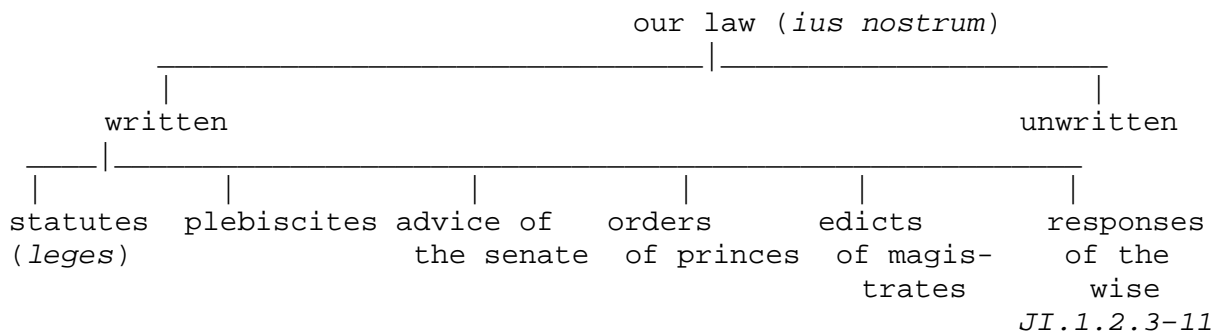


OUTLINE — DISCUSSION CLASS 2

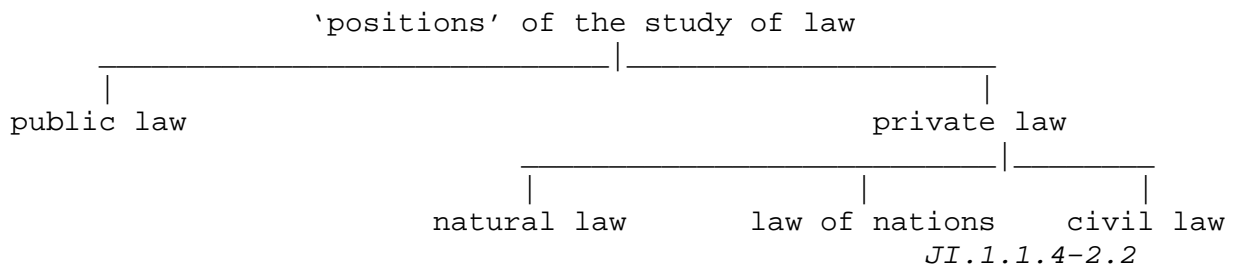
I posted on the [web](#) a set of schematics for Justinian's *Institutes*. It is much more elaborate than the one that we looked at in Lecture 2. Learning this scheme and its terminology will repay itself handsomely, not only for this course or any future work that you might do in legal history, but also for modern European law. Much of this terminology is still with us today. I do not, however, want to spend the whole class (or even half of it) focusing on the details of this scheme. Please feel free to ask questions at any time about any of it that puzzles you. Our focus, however, will be, once more on the basic categories: *ius* vs. *lex*; public law vs. private; persons, things, and actions; individual things, things in the aggregate, and obligations; contract and delict. The more we think about these distinctions, the more puzzling they are; yet they have shaped legal thought in the west for centuries. In this context I would like to look at the legacy of Roman law on our specific topics: marriage, wild animals, and witnesses.

Major Categories in Justinian's *Institutes*

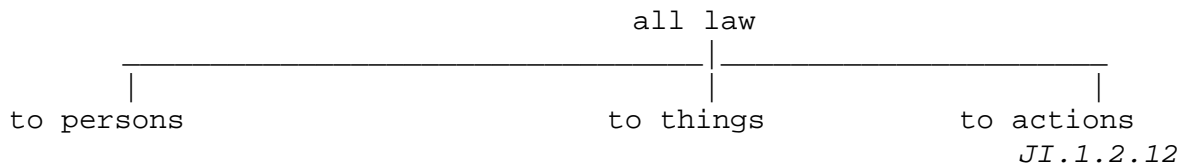
1. *Ius* vs. *lex*. This isn't even in the scheme. It's simply fundamental to the language. The only place where J uses the word *lex* in the sources of law section is where he is referring to the Republican statutes.



