218.

⁷⁰ Edward GIBBON, *Decline and Fall of the Roman Empire* IV, London 1977, pp. 392-393: "Augustus and Tiberius were the first to adopt, as a useful engine, the science of the civilians; and their servile labours accommodated the old system to the spirit and views of despotism. Under the fair pretence of securing the dignity of the art, the privilege of subscribing legal and valid opinions was confined to the sages of senatorian or equestrian rank, who had been previously approved by the judgment of the prince; and this monopoly prevailed till Hadrian restored the freedom of the profession to every citizen conscious of his abilities and knowledge. The discretion of the praetor was now governed by the lessons of his teachers; the judges were enjoined to obey the comment as well as the text of the law; and the use of codicils was a memorable innovation, which Augustus ratified by the advice of the civilians."

⁷¹ Christian F. GLÜCK, *Ausführliche Erläuterung der Pandekten* I (2. Aufl.), Erlangen 1797, p. 433.

⁷² G. HUGO, *Lehrbuch der Geschichte des Römischen Rechts*, (Lehrbuch eines civilistischen Cursus 3, 3. Aufl.), Berlin 1806, pp. 336-339. He notes that if Pomponius remarks that the founding of the institution was a matter of *ut obiter sciamus*, this could not have been very important.

of the Institutes of Gaius brought new credibility to the *ius respondendi*.

Puchta saw the *responsa* as the line that connected jurists to the judges, giving jurists a direct way to influence legal practice. Augustus's schemes were nothing more than a direct continuation of a plan to undermine the jurist's influence. To Puchta it was a general quality of all reform-minded leaders to belittle the legal profession: Cicero's antipathy towards lawyers mirrored the attitude of some mayors in Puchta's time, and Caesar's plans for codification had their counterparts in the plans for codification of modern regents. Puchta gave Augustus credit for being wiser than his predecessors in claiming to be securing and supporting the jurists's authority, all the while

making the jurists dependent on him. Thus the expertise of the jurists would seem to originate from the emperor, without the emperor having to do anything with the *responsa*⁷³.

Theodor Mommsen, whose dislike of Augustus was intense, contributed few but important lines to the matter. He wrote that in the Republic, legal science was applied to individual cases through the *responsa* of the jurists sought by the parties. Augustus moved against the freedom of jurists by banning *responsa* from jurists who did not have his special authorisation. Those who did not have the *ius respondendi* and continued to give *responsa* defied him and were in opposition. Mommsen compared Augustus unfavourably to emperors of better times, especially Trajan, who wisely refrained from giving their own *responsa*⁷⁴.

One of the recurring features of the literature of the late 19th century is that at some point, Suetonius's story of Caligula trying to control the *responsa* of the jurists would then emerge as evidence of the emperor's incessant jealousy of the jurist's free reign on giving *responsa*. Karlowa, who otherwise followed Puchta and Mommsen, described the situation as a battle of equals between the emperor and

⁷³ PUCHTA, *Cursus*, op. cit., pp. 322-324.

⁷⁴ T. MOMMSEN, *Römische Staatsrecht II*, Basel 1952, p. 912.

the jurists. In this view, the freedom of giving *responsa* was seen by the emperor as a dangerous threat to his power⁷⁵.

These views were contested by the rather large group of scholars who viewed Augustus and his reign positively. Helssig rejected the proposition that jurists were an influential and homogenous group that was in political opposition to the emperor. Although the early Republican lawyers used to be prominent patricians who regularly rose to the consulship, this link between law and politics was severed during the final years of the Republic. By granting the *ius respondendi*, Augustus actually increased the influence of the jurists without interfering with the content of the law. Helssig denied the possibility that the emperor might have misused this power to advance his political agenda on the grounds that he had easier methods at his disposal. The emperor was largely benevolent towards the jurists, and juristic opposition was merely an unsuccessful campaign by a few individuals such as Labeo and Cascellius⁷⁶. Helssig's views were supported among other by Kipp, who said that the impact of jurists greatly increased during the Early Empire because of the *ius respondendi*⁷⁷.

The idea of the benevolent emperor did not gain universal acceptance, as traditional legal historians stressed the value of unhindered *responsa* in the evolution of the law. The *ius respondendi* was interpreted by Hahn as a part of the ongoing centralisation of law in the hands of the emperor and the emperor's rise above the law⁷⁸. Berger wrote in his influential article in Pauly's Real-Enzyklopädie that Pomponius was gravely mistaken, as Augustus had no intention to increase the authority of the law⁷⁹. As several of his contemporaries attested, the jurists were the highly esteemed elite of the Republic, and they did not need help from the emperor. In fact, the high regard

⁷⁵ PUCHTA, *Cursus*, *op. cit.*, p. 323; MOMMSEN, *op. cit.*, II, p. 912; Otto KARLOWA, *Römische Rechsgeschichte I*, Leipzig 1885, p. 659. Suet. *Cal.* 34.5 had naturally been evoked before, cf. BACH, *op. cit.*, p. 218.

⁷⁶ HELSSIG, *op. cit.*, pp. 1318-20, 1322, 1332-1333.

⁷⁷ KIPP, *op. cit.*, p. 109.

⁷⁸ Otto HAHN, *Das Kaiserthum*, in *Das Erbe der Alten VI*, Leipzig 1913, pp. 74-77.

⁷⁹ BERGER, *Jurisprudentia*, in *Pauly-Wissowa's Real-Encyclopädie* 10 (1919), pp. 1159-1200.

in which the jurists were regularly held was a threat to the emperor, which he sought to eliminate using his sovereign power⁸⁰.

The next phase of the discussion was an offshoot of the extensive discussion around the *Monumentum Ancyranum* or the *Res Gestae Divi Augusti* 34.2 during the early 20th century. Wenger and von Premerstein applied the redefined concept of *auctoritas* as a social and moral force to Pomponius's text. Wenger wrote that because jurists were intimately familiar with *auctoritas* as the binding force behind their *responsa*, they easily accepted the idea that a greater *auctoritas* would result from an imperial *beneficium*. von Premerstein linked the *ius respondendi* to the general ideological programme and administrative structures of Augustus's principate. He was also the first to ponder how exactly Augustus created this privilege, by edict or some other arrangement⁸¹.

Premerstein's questions of how the *ius respondendi* was really used and what effects it had were answered by F. de Visscher in the first article devoted exclusively to *ius respondendi*. De Visscher recognised that the effects of the privilege were more assumed than scientifically proven and envisioned the historical evolution behind the actions of Augustus, Tiberius and Hadrian, in which the institution went through extensive changes during each of their reigns⁸².

Fritz Schulz dismissed the whole existence of the institution as being contrary to the Augustan programme: "A *ius respondendi* existed no more than a right to breathe."⁸³ This prompted Kunkel to call for a critical evaluation of the sources instead of comparing constructed, doctrinal images of the Augustan system. In an interesting case of self-contradiction, Kunkel then proceeded to describe how the jurists battled constantly against codifications which threatened jurist's law, the precondition of juristic creativity and

⁸⁰ BERGER, *op. cit.*, p. 1165; HAHN, *op. cit.*, p. 73; Emilio COSTA, *Storia delle fonti del diritto romano*, Milano 1909, p. 77; KRÜGER, *op. cit.*, p. 120. Both KRÜGER and BERGER evoked Suet. *Cal.* 34 to prove the emperor's animosity.

⁸¹ Leopold WENGER, *Praetor und Formel*, in *Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Philosophisch-philologische und historische Klasse*, Jahrgang 1926, 3. Abhandlung, p. 108; Anton VON PREMERSTEIN, *Vom Werden und Wesen des Prinzipats*, in *Abhandlungen der Bayerischen Akademie der Wissenschaften, Philosophisch-historische Abteilung, Neue Folge*, Heft 15 (1937), pp. 158, 202.

⁸² VON PREMERSTEIN, *op. cit.*, p. 204; DE VISSCHER, *op. cit.*, p. 615.

⁸³ SCHULZ, *op. cit.*, p. 113.

profession, from Caesar's reign up to the codification projects of the Enlightenment. Kunkel discarded as false the image of the benevolent Augustan principate and erected in its place the old standard of glorious juristic freedom⁸⁴.

After these contributions, the discussion of the *ius respondendi* became more varied and specialised. Guarino interpreted the Augustan privilege as a social honour bestowed upon jurists he trusted, which only later became a *beneficium*⁸⁵. Magdelain also presented a grand historical reconstruction, like Kunkel proceeding from the assumption that Augustus wanted to control the jurists. Augustus, the master of indirect rule, did not want to attack the proud juristic profession, but used his silence to suppress other sources of law, the praetor and jurisprudence. To Magdelain, the history of *ius respondendi* was a chapter in the long campaign towards legal unity, a campaign that Augustus and his successors waged with stealth⁸⁶.

In his later writings Kunkel restated his conviction that Augustus used the *ius respondendi* to return jurisprudence to the hands of the senatorial class and to exclude the avaricious and business-minded knights. Wieacker agreed that Kunkel was right about the *ius respondendi* being more a moral reorganisation than power politics, but he was sceptical about how few historical sources there were about the *ius respondendi* compared with the high regard it was held. Actually, we know next to nothing about the contents and scope of the privilege and those who gained it. Wieacker's claim was that *ius respondendi* had been self-evident to romanists, who never duly called it into question⁸⁷.

⁸⁴ KUNKEL, *Wesen*, *op. cit.*, pp. 445-450.

⁸⁵ GUARINO, *op. cit.*, pp. 411, 413-415, strongly criticised DE VISSCHER's reconstruction: "...è tortuoso, contraddittorio e, allo stato delle nostre conoscenze generali, inammissibile."(p. 414).

⁸⁶ MAGDELAIN, *op. cit.*, pp. 1-3. "Il n'hésita pas à agir par voie d'autorité, mais il le fit avec modération, en ménageant les principes. Parmi les *arcana imperii*, il faut compter avant tout le silence presqu'officiel qui enveloppait la limite des attributions de l'empereur et facilitait ainsi leur accroissement continu. Auguste exploita avec bonheur la marge d'indétermination qui entourait les siennes. Initiateur de la méthode, il l'utilisa avec tact. Il eût été absurde d'avoir décliné l'offre d'un pouvoir législatif personnel, manifestement contraire à la tradition républicaine, pour l'exercer en fait." MAGDELAIN, *op. cit.*, p. 1.

⁸⁷ KUNKEL, *Herkunft*, *op. cit.*, pp. 272-282; WIEACKER, *Augustus*, *op. cit.*, pp. 336, 338, 349; WIEACKER, *Respondere*, *op. cit.*, pp. 71-72.

Wieacker's refutation of the older theories has been followed by a marked suspicion about the *ius respondendi* in recent literature. F. Cancelli's article was even entitled "the presumed *ius respondendi*". Cancelli notes how centuries of scholarly work have not produced reliable results, and fictitious explanations have proliferated without much regard of historical facts. The only clear conclusion should be that the *ius respondendi* did not have any effect whatsoever. Similarly, M. T. Fögen calls the institution an "ineffectual contact announcement." The emperor had perhaps tried to lure jurists into a mutually beneficial fusion of authorities, but since the *ius respondendi* was not once mentioned in the Digest or any writings of the jurists, the jurists must have ignored the offer⁸⁸.

If the basic tenet in both Cancelli and Fögen is juristic freedom, Bauman takes a completely different view in the third part of his jurisprudential trilogy. To Bauman, the *ius respondendi* was one of the most important changes in law during the Principate, along with the founding of the schools. With it, the emperor took complete control over jurist's law in the typical Augustan indirect mode, but with the permission of the jurists. Augustus had good reasons for his actions, which Bauman identifies as the chaotic state of the law, incompetent jurists, the misuse and forgery of *responsa* and their ignorance by judges. In Bauman's view, the context and significance of the *ius respondendi* is mostly political⁸⁹.

Deciphering the ius respondendi

What should we then make of the institution? The Roman sources on the *ius respondendi* are at best ambiguous. Pomponius's account has been subjected to intense text and source criticism because of the contradictions it contains and the general lack of consistency and style. Despite the amount of ink used to the discussion over the years, the present *communis opinio* seems to be that we have approximately what Pomponius wrote, which is, in essence, that Augustus granted the right to give *responsa* on his own authority in order to raise the authority of the law. Sabinus was the first to give his opinions *publice*

⁸⁸ CANCELLI, *op. cit.*, pp. 543-544; FÖGEN, *op. cit.*, pp. 203-206. Other recent authors like PARICIO have taken a cautiously negative view of the institution. PARICIO, *op. cit.*, pp. 88-9, 105.

⁸⁹ BAUMAN, *Empire*, *op. cit.*, pp. xxvi, 8-10, 16-17.

and Hadrian said that the *ius respondendi* should be earned, not applied for. Gaius maintained that unanimous *responsa* of jurists had the same status as law and that the *responsa* were the opinions of those with the right to compose law (*iura condere*). The Institutes of Justinian contain a similar passage formulated in an extended form: the *iuris consulti* were those whom the Emperor had granted the right to give formal responses, which were binding on the judges.

This all sums up to a very convincing mass of evidence for the *ius respondendi*, which would be difficult to contradict or refute. The trouble is that the evidence is very convincing as long as one looks only at this material. When examining ancient sources in general, conclusive evidence on the *ius respondendi* is very much lacking. There are a few references to *ius publice respondere*, but none of them contains any allusions to imperial intervention. Similarly, the theory based on the Institutes of Justinian that the title of *iuris consultus* is tantamount to *ius respondendi* is not supported by any evidence from literary or epigraphical sources. References to *responsa* in the literature in general indicate that opinions were simply the form of communication used by jurists, and that there were no special classes of *responsa* above the rest.

In the literature on the *ius respondendi* there was a notable break in the development of the research on the *ius respondendi* during the early 20th century, when scholars began to search for corroboration, evidence from outside the traditional sources. Because the results of these quests were disappointing, scepticism persisted. The result has been that the credibility of the *ius respondendi* seems to depend on whether the researcher has faith or not.

The research on *ius respondendi* has basically wavered between two opposing stereotypes, of the benevolent and the malevolent Augustus. The kind Augustus supported the jurists with altruistic motives and did not use the *ius respondendi* as a means to interfere with the law. In contrast, the corrupt Augustus usurped the free Roman jurisprudence and used it as a tool for his political aim, the total dominance over Roman society.

In the earliest literature on the *ius respondendi* the banner of free jurisprudence was still dominant. As described earlier, Zasius wrote in the 16th century how the *ius respondendi* acted as a bulwark of learned lawyers against the corruption of the ignorant jurists. The privilege was a safeguard to protect the influence of the wise jurists that had

dominated the field of law ever since the Republic. In order to grasp the meaning of this statement, one must look at the political and intellectual context in which it was written.

J. Q. Whitman described the importance of the *ius respondendi* for the professors of Roman law during the sixteenth century. The professors based their pride and dignity on the image of ancient Roman jurists and their power, of which the clearest example was the *ius respondendi*, the right to give opinions that were binding on the judges. Even if the significance of the privilege in Rome was unclear, according to Whitman it provided the most important legal doctrine behind the power of the professors of Roman law in Germany. The respect for scholarly legal authority it embodied was the basis of professorial lawmaking in the *Spruchkollegien*. Roman law and the professors who taught it were declared to be uniquely learned and impartial⁹⁰.

From Huber onwards in the 17th century the interpretation was reversed: evil Augustus corrupted the jurists' profession in his quest to sideline the praetors and to gain complete control over Rome. Thomasius blamed the jurists for falling into Augustus's trap in their greed with the result that their influence no longer emanated from their learning, but from the sovereign will of the Emperor.

During the 17th and 18th century crisis of Roman law, the orientation of Roman law professors was changed and the concepts of law and the place of lawyers were remodelled to suit the demands of the new ideals of absolutism. Lawyers would henceforth be servants of the prince, not objective interpreters of impartial law. The reinterpretation of *ius respondendi* took the form of law emanating from the power of the emperor, and hence it was the emperor whom the jurists should thank for their power. Samuel Stryk even drew a parallel between the Roman *ius respondendi* and his contemporary jurists⁹¹.

⁹⁰ J. Q. WHITMAN, *The Legacy of Roman Law in the German Romantic Era*, Princeton 1990, pp. 29–38.