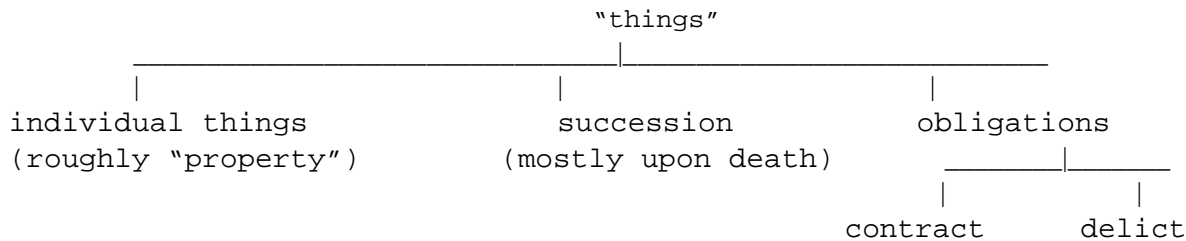
2. Public law vs. private law. What's the problem with this distinction?



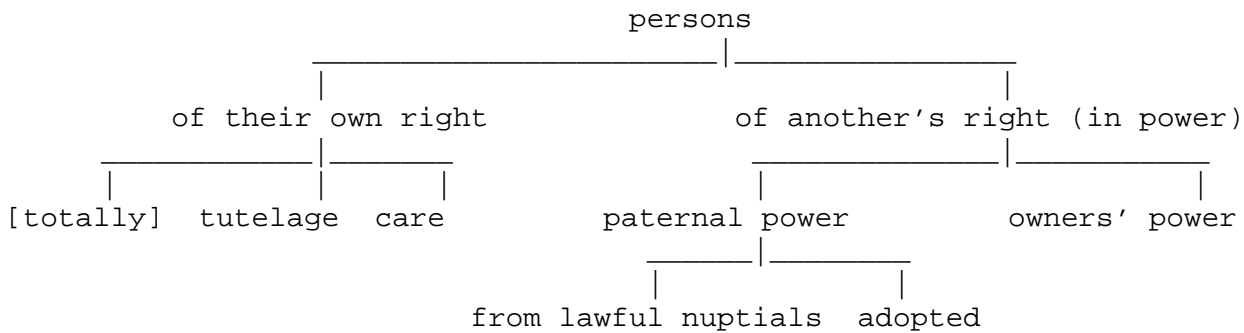
3. Persons, things, and actions. Capacity, substantive rights and remedies, procedure. What's the problem with making these distinctions?



4. Acquisition of individual things, acquisitions of things in the aggregate, obligations (i.e., contract and delict). *In rem* vs. *in personam*.



5. Where do you think the provisions in JI on the formation of marriage go?



JI.1.8-26

6. JI on the formation of marriage (1.10, i.e., book 1, section 10):

“Roman citizens are joined together in lawful wedlock when they are united according to law, the man having reached years of puberty, and the woman being of a marriageable age [Other texts tell us that these ages are presumptively 14 and 12.] whether they be *sui iuris* or *in potestate* [all Roman children of whatever age were in the power of their fathers as long as the father was alive, unless the child were expressly emancipated.] provided that in the latter case they must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law. [The consent of the husband and wife seems to be presumed. Parental consent is clearly important.]”

7. Austrian Civil Code of 1811:

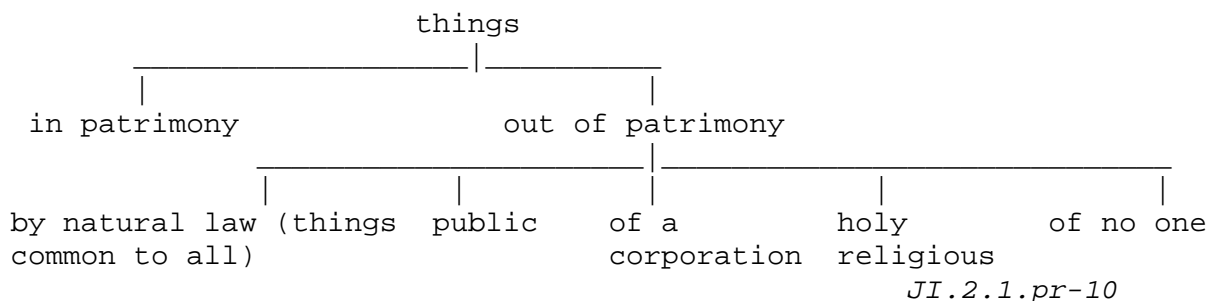
49. Minors [defined in c.21 as those under 25], as well as persons, who have attained their majority, but who for whatever reason, are not able alone to conclude a valid obligation, are likewise incapable of marrying without the consent of their legitimate father. If the father is no longer alive, or incapable of representing his children, besides the declaration of the proper representative, the consent of the tribunal is required for the validity of the marriage.