⁹¹ WHITMAN, *op. cit.*, pp. 56–65; STRYK, *op. cit.*, pp. 48–49: “Praecipue vero ex hoc titulo quoad usum modernum monendum, potestatem de jure respondendi fuisse olim unicuius apud Romanos permisam, sed postea imperante Augusto effectum, ut haec facultas publice respondendi beneficii loco ab Imper. peteretur, quo eo major auctoritas esset eorum qui consularentur per l. 2. §. 47, vers. et ut Obiter ff. h. t. add. §. 8. i. de i. n. g. et c. Hodie diversum ius obtainere non puro, sed facultatem de iure

In the writings of Heineccius, Bach, Gibbon, and Hugo the situation was reformulated once again. It was now the jurists who had the authority and influence, which Augustus wanted to utilise to his own advantage. Again the greed of the jurists made them step into the service of the autocrat. Bach described how the *ius respondendi* gave the Emperor power over legislation through his control over jurisprudence⁹².

During the latter half of the 19th century the discussion on the *ius respondendi* began to reflect the debate about codifications. Puchta saw in the *ius respondendi* a parallel to all rulers who attempted to deviously terminate the freedom of jurists and to take control over the law. Similarly Mommsen envisioned how Augustus destroyed independent jurists by terminating the freedom to give *responsa*.

At the turn of the 20th century Augustus came back in fashion along with a general enthusiasm for things imperial in Germany. The advocates of imperial rule saw in Augustus the ideal emperor, who raised the influence of the jurists without interfering with the content of the law. This movement was quickly countered by realists who saw in Augustus a cunning despot, who had managed to confuse both Pomponius and their contemporaries.

From the 1930s onwards attempts were made to reveal the historical context in which the institution developed, spearheaded by de Visscher. The discussion followed two parallel lines, the first supported by Schulz, Wieacker, and Cancelli, who claimed that the *ius respondendi* never existed in practice despite the possible attempts by Augustus to install it. The second line revolved around Kunkel and Magdelain, who asserted that Augustus successfully harnessed the jurists' profession with the *ius respondendi*. An extreme variant of this is Bauman's declaration that Augustus was in fact helping the jurists with the *ius respondendi*.

How should the *ius respondendi* then be interpreted? Should we believe authors like Cancelli and Fögen, who maintain that the whole affair was merely a futile attempt by Augustus to encroach on the

respondendi adhuc nemini competere assero, nisi cui illa publice collata. Et eapropter Iuris Doctores, qui in locum veterum illorum prudentum successerunt Carpz. p. 2. c. 10. def. 4. n. 3. potestatem consulendi et respondendi ex auctoritate imperatoria in promotione solemniter collata sibi rectissime vindicant Cothmann [et al.]".

⁹² BACH, *op. cit.*, p. 218.

liberty of jurisprudence, coupled with Late Antique misunderstandings about the nature of the sources of law? Cancelli has stressed that all evidence points towards the complete lack of any authority outside the law, and that the jurists worked as a collective for the greater good of law⁹³. Fögen affirmed that the pursuit of *respondere* retained its freedom and remained uninvolved with politics. The influence of the emperors on law came through laws and later imperial constitutions that produced legal texts for the lawyers to comment on. There is no denying that the model for the future was imperial constitutions and lawyers working in imperial bureaucracy⁹⁴. The transformation of the image of *ius respondendi* Cancelli dated to the Dominate, when it was more difficult to understand private persons creating law. What remained was the juristic doctrine, which continued to evolve when the Law of Citations brought a new dimension to the *responsa*. The difference between jurists and lawgivers began to blur in the later literature, especially in Justinian⁹⁵.

The other option would be to believe Kunkel, Magdelain, or Bauman, and their visions of ruthless power struggle between the emperor and jurists. Kunkel saw the situation as a trade-off; the senatorial jurists gained a monopoly in the interpretation of law in addition to the abandonment of Caesar's codification plans, and in return Augustus secured the support of jurists for his new regime⁹⁶. Magdelain spoke of the cold hostility and silence of the emperor against sources of law not under his direct control, which was remedied with the *ius respondendi*⁹⁷. They are self-described realists, who believed that the field of law was not immune to the power politics of the Roman Empire.

Furthermore, does this dichotomy obscure an even larger question, the function and significance of jurist's law? Paul Koschaker, one of the great authorities on jurist's law, has written that the jurist's law and the centralised power of the state needed each other. The jurists needed some instance to give the factual power of law to their

⁹³ CANCELLI, *op. cit.*, pp. 552-553, seeks his precedent from L. Valla and Leibniz.

⁹⁴ FÖGEN, *op. cit.*, p. 206.

⁹⁵ CANCELLI, *op. cit.*, pp. 557-559. Cancelli draws a parallel to early Greek lawgivers. A law found intact and unchangeable was seen as the work of a legislating sage. Cfr. Amm. Marc. 27.9.5 *inventores iuris antiqui*.

⁹⁶ KUNKEL, *Wesen*, *op. cit.*, pp. 448-456.

⁹⁷ MAGDELAIN, *op. cit.*, p. 1.

findings, and the emperor needed someone to formulate the law according to his wishes⁹⁸. This view is in complete opposition to Puchta's idealism regarding the freedom of jurisprudence and the outlook that the jurist's law was based solely on the skill and authority of the jurists themselves⁹⁹.

The underlying question is whether all this comes down to the 19th century debate between idealists in their conceptual heaven and materialists with their views on the inseparability of law and power? The materialist turn, initiated by Jhering and Mommsen, stressed that behind the supposedly objective surface of the law lay a mass of contradictory interests and power struggles, which were not taken into account by the traditional Roman law scholars¹⁰⁰. It is perhaps fitting that similar to the difference between the disputing factions of Romanists of the late 19th century, the difference between the idealists and the realists is minor compared to their overall similarity.

The most poignant similarity is related to the concept of a patriotic narrative. This term was originally used to describe historical writing with an agenda linked with nationalistic enterprises such as glorifying or constructing the national past. Lately it has been proposed that the concept can be applied to situations outside the nationalistic projects, such as histories of specific groups or entities, such as cities, various groups, associations, or companies¹⁰¹.

⁹⁸ P. KOSCHAKER, *Europa und das römische Recht*, (4. Aufl.) München 1966, pp. 178-180. This perception was supported by VON LÜBTOW, *op. cit.*, p. 377, who claimed that the whole validity of the jurist's law depended on the imperial *ius respondendi*, and HORVAT, *op. cit.*, p. 715.

⁹⁹ A. A. SCHILLER, *Jurist's Law*, in *An American Experience in Roman Law*, Göttingen 1971, reprinted from *Columbia Law Review* 58 (1958), p. 1236: "Given *auctoritas prudentium*, the view of one jurist was as valid as that of another. It was the respect and confidence in the ability of a jurist, in the knowledge that his services were dedicated to the well-being of the Roman state, that gave his views legal force, not their adoption by a state official or even another jurist."

¹⁰⁰ R. VON JHERING, *Scherz und Ernst in der Jurisprudenz*, Leipzig 1892, pp. 7-14; MOMMSEN *op. cit.*, p. I, 6.

¹⁰¹ Thomas HYLLAND ERIKSEN, *Ethnicity and Nationalism*, London 1993, 82-120, discusses how ethnicity and nationality are formed culturally through ideology and narratives in history. Jukka RELANDER, a psychohistorian, has developed the concept of patriotic narrative in a debate published in the journal *Historiallinen Aikakauslehti/Journal of History* (1/2003). Cfr. also C. STEEDMAN, *Battlegrounds: History in primary Schools*, *History Workshop Journal* 17 (1984), pp. 102-112; J.C.D. CLARK, *National identity, state formation and patriotism: the role on history in the public mind*, *History Workshop Journal* 29 (1990), pp. 95-102.

Were we to employ this category in the debate at hand, we would notice that the fundamental issue is not whether to present a patriotic narrative, but what kind of patriotic narrative to present. The options that are offered are the idealistic version of the patriotic narrative of the jurist's profession, which presents a powerless emperor attempting in vain to prevail over proud and powerful jurists. The realistic version is just as patriotic, even though the role of the emperor is different. In this case, the jurists or a group of them collaborate with the emperor, who allows them free reign over the law as long as his power is not questioned. Contrary what one might think, this model of the disinterested emperor salvaged the idea of the freedom of jurisprudence by making the most out of available options.

How much is the proud profession of the jurists a Roman phenomenon and how much is it a later retrojection from modern ideals? It is well documented that modern concepts and ideals influence our interpretations of ancient events¹⁰². The fact that the autonomy of the law and of the jurists' profession is one of the fundamental ideals of modern law raises questions of distortion or interference between the object and subject of history through a connection of loyalty. These loyalties may originate from a similarity real or imagined or an imagined community of which both are members¹⁰³.