71. The publication of the banns must take place on three sundays or holidays before the usual congregation of the parish, and when each of the persons intending to marry live in another parish, before the usual congregations of both parishes. For marriages between non-catholic Christians, the publication of the banns must take place not only in their meetings for the celebration of divine service, but also in those catholic parish-churches, in the district of which they live; and for marriages between Catholic and non-Catholic Christians, both in the parish-church of the Catholic, and in the prayerhouse of the non-catholic party, as well as in the catholic parish-church in the district, in which the latter lives.

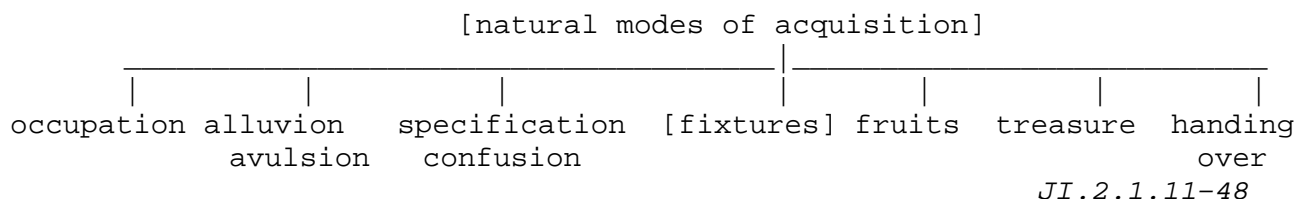
75. The solemn declaration of consent must take place before the proper guardian of souls

of one of the persons intending to marry, whether his denomination, according to the difference of the religion, be parson, pastor or otherwise, or before their representatives, in the presence of two witnesses.

8. Before J. and G. get to the *res corporales/res incorporales* distinction, they both make another distinction, principally, it would seem, for excluding topics from the book:



9. J. then deals (as Gaius had not, though it is in G. at a later point) with the “natural modes of acquisition,” and the connection is almost certainly our old friends the wild animals, who are at once *res nullius* and are naturally acquired by *occupatio*.



10. Let us take a look at the “natural mode” of acquiring wild animals. J.I.2.1.12ff (p. I-22):

“Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner. So far as the occupant’s title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man’s land for the sake of hunting or fowling, the latter may forbid him entry, if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it. It has been doubted whether a wild animal becomes your property immediately [when] you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of the opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it. Bees, again, are naturally wild ... [skipping to the end of the section]. A swarm which has flown from your hive is considered to remain yours so long as it is in your sight and easy of pursuit: otherwise it belongs to the first person who catches it.”

11. Austrian Civil Code of 1811:

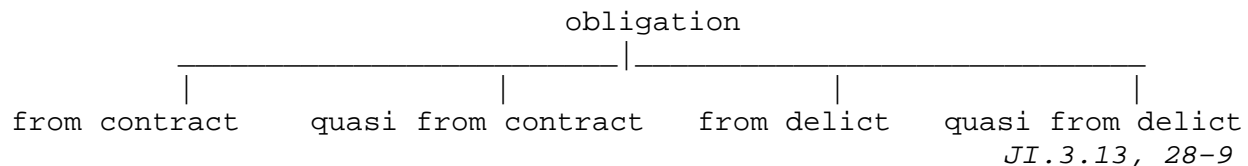
381. For vacant (*freistehenden*) things the title consists in the inborn liberty to take possession of them. The mode of acquisition is occupancy, by which one seizes a vacant thing with the intention to treat it as his own.