The details of the patriotic narrative

Because in historiography every theory remains a mere hypothetical construct unless it can be applied fruitfully to the material at hand, in the following its applicability to some of the central questions of the *ius respondendi* shall be attempted. These questions are the nature of the privilege, its recipients, the effects it had in law, the purpose it served and its evolution during the Principate. Can these problems be linked to the patriotic narrative of

¹⁰² Cfr. P.J. RHODES, *Ancient Democracy and Modern Ideology*, London 2003, elaborates how the Athenian ideal of democracy has influenced us, as well as how our modern concept of democracy has influenced our view of the Athenian democracy.

¹⁰³ Cfr. HYLLAND ERIKSEN, *op. cit.* R. Hingley, in *Roman Officers and English Gentlemen*, London 2000, discusses the extent to which Victorian English archaeologists and scholars identified the Roman and British Empires and themselves with both ancient Romans and Britons.

jurists and the opposite images of the emperor as malevolent or benevolent, repressing or disinterested?

On the individual questions surrounding the institution, the nature of the privilege is one of the most directly linked with the relations between Augustus and the jurists. Did the *ius respondendi* create a privileged class among jurists, whose *responsa* were held binding to the judges? Or was the *ius respondendi* a licence to practice law, without which no *responsa* could be given? In the earlier literature the licence theory and the monopoly of the licensed jurists was dominant, as it agreed with the image of the sovereign power of the Emperor¹⁰⁴. From Puchta onwards the interpretation changed to the elite theory, which appealed to the idea of jurist's law. The jurist profession was divided into two classes, the small group of lawyers who had it and those who did not¹⁰⁵. Parallel to this continued the licence theory, which was popular among those who saw the Augustan regime as an authoritarian enterprise, such as Mommsen, Kunkel, and Magdelain. According to the licence theory, Augustus banned *responsa* from unprivileged lawyers¹⁰⁶.

¹⁰⁴ THOMASIUS, *op. cit.*, p. 70; GIBBON, *op. cit.*, p. 392.

¹⁰⁵ BACH, *op. cit.*, p. 217; PUCHTA, *Cursus*, *op. cit.*, p. 326; KARLOWA, *op. cit.*, p. 660; KIPP, *op. cit.*, p. 111; KRÜGER, *op. cit.*, pp. 122-123; HAHN, *op. cit.*, p. 74; BERGER, *op. cit.*, p. 1166; WENGER, *Praetor*, *op. cit.*, p. 104; KÜBLER, *op. cit.*, p. 257; VON PREMERSTEIN, *op. cit.*, p. 203; SIBER, *op. cit.*, p. 401. KARLOWA suggested that only the process *responsa* were given under the *ius respondendi*, signed and sealed. KARLOWA, *op. cit.*, p. 660. VON PREMERSTEIN, *op. cit.*, p. 204: the *responsum* had to be written and equipped with an imperial seal as a sign of imperial acceptance. He rejected WENGER's claims that *responsa* were stored in imperial archives (L. WENGER, *Über Stempel und Siegel*, ZRG 42 (1921), p. 633). DE VISSCHER, *op. cit.*, p. 625 pointed out that it was not unprecedented to give an imperial seal. Augustus gave Maecenas and Agrippa his seal so that they could act with his authority. SCHULZ, *op. cit.*, p. 112-113: "Unauthorized jurists were at liberty to continue to give *responsa* in the republican style, *propria et privata auctoritate*." GUARINO, *op. cit.*, p. 415 compared the privileged to "purveyors of the Court" ("fornitori della Real Casa"); DAUBE, *op. cit.*, p. 517; SCHÖNBAUER, *Zur Entwicklung*, *op. cit.*, pp. 225-6; PROVERA, *op. cit.*, p. 354; BRETONE, *op. cit.*, p. 247; WIEACKER, *Respondere*, *op. cit.*, pp. 89, 92; PARICIO, *op. cit.*, p. 99.

¹⁰⁶ MOMMSEN, *op. cit.*, II, p. 912, opted for the mandatory licence, but in a footnote accepted that unprivileged lawyers did give *responsa*. HELSIG, *op. cit.*, p. 1332; KUNKEL, *Wesen*, *op. cit.*, p. 455: "Das von Augustus eingeführte *ius publice respondendi* war die vom Princeps verliehene Lizenz zu öffentlicher Erteilung von Rechtsgutachten. Wer es nicht besaß, dürfte offenbar von Rechts wegen nicht respondieren." MAGDELAIN, *op. cit.*, pp. 4-7, 13, was slightly more cautious. KUNKEL was followed by Max KASER in his *Römische Rechtsgeschichte*, Göttingen 1965,

The debate between the theories abated markedly after Kunkel, the most ardent proponent of the mandatory licence theory, shifted to the elite theory¹⁰⁷. After Wieacker denounced the theory as completely unsuitable to anything that is generally known about *auctoritas* and Augustus¹⁰⁸, the mandatory licence theory is supported only by Bauman¹⁰⁹, who has attacked the prevailing view fervently¹¹⁰.

The vital question here is whether these scholars believed that Augustus was benevolent towards the jurists, did Augustus wish to gain complete control over them? The freedom of the jurists is in itself not relevant, since what is freedom to some is to others a chaotic legal confusion, and what is repressive control to some is to others a welcome order. The emergence of the patriotic narrative transformed

p. 158. However, KASER was noncommittal in *Das Römische Privatrecht*, München 1955, p. 189, and later turned to the elite theory in *Römische Rechtsquellen und angewandte Juristenmethode*, Wien 1986, p. 19. KUNKEL gained the wholehearted support of i.a. V. ARANGIO-RUIZ, *Storia del diritto romano*, (7. ed.), Napoli 1985, p. 271 and Alvaro D'ORS, *La signification de l'œuvre d'Hadrien dans l'histoire du droit romain*, in PIGANIOL et al. (ed.), *Les empereurs romains d'Espagne*, Paris 1965, p. 155.

¹⁰⁷ KUNKEL, *Herkunft*, *op. cit.*, pp. 282-3 still calls it "Patent" but changed its definition because he did not think that unlicensed jurists would refuse help from their friends in need.

¹⁰⁸ WIEACKER, *Respondere*, *op. cit.*, pp. 83-87. BAUMAN concedes that the concept of *auctoritas* does not lend itself to exclusiveness, but explains that the word was used out of Republican nostalgia. He notes that there was perhaps no need to prevent unprivileged from giving *responsa*, because no client would trust his matters to an unauthorised jurist, nor would he know of his existence. BAUMAN, *Empire*, *op. cit.*, pp. 11-12, 15-16. Bauman is clearly attracted to the idea that a jurist would traditionally put up a sign saying *licet consulere* (p. 16). In the first part of his jurisprudential trilogy, he has Tiberius Coruncanius putting up a similar sign: "As for the procedure, he simply put up a sign reading *licet consulere* (*Cic. Mur.* 28)." BAUMAN, *Lawyers in Roman Republican Politics*, Munich 1983, p. 72.

¹⁰⁹ Bauman describes the rather short list of supporters of the mandatory licence theory. He mentions that the theory was popular during the 19th century but does not mention anyone besides Mommsen who had actually supported the theory. BAUMAN, *Empire*, *op. cit.*, pp. 3. As mentioned earlier, Bauman identifies four problems that the *ius respondendi* was meant to solve. The chaotic state of the law would be clarified by creating indisputable law. Incompetent jurists would be banished from the profession by certification. The misuse of *responsa* would be halted by verification under a seal. Finally, judges would not dare to ignore a *responsum* given under the authority of the emperor. BAUMAN, *Empire*, *op. cit.*, pp. 10-13.

¹¹⁰ Bauman's critique of the "charismatic theory" is like attacking men of straw, because he simplifies the arguments of his opponents, see his attacks on de Visscher, Guarino and Schulz, in BAUMAN, *Empire*, *op. cit.*, pp. 2-3, 10-11.

the interpretations on the nature of the privilege. The elite theory, which was originally based on the idea that a malevolent emperor was raising his henchmen above other jurists, gradually transformed into Schulz's and Guarino's theory of a mostly ceremonial honour given to jurists loyal to the emperor, which did not affect other jurists. The mandatory licence theory underwent a similar transformation. The machiavellian tones that dominated the discussion from the 17th century onwards, including the image of the evil emperor corrupting and repressing the jurists was changed into a powersharing agreement among the emperor and a group of lawyers. In Kunkel's, Magdelain's, and Bauman's vision the legal elite gained a monopoly in law with the support of the emperor. In both cases the emperor is transformed from an evil oppressor into a partner of at least a group of lawyers.

To whom was the privilege granted, and why do we know of no other recipient than Sabinus? The recipients of the privilege were not a pressing issue for earlier scholars, but since then the theories have been numerous, ranging from licensing single jurists at a time¹¹¹, the approval of single *responsa*¹¹², to licensing of only upper-class jurists¹¹³. This question was too dependent on the nature of the privilege. The licence theory would solve the problem by requiring that all practicing jurists would have to be recipients of the *iis respondendi*¹¹⁴. Magdelain, the most vocal advocate of this theory, claimed that all practicing jurists mentioned in the Digest, some 30 in all, had had the *iis respondendi*¹¹⁵. The other extreme was the theory that the *iis respondendi* never existed in practice, which would explain why we do not know of any recipients¹¹⁶. Therefore the lack

¹¹¹ THOMASIUS, *op. cit.*, pp. 70-71.

¹¹² DE VISSCHER, *op. cit.*, p. 622. The problem is that de Visscher's reconstruction called for Tiberius to license individual jurists, whose absence from the sources is not explained.

¹¹³ GIBBON, *op. cit.*, p. 392.

¹¹⁴ Kunkel admitted that it is a modern interpretation that Augustus granted the licence to some particular jurists, because the text did not say so specifically. He thus tried a new approach: Augustus did not give the privilege to all jurists, but all jurists had to be licenced. As in Mommsen's theory, the *iis respondendi* was exclusive: those who did not have it simply were not jurists. KUNKEL, *Wesen*, *op. cit.*, pp. 436-441.

¹¹⁵ MAGDELAIN, *op. cit.*, pp. 19-22. According to his calculations, about half of the known jurists from the reign of Augustus until the reign of Diocletian had the *iis respondendi*. Non-practicing lawyers, such as Gaius, did not have it.

¹¹⁶ CANCELLI, *op. cit.*; FÖGEN, *op. cit.*, pp. 205-206.

of known recipients leaves only the possibilities of total freedom and total control.

One of the apparently incurable dilemmas of Pomponius's text is that on the one hand Sabinus of the order of knights was the first to respond publicly and this privilege was given to him by Tiberius, but on the other hand, Augustus initiated the privilege¹¹⁷. This was from Karlowa onwards resolved with a genial stroke of conjecture: Augustus had given the privilege only to senators and Tiberius gave it to the first non-senator, Sabinus¹¹⁸. Kunkel's reconstruction was that Augustus wished to restore the authority of the law by returning it to the hands of the senatorial class¹¹⁹. Wieacker and Bauman have noted how most of the jurists in Augustus's inner circle (such as Trebatius, Ofilius and Alfenus) were actually knights, which makes it hard to understand why Augustus should have angered his closest allies by establishing a privilege they were not eligible to apply for¹²⁰.

Again the situation calls for either a total control or the total lack of it to enable the main theories to conform with the sources, which do not mention a single jurist holding the privilege except Sabinus. Either the privilege had to be strictly exclusive, which would mean that all jurists had to be licensed, as the Kunkel-Magdelain theory proposed, or completely inclusive, so as to include every lawyer, as de

¹¹⁷ De Visscher tried to solve this dilemma by claiming that the passus in Pomponius that others have interpreted as Augustus giving the privilege as a *beneficium* actually refers to Tiberius. DE VISSCHER, *op. cit.*, pp. 626-628. Pomponius's text from *ex illo tempore* onwards actually refers to Tiberius *Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit.* D. 1.2.2.49.

¹¹⁸ KARLOWA, *op. cit.*, p. 661; KIPP, *op. cit.*, p. 109; KRÜGER, *op. cit.*, p. 124; KÜBLER, *op. cit.*, p. 257.

¹¹⁹ The great senatorial jurists of the Republic were primarily responsible for the extensive authority of the law. As Cicero (*off.* 2.65) states, this authority had been compromised by the social rise of ignorant, upstart equestrian lawyers. Returning the initiative in legal matters to the senatorial class was totally in line with Augustus's principate, which, according to Kunkel, restored the Republic by restoring the influence of the Senate. KUNKEL, *Wesen*, *op. cit.*, pp. 451-456; KUNKEL, *Herkunft*, *op. cit.*, p. 284.

¹²⁰ WIEACKER, *Augustus*, *op. cit.*, pp. 346-347. Bauman even proves statistically that Kunkel's main thesis, the rise of the senatorial class to prominence in early Principate, is false. BAUMAN, *Empire*, *op. cit.*, pp. 17-21. Cf. also SCHÖNBAUER, *Zur Entwicklung*, *op. cit.*, p. 226; PARICIO, *op. cit.*, p. 93. Later Wieacker made a surprising and unexplained reversal to the senatorial theory in WIEACKER, *Respondere*, *op. cit.*, pp. 92-93.

Visscher said, or none, as Cancelli and Fögen have proposed. This dilemma is the main obstacle to the very credibility of the institution. The second main problem, the question of who was the first to grant the privilege, Augustus or Tiberius, provided the impulse for the senatorial theory. Its erosion by Kunkel with the admission that imperial control did not prevent all non-licensed jurists from practicing law somewhere is symptomatic of the decrease of the credibility of total control. The beneficiary is the conception of juristic freedom, which is vital to the patriotic narrative of the jurist's profession.

The effect of the privilege was one of the earliest points of discussion of the *ius respondendi*. Did the *responsa* of the jurists with *ius respondendi* have a binding effect on the judges? Did the *responsa* have effects beyond the individual case they were addressing, did they create law?

The presumed effect of the *ius respondendi* changed according to the trends. During the absolutist period the word of the emperor had the status of law, it created law, and thus lawyers speaking with the authority of the emperor created law. This produced the practical problem of contradictory and binding *responsa*, if two or more lawyers spoke with the authority of the emperor¹²¹. However, the proposition that the *responsa* were binding on the judges was largely accepted and disseminated¹²². Puchta confused the situation even more by dividing the authority of the lawyer into an inner authority arising from the skill of the lawyer, and an outer authority derived from imperial authorisation¹²³. Unresolved practical problems led to the

¹²¹ For instance Samuel STRYK, *Specimen usus modernus pandectarum I*, Halle 1713, pp. 48-49, pondered at length how the binding nature of the *responsa* and their mutual relations were dealt with in ancient Rome and in his contemporary Germany.

¹²² THOMASIUS, *op. cit.*, pp. 67-72; HEINECCIUS, *op. cit.*, pp. 100-101; BACH, *op. cit.*, p. 217; GIBBON, *op. cit.*, p. 393. Only HUGO was puzzled by the fact that the classical jurists did not devote a single line to what a judge should do in the case of contradictory *responsa*. HUGO, *op. cit.*, p. 337.

¹²³ The inner authority of the respected jurist added the persuasiveness of his arguments, while the outer authority of the licensed jurist gave his opinions the officially binding effect. This binding effect covered all legal opinions given by the *iuris auctores* as well in their other writings. PUCHTA, *Cursus*, *op. cit.*, pp. 326-7.

rejection of universal binding effect in the early 20th century¹²⁴, and henceforth the idea of binding effect in the single case based on imperial authorisation prevailed¹²⁵. Magdelain demonstrated that the jurists did not exercise imperial power, which could have been interpreted as legislative, but gave binding *responsa* as authorised by the emperor¹²⁶. This was opposed by the advocates of juristic freedom, who claimed that all *responsa* were mere recommendations in the manner of Republican jurisprudence, and that the *ius respondendi* provided only added authority¹²⁷.

¹²⁴ MOMMSEN, *op. cit.*, II, p. 912 agreed to the binding effect but did not see a difference to the *responsa* of the Republic. KARLOWA, *op. cit.*, pp. 659-662 started to question the practical implications of Puchta's universally binding effect, such as that it would have been immensely unpractical if every single utterance of a jurist would create law. Furthermore, it would also have removed the possibility of scientific discussion and critique among the jurists. HELSSIG, *op. cit.*, p. 1332 agreed to a binding effect in the case it was connected only. COSTA, *op. cit.*, p. 77 still held that both the *responsa* and other writings had "un valore obbligatorio". KIPP, *op. cit.*, pp. 110-113: the emperor did not even have legislative power to grant to others; KRÜGER, *op. cit.*, pp. 120-122; BERGER, *op. cit.*, pp. 1165-1166; WENGER, *Praetor*, *op. cit.*, p. 108; Leopold WENGER, *Institutionen des Römischen Zivilprozessrechts*, München 1925, p. 194; KÜBLER, *op. cit.*, pp. 256-257. HAHN, *op. cit.*, p. 74 is an individual thinker, claiming that unanimous *responsa* not only had the force of law but were also binding on the emperor.