382. Vacant things can be acquired by all members of the State by means of occupancy, insofar as this right is not restricted by political laws (*politische Gesetze*), or insofar as some members do not have the privilege (*Vorrecht*) of occupancy.

[c. 383 emphasizes that there are a lot of ‘political laws’ that deal with hunting and fishing.]

384. Domestic swarms of bees and other animals, which are tame or have been tamed, are not an object of the free catching of animals; on the contrary the proprietor has the right to follow them on the land of another person, but he must make up any damage caused to the proprietor of the land. In case the proprietor of a bee-hive kept for breeding has not followed the swarm within two days; or in case an animal, which has been tamed, has remained away of itself for forty two days, every one can take and keep it on common ground and the proprietor on his land.

12. The notion of obligation is never defined in the classical texts. J.3.13 is justly famous and is his own: “An obligation is a legal bond, with which we are bound by necessity of performing some act according to the laws of our State.” For Justinian obligations are then divided:



13. I dealt with J’s scheme of procedure in the lecture, and I won’t repeat what I said here, unless there are questions. We should, however, note that there’s nothing about witnesses in the *Institutes*. Does anybody have any idea why? There are, however, titles on witnesses in both the *Digest* and the *Code*, both of which are included in full in Chapter 1 of the *Materials*. P. I-33 and I-35. By comparison with the title on marriage, the *Digest* title is very short. Why? What little material that there is is late. One can tell this by looking up the names of the jurists.

14. We’ll get to this only if there’s time (Daniel 13):

In Babylon, Susannah, the daughter of Hilkiah and the wife of Joachim, was the object of the lust of two elders of the people. They trapped her in her garden where she was taking a bath alone and told her that they would accuse her of being with a young man if she did not have sexual relations with them. She screamed, and the elders appeared before the people and accused her of committing adultery with the (fictitious) young man. As we pick up the story, Susannah, being led to execution, cries out to God for help:

The Lord heard her cry **45** and, as she was being led away to die, he roused the holy spirit residing in a young man named Daniel **46** who began to shout: ‘I am innocent of this woman’s death!’ **47** At this all the people turned to him and asked, ‘What do you mean by that?’ **48** Standing in the middle of the crowd he replied, ‘Are you so stupid, children of Israel, as to condemn a daughter of Israel unheard, and without troubling to find out the

truth? Go back to the scene of the trial: these men have given false evidence against her.'

51 All the people hurried back, and the elders said to Daniel, 'Come and sit with us and tell us what you mean, since God has given you the gifts the elders have.' **51** Daniel said, 'Keep the men well apart from each other, for I want to question them.' **52** When the men had been separated, Daniel had one of them brought to him. 'You have grown old in wickedness,' he said, 'and now the sins of earlier days have overtaken you, **53** you with your unjust judgments, your condemnation of the innocent, your acquittal of the guilty, although the lord has said "You must not put the innocent and upright to death." **54** Now then, since you saw her so clearly, tell me under what sort of tree you saw them lying under.' He replied, 'Under an acacia tree.' Daniel said, 'Indeed, your lie recoils on your own head:¹ the angel of God has already received from him your sentence and will cut you in half.' **56** He dismissed the man, ordered the other to be brought and said to him, 'Son of Canaan, not of Judah, beauty has seduced you, lust has led your heart astray! **57** This is how you have been behaving with the daughters of Israel, and they have been too frightened to resist; but here is a daughter of Judah who could not stomach your wickedness! Now then, tell me what sort of tree you surprised them under.' He replied, 'Under an aspen tree.' **59** Daniel said, 'Indeed! Your lie recoils on your own head: the angel of God is waiting with a sword to rend² you in half, and destroy the pair of you.'

60 Then the whole assembly shouted, blessing God, the Saviour of those who trust in him. **61** They turned on the two elders whom Daniel had convicted of false evidence out of their own mouths. **62** As the law of Moses prescribes, they were given the same punishment as they had schemed to inflict on their neighbour. They were put to death. And, thus, that day an innocent life was saved.

¹ A play on words in the Greek.

² Another play on words in the Greek.