¹²⁵ DE VISSCHER, *op. cit.*, p. 623; SIBER, *op. cit.*, p. 402 believed that *responsa* became binding only with the rescript of Hadrian. GUARINO, *op. cit.*, p. 416: Tiberius gave Sabinus the first binding *ius respondendi*.

¹²⁶ He wrote that the words *ex auctoritate principis*, as proven by epigraphic evidence, were used to convey an imperial order. This order was used in the *ius respondendi* to authorise jurists to give *responsa*. MAGDELAIN, *op. cit.*, pp. 7-12. This theory was later adopted by PROVERA, who claimed that the otherwise uncomfortable Inst. 1.2.8 was merely a fiction used by Justinian to justify the use of juristic writings as sources of law. PROVERA, *op. cit.*, pp. 347-350, 355. In the most recent literature the binding effect in the single case has been almost universally accepted both on the account of the emperor's *auctoritas* and the testimony of G. 1.7. KUNKEL, *Herkunft*, *op. cit.*, pp. 282-283; BRETONE, *op. cit.*, pp. 245, 248; WIEACKER, *Respondere*, *op. cit.*, pp. 92; BAUMAN, *Empire*, *op. cit.*, p. 12; PARICIO, *op. cit.*, pp. 96-97.

¹²⁷ SIBER, *op. cit.*, p. 401; SCHULZ, *op. cit.*, p. 113: "The jurisconsult remained simply a private citizen; he was not a magistrate, but he spoke *ex auctoritate principis*, and this would be an inducement for praetor and iudex to accept his opinion, although they were not legally bound to do so." Because it has been widely accepted that at the time when Gaius was writing the privilege had a binding effect, the notion of its non-binding effect has continued only in the transformation theories. For instance, Guarino's idea that Augustus's *ius respondendi* was a non-binding social recognition that was gradually transformed to a binding force has been accepted by PARICIO. GUARINO, *op. cit.*, p. 415; PARICIO, *op. cit.*, pp. 93-94.

The sovereign authority of the emperor and the legal authority of the lawyer would seem incompatible. The patriotic narrative managed to combine these in an interesting way. Either the emperor was sovereign and granted the jurists the power to create law, thus raising their influence, or the professional authority of the jurist prevails and the imperial privilege was merely an added bonus. The jurists's profession stands to gain every time. The debate over universal or individual effect was a testing ground on the limits and practical implications of jurist's law¹²⁸. The patriotic narrative derived its force from the idea of jurist's law, but the assumption that every uttering of every single licensed jurists could create law was much too impractical to gain popularity. The opposite view that the privilege only gave added *auctoritas*¹²⁹ to the opinions of the jurist on its own part reinforced the autonomous authority of the profession in contrast to the external authority of the emperor.

Although Pomponius quite clearly stated the motives of Augustus in founding the *ius respondendi*, scholars have been rather sceptical of whether raising the authority of jurisprudence was really the main objective. Most of them have suspected Augustus of ulterior motives, such as wanting to use jurists as his servants or to seek the support of the profession for his political agenda.

Nearly all writers after Huber from the 17th century onwards have believed that Augustus intended to enslave the jurists for his own

¹²⁸ One of the more creative attempts to solve the problem was de Visscher's theory that during the reign of Augustus jurists submitted their *responsa* to the emperor to have them validated. Tiberius then formed the *ius respondendi* as a privilege that was granted to jurists until further notice as he withdrew to Capri. DE VISSCHER, *op. cit.*, pp. 623-626. P. 623: "L'autorité du Prince n'étant pas attachée à la personne du jurisconsulte, il faut bien qu'elle ait été imprimée au *responsum* lui-même." This was proposed also by VON PREMERSTEIN, *op. cit.*, p. 204 because of the magnitude of the power given in the *ius respondendi*. Kunkel condemned this theory as ludicrous, although his opinion was based more on his conviction of the jurist's status than on the actual evidence. He considered that it was completely impossible even to speculate that the proud men of the Republican opposition, such as Labeo and Casellius, would humble themselves in front of the hated emperor with their *responsa*! KUNKEL, *Wesen*, *op. cit.*, pp. 427-429.

¹²⁹ Wenger, whose opinion on the matter vacillated, stressed that *auctoritas* was just a social and political power and would not directly lead to any legal consequences. von Premerstein concurred, the binding effect was only produced by the jurist's own *auctoritas* and any imperial licence would merely serve as an added recommendation. WENGER, *Praetor*, *op. cit.*, pp. 105-107; VON PREMERSTEIN, *op. cit.*, pp. 203-204.

purposes. With astonishing unanimity, the core of jurist historians from Thomasius to Fögen have affirmed that the authority of the jurists or the law was not in need of promotion, quite the contrary, Augustus was trying to steal the glory of the jurists¹³⁰. Only Bauman objects arguing that the jurists lured Augustus into the whole affair¹³¹.

The second motive, the claim that Augustus was in fact seeking the support of the jurists, a sideline to the conspiracy theory popular from the early 20th century onwards, further emphasised the power of the jurists¹³². This conviction was also invariably linked to the ardent defence of the independence of the profession¹³³. Whether the *ius respondendi* was a great challenge to the independence of the profession or not seems to depend mostly on whether a scholar believes Augustus succeeded in its introduction. Recent scholars seem to think that he at least tried to harness the profession¹³⁴.

The explanation of Pomponius that Augustus wanted to raise the authority of the law was accepted during the 16th century, discredited, and returned to sporadically, mostly with the help of Cicero's ridicule of the lawyers of his time¹³⁵. Its derivation, the explanation that

¹³⁰ THOMASIUS, *op. cit.*, pp. 69-70; HEINECCIUS, *op. cit.*, pp. 100-101; GIBBON, *op. cit.*, pp. 392; BACH, *op. cit.*, pp. 217-218; PUCHTA, *Cursus*, *op. cit.*, p. 324; MOMMSEN, *op. cit.*, p. II, 912; KARLOWA, *op. cit.*, pp. 659-662.

¹³¹ BAUMAN, *Empire*, *op. cit.*, pp. 21-24: Jurists close to Augustus actively sponsored and supported the institution and were the main beneficiaries. If Augustus had some agenda, it was perhaps gaining a patronage over the profession.

¹³² HELSSIG, *op. cit.*, pp. 1331-2; KIPP, *op. cit.*, p. 109: "Die Macht, welche die Juristen durch die Erteilung von Rechtsgutachten über die Bevölkerung hatten, mußte es dem Kaiserstum wünschenswert erscheinen lassen, die Jurisprudenz zur Freundin zu haben und sie zugleich in Abhängigkeit vom Kaiser zu bringen." KRÜGER, *op. cit.*, p. 120; HAHN, *op. cit.*, pp. 73-74; KÜBLER, *op. cit.*, p. 257; VON PREMERSTEIN, *op. cit.*, p. 203; KUNKEL, *Herkunft*, *op. cit.*, p. 286; WIEACKER, *Respondere*, *op. cit.*, p. 92; BAUMAN, *Empire*, *op. cit.*, pp. 21-24.

¹³³ BERGER, *op. cit.*; KÜBLER, *op. cit.*, p. 257; SCHULZ, *op. cit.*, p. 112; MAGDELAIN, *op. cit.*, p. 3; CANCELLI, *op. cit.*, p. 543; FÖGEN, *op. cit.*, p. 205; CANCELLI, *op. cit.*, p. 543: the sacred independence and objectivity of jurisprudence and its status as the voice of justice and law would never have subjected to political pressure!

¹³⁴ PARICIO, *op. cit.*, p. 95; FÖGEN, *op. cit.*, p. 205.

¹³⁵ THOMASIUS, *op. cit.*, p. 69 with references to earlier authors and Cicero. BACH, *op. cit.*, pp. 217-218: the authority of the law and the dignity and splendour of jurisprudence had been damaged during the civil wars of the Republic; KUNKEL, *Wesen*, *op. cit.*, pp. 451-45: the incursion of equestrian lawyers had debased the authority of the jurists.

Augustus wanted to enhance the authority of the jurists, arose from Ferrini's edition of Pomponius and enjoyed brief acceptance¹³⁶.

The main question about the motives of Augustus in creating the *ius respondendi* is not whether he tried and succeeded in subjugating the jurist's profession, it is how the emperor could serve the profession. While the earliest authors believed that Augustus succeeded in corrupting and subjugating the jurists, later this defeatist view was not compatible with the patriotic narrative. As if by common agreement, nearly all interpretations of Augustus's motives seem to glorify the jurists. Augustus either failed to repress the powerful jurists's profession, or he was actually asking for their support and in return granted them the privilege. In some versions, Augustus acted as the jurists's loyal aid, either helping them to purge unsuitable elements from the profession or generally to increase their authority.

Did the *ius respondendi* come to an end after the reign of Tiberius, as is alleged by the advocates of juristic freedom, or did it continue to evolve, as Gaius and the Institutes of Justinian seem to claim? The theory that the jurists were opposed to the emperors is strengthened by the various stories about the late Julio-Claudian emperors. Similarly, Hadrian becomes the liberator of jurisprudence from the works of Gibbon onwards. Later on, it is explained that Hadrian abandoned the *ius respondendi* in favour of imperial constitutions.

With the evolution of the institution, there are several questions of chronology. Augustus is generally credited with the founding of the *ius respondendi*. Because Tiberius was mentioned by Pomponius as granting the first privilege to Sabinus, the question has been what it was that Augustus did? Numerous explanations have sought to rationalise the primacy contradiction by making Augustus and Tiberius either granting different things¹³⁷ or to different people¹³⁸.

¹³⁶ *Digesta* (ed. BONFANTE, FADDA, FERRINI, RICCOBONO, AND SCIALOJA), Milano 1931, p. 36 included an addition of the word *consultorum* after *iuris*, so that the text read as *ut maior iuris consultorum auctoritas*. HELSIG, *op. cit.*, pp. 1331-2; DE VISSCHER, *op. cit.*, pp. 617, 623: Augustus wanted to increase the authority of the jurists by helping them find the most equitable solution and avoid unfruitful disputes; SIBER, *op. cit.*, p. 400; BRETONE, *op. cit.*, pp. 246-248: because Pomponius generally speaks of the authority of the jurists, *auctoritas* had to be connected with an *auctor* and there was no need to raise the authority of the law.

¹³⁷ BACH, *op. cit.*, pp. 218, 221: Sabinus was the first to grant *responsa signata*. DE VISSCHER, *op. cit.*, pp. 621-622 and SIBER, *op. cit.*, p. 401: Augustus authorised

The problem with these explanations is that they have difficulties in explaining the change that was involved, for instance Bauman imagines a grand restructuring of the privilege, whereas Wieacker thinks that the *ius respondendi* died out after Tiberius¹³⁹.

The discussion of the fate of the *ius respondendi* after Tiberius has been dominated by Suetonius's passus about Caligula oppressing different professions. By most accounts this marks the beginning of the crisis of the institution, during which the *ius respondendi* was either banned¹⁴⁰ or not sought by the best jurists¹⁴¹. As none of the sources mention the *ius respondendi* during the later Julio-Claudians, these theories have been under some criticism¹⁴².

individual *responsa* and Tiberius gave a *beneficium*. GUARINO, *op. cit.*, p. 415: Augustus gave a social privilege and Tiberius started the real *beneficium*. SCHÖNBAUER, *Zur Entwicklung*, *op. cit.*, p. 227.

¹³⁸ The extension of the privilege to the knights, see KIPP, *op. cit.*, p. 109; KRÜGER, *op. cit.*, p. 124; KUNKEL, *Wesen*, *op. cit.*, p. 455; PROVERA, *op. cit.*, pp. 354-5.

¹³⁹ PARICIO, *op. cit.*, pp. 93-94, 101: The desire to attribute some reform to Tiberius to do is only natural, cf. also BRETONE, *op. cit.*, p. 247. BAUMAN, *Empire*, *op. cit.*, pp. 57, 63-67: something had gone wrong with the *ius respondendi* during the reign of Tiberius, as a great number of contradictory laws is mentioned. Tiberius was unhappy with the concept of *auctoritas* or giving the right to respond in his authority, which is why he gave only a right to respond *publice* or *populo*, publicly or to the people. Therefore, it is possible that Augustus gave Trebatius the old *auctoritas* version and Sabinus was the first to receive the new *ius respondendi*. BAUMAN dates this change between 23 and 31 AD. WIEACKER, *Respondere*, *op. cit.*, p. 93.

¹⁴⁰ BACH, *op. cit.*, p. 218: Caligula wanted to get rid of the *responsa* of the jurists; DE VISSCHER, *op. cit.*, pp. 630-632: Caligula, Claudius, and Nero envied the influence of the jurists and with some probability banned the *ius respondendi*; Sen. *apocol.* 12.2 *iuris consulti e tenebris procedebant pallidi graciles, vix animam habentes, tamquam qui tum maxime reviviscerent*. The jurists celebrated the funeral of Claudius. The above quoted Suet. *Cal* 34.2 describes how Caligula persecuted lawyers along with other professions. See also Tac. *Ann.* 16.9; Suet. *Nero* 37; D. 1.2.2.52. Cf. MAGDELAIN, *op. cit.*, pp. 14-15.

¹⁴¹ SCHULZ, *op. cit.*, p. 113: "Like so many of Augustus' creations, this institution did not endure long. Under his successors some of the outstanding lawyers, being in opposition, probably preferred not to ask for imperial authorization, but to give their *responsa* in the proud old republican fashion, *propria auctoritate*." Under the hostile reigns of Claudius and Galigula the privilege was probably forgotten. Similarly WIEACKER, *Respondere*, *op. cit.*, pp. 80-83 wondered why there is no trace of the *ius respondendi* between the reigns of Tiberius and Hadrian, as Suet. *Cal.* 34 is clearly not about the privilege.

¹⁴² HUGO, *op. cit.*, p. 338: there is no way to deduce from Suetonius what Caligula really wanted to do to the jurists; BAUMAN, *Empire*, *op. cit.*, pp. 130-133: the hostility of the later Julio-Claudians is a myth.

Pomponius's narrative continued until the reign of Hadrian. The mysterious *viri praetorii* ask for the right to respond and are given a rather curious answer. Gibbon wrote, reflecting Heineccius, that "Hadrian restored the freedom of the profession to every citizen conscious of his abilities and knowledge."¹⁴³ Heineccius's reinterpretation of the *ius respondendi* was transmitted through Gibbon to Haubold and Hugo, to fit the image of the age of the Antonines as the most auspicious of humankind. Whitman wrote that during the late 18th and early 19th century imperial revival, Augustus was replaced by Hadrian, who liberated the lawyers by granting the *ius respondendi* according to merit, not blind loyalty. The jurists were again their own masters, commanding a high social status because of their learning and skill¹⁴⁴.

Since then, deciphering what Hadrian did has filled most scholars with near desperation¹⁴⁵. From Hugo and Puchta onwards the theory of a privilege earned by merit has become the standard solution¹⁴⁶. Parallel to it has continued the theory that Hadrian actually abolished the whole institution and completely ended state involvement¹⁴⁷. Some have also suggested that Hadrian deceived the praetorians or denied their request on different grounds¹⁴⁸. Bauman believes that

¹⁴³ GIBBON, *op. cit.*, p. 392.

¹⁴⁴ WHITMAN, *op. cit.*, pp. 84-89.

¹⁴⁵ PUCHTA, *Cursus*, *op. cit.*, p. 324; KRÜGER, *op. cit.*, p. 123; KARLOWA, *op. cit.*, p. 661: Hadrian first confirmed the institution but later eliminated it; DE VISSCHER, *op. cit.*, pp. 634-638.

¹⁴⁶ PUCHTA, *Cursus*, *op. cit.*, pp. 324-325: Hadrian informed the men that the *ius respondendi* was not purely a *beneficium*, an honour, but an acknowledgement of skill that was placed in the service of others. GUARINO, *op. cit.*, pp. 417, 419; MAGDELAIN, *op. cit.*, pp. 16-18; KUNKEL, *Herkunft*, *op. cit.*, pp. 295-296; PROVERA, *op. cit.*, pp. 355-356; BRETONE, *op. cit.*, pp. 249-254; BAUMAN, *Empire*, *op. cit.*, pp. 287-304.

¹⁴⁷ PUCHTA, *Cursus*, *op. cit.*, pp. 324-325: Hadrian freed the right to respond from the emperor's power; SCHULZ, *op. cit.*, pp. 113-114; SCHULZ, *op. cit.*, p. 118 on *concilium*: "Its establishment by Hadrian is the counterpart of his codification of the Edict and his disuse of the *ius auctoritate principis respondendi*. The ancient right of the jurists to apply and develop the law was respected, but the bureaucratic tendencies of the times demanded centralization and officialization. The ancient aristocratic jurisprudence was gradually coming to an end."

¹⁴⁸ KIPP, *op. cit.*, p. 111, and F. PRINGSHEIM, *Legal policy and reforms of Hadrian*, *Journal of Roman Studies* 24 (1934), p. 148: Hadrian misunderstood the praetorians on purpose and verified their right to respond in private instead of the *ius respondendi*. KRÜGER, *op. cit.*, p. 123: the emperor merely confirmed the free right to respond without the *ius respondendi*, and nothing was granted. KUNKEL, *Herkunft*,

Hadrian wanted to depoliticise and professionalise the institution as a part of his judicial reform, which he carried out in coordination with the jurists¹⁴⁹.

How long did the *ius respondendi* continue? Puchta wrote that the privilege continued uninterrupted and last person to have it was Innocentius, who lived during the reign of Diocletian, which has been accepted with reservations by those who believe that the privilege outlived Hadrian¹⁵⁰. Whether the famed jurists Papinian, Ulpian, Paul and Modestinus had the privilege is uncertain, as is reported by

op. cit., pp. 295-296: the emperor's reply was a friendly denial, a suggestion that through serious study one might reach the level of proficiency needed to have the *ius respondendi*. WIEACKER, *Respondere*, *op. cit.*, p. 92 suggested that the praetorians were in fact trying to resurrect an old and obsolete privilege, which the emperor deftly denied. PARICIO, *op. cit.*, pp. 103-105: the whole passage is an amusing episode meant to demonstrate that the *ius respondendi* was granted to only a very select few, probably members of the *concilium*. DAUBE, *op. cit.*, pp. 511-517 considered that the men in fact asked for the renewal of *beneficia* that had ceased with the death of Trajan. Hadrian answered that he would renew the *beneficia* in due time. BRETONE, *op. cit.*, pp. 249-254 dismissed Daube's explanation because the verb *praestare* was never used in the renewal of *beneficia*.

¹⁴⁹ BAUMAN, *Empire*, *op. cit.*, pp. 287-304. Bauman refutes the majority of theories proposed by earlier scholars because they do not fit his master theory. BAUMAN, *Empire*, *op. cit.*, p. 320 on his grand theory: "The Principate was ready for a restructured legal system, and the lawyers were ready to supply it. Thus the main impetus now came from the profession itself - not entirely a new phenomenon, since the lawyers (or at any rate a segment of them) had promoted the *ius respondendi* and the schools from the start, but now their initiatives were more deliberate and more comprehensive. Behind every reform-minded emperor stood a group of legal luminaries. Imbued with a new professionalism, aware of the growing sophistication of their thinking and writing, conscious of the new juristic autonomy stemming from the *ius respondendi*, alive to the new opportunities for new men in all spheres of post-Julio-Claudian Rome, jurists like Pegasus, Iavolenus, Neratius, Celsus filius and Julian began pressing for a new kind of *cursus honorum* adapted to their special skills. They persuaded the emperors to restructure the *ius respondendi* and the consilium principis, to give them systematic entry into the senate, and to open wide the doors of the imperial service. Hence such innovations as Pegasus' urban prefecture, the first to be held by a jurist and probably the first to be held without a prior consulship."

¹⁵⁰ G. F. PUCHTA, *Nachträgliches über das Ius respondendi*, in *Kleine Zivilistische Schriften* (reprint of the 1851 original), Aalen 1970, pp. 297-299; PUCHTA, *Cursus*, *op. cit.*, p. 324: Gaius's use of present *est* and Justinian's use of past *erat* must mean that the *ius respondendi* was brought to an end sometime between them. The continuous use was accepted by WENGER, *Praetor*, *op. cit.*, p. 108; DE VISSCHER, *op. cit.*, pp. 634-638; BAUMAN, *Empire*, *op. cit.*, pp. 287-304.

Kunkel. Puchta notes that someone like Ulpian as praetorian prefect hardly needed any additional authority¹⁵¹. This theory has since then been unchallenged¹⁵².

The whole discussion of the continuation of the institution highlights the problematic nature of the evidence. The traditional explanation of Pomponius's text is that the *ius respondendi* continued from Augustus until Hadrian, who discontinued granting it as a privilege. How is this compatible with the interpretation that Gaius 1.7 spoke of the *ius respondendi* as an existing institution?¹⁵³ This means that as some explanations started with the assumption that the institution never existed in practice, or at least fell into disuse after Tiberius, they were at pains to explain Hadrian's involvement and the possible existence of the institution at the time of Gaius. Then again, if one advocates for the continuing use of the institution, how can complete silence of all other sources be explainable for one and a half centuries?

The situation is impossible to solve with a single stroke of genius, but it does provide the patriotic narrative of the jurists's profession with several uplifting examples. The juristic opposition to the dictatorship of the later Julio-Claudian emperors has been used to prove the independence of the profession. Hadrian's reply to the praetorians has been seen as an indication that he accepted Putcha's division of legal authority into the external authority of the emperor and the internal authority of the skilled jurist and held the latter in greater esteem. The versatility of the patriotic narrative is in its ability to simultaneously present parallel alternatives.

Conclusions

The tradition of the *ius respondendi* of Augustus is based on Pomponius's *Enchiridion*: Augustus, to enhance the authority of the law, established that opinions might be given under his authority. Other than this, the Roman sources are indecisive and unclear. The traditional sources, Pomponius, Gaius and the Institutes of Justinian are promising, but beyond that there is a void.

¹⁵¹ PUCHTA, *Nachträgliches*, *op. cit.*, p. 302; KUNKEL, *Herkunft*, *op. cit.*, p. 303.

¹⁵² KRÜGER, *op. cit.*, p. 296; SCHULZ, *op. cit.*, p. 114; BAUMAN, *Empire*, *op. cit.*, pp. 287-304.

¹⁵³ WENGER, *Institutionen*, *op. cit.*, p. 312; DE VISSCHER, *op. cit.*, p. 648.

This contradiction is clearly reflected in the literature from the 16th century to the present. The earliest authors followed the traditional sources quite literally, while recent scholars have been increasingly sceptical.

What is more noteworthy is that the interpretations of *ius respondendi* have followed the general trends of law in an intriguing fashion. Most of the interpretations proceed from a certain view of the Augustan Principate and then explain the passage accordingly. The 16th century elegant jurisprudence stressed the significance of the jurist's abilities, while 17th and 18th century absolutist authors followed the dictum that the word of the emperor was law. From the late 18th century onwards the freedom of the jurists returned and law flowed again as jurist's law.

The two main theories visible in the literature, the one emphasising the freedom of jurisprudence and the one stressing the power of the emperor are at closer examination two sides of the same coin. Both reflect a self-aggrandising form of historiography, a patriotic narrative of the jurists. The narrative subject of the good emperor stressed how the emperor never wanted to interfere in the activities of jurists, whereas the theme of the malevolent emperor pointed out how, in spite of his intentions, he was unable to do so because of the great authority of the jurists.

What was not distinguished in the formulation of these main theories was the amount of preconceptions needed to reach the basic propositions of nearly every solution proposed. The narratives form frameworks of interpretation, that guide scholars to their foregone conclusions. Most researchers simply accepted that the jurist's law was a certain thing with certain components and then proceed to determine the existence of these components. There are present, in the explanations, various types of presuppositions on the roles of the emperor and the jurists that can be traced back to earlier traditions. For instance, the theme of the bad emperor can be traced back to the 16th century, as can the argument for the importance of the jurist's law.

As we have traced the Roman sources and the history of interpretations of the *ius respondendi*, should we be able to say something conclusive about the historical events in themselves? In my opinion, no. The *ius respondendi* remains an unsolved puzzle by its

very nature. The value of the *ius respondendi* and its power as a catalyst seems to be based on the ambiguous nature of the evidence, which has elicited such a wide variety of interpretations. Therefore, all new attempts at a conclusion simply extend the long line of conjecture quite like their earlier predecessors.

The ambiguous nature of the *ius respondendi* highlights with clarity the patriotic narrative of the jurist's profession, the modern ideal of the autonomy of law projected into the past. The imaginable historical events behind the tradition have been completely separated from the interpretative tradition that has been created on its sources.