

I. GAIUS' *INSTITUTES* – GENERALITIES

1. What we are going to do in the next three weeks.
 - a. This part of the course, paradoxically, may be easier for non-lawyers than for American lawyers.
 - b. We have a taxonomy but we are ashamed of it.
 - c. A focus on categories can make one think that the basic categories are static or inevitable, or that lawyers live in a world all by themselves, or that categories necessarily determine results. None of these things is necessarily true, and you have to do more to do real legal history, but this is an important part.
 - d. The point about basic categories is that they are basic. That means that they may be simply assumed and not thought too much about or at all.
2. How we are going to do it.
 - a. Gaius' *Institutes* (GI) – the most important
 - b. Justinian's *Institutes* (JI) – only where he says something different from Gaius
 - c. Barry Nicholas's *Introduction to Roman Law* – to answer questions that G. and J. don't answer
 - d. Lectures and classes will focus on the organizational scheme of Gaius using the charts in the *Materials* (Sec. 3C, starting on p. 257).
3. Justinian, *Institutes* 1.1: JI begins with some material that is not in GI.
 - a. JI offers some jurisprudential maxims (JI.1.1pr–1, 3) that do not tell us anything about the way in which the book is organized and then states a fundamental division of law (JI.1.1.4) that does:

“The study of law consists of two branches, law public (*ius publicum*), and law private (*ius privatum*). The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen.”
 - b. This distinction does not appear anywhere in GI. It may not have been so common in Gaius' time as it was a couple of generations later.
4. Public vs. private (*publicum* vs. *privatum*): history of Latin terms
 - a. Appears early and often in Latin in the context of rites (*sacra*), a road (*via*), a field (*ager*), or just property (*res*)
 - b. Public courts (*iudicia*) vs. private courts
 - c. “Public law cannot be changed by private agreement” (D.50.17.45)
 - d. *Ius publicum* vs. *ius privatum* is first found in non-juristic writing (e.g. Cicero); Livy refers to the XII Tables as “the fountain of all public and private law”
 - e. The distinction appears sufficiently often in juristic writing that we are probably safe in concluding that it is not an interpolation. That does not mean, however, that it was necessarily very precise
5. Public vs. private: Ulpian, *Institutes* 1 (D.1.1.1.2) (underlining indicates words carried over into JI)

Of this subject there are two departments (*positiones*), public law and private law. Public law (*publicum ius*) is that which regards the constitution of the Roman state, private law (*privatum ius*) looks at the interest of individuals; as a matter of fact, some things are beneficial from the point of view of the state, and some with reference to private persons. Public law is concerned with sacred rites, with priests, with public officers. Private law [JI: “Of private law then we must say that it”] has a threefold division, it is deduced partly from the rules of natural law (*ex naturalibus praeceptis*), partly from those of the *ius gentium*, partly from those of civil law (*civilibus*).

- a. Ulpian’s use of the word *positio* may indicate that he is thinking that you can look at law from two points of view, public or private, an idea not too far from our own.
 - b. He then goes on to suggest, however, that public law deals with particular legal topics: religion, priesthood, and the magistracies. On the basis of what we find elsewhere in the jurists we can broaden this to say that public law topics are what we would call religious, criminal, administrative or regulatory, or constitutional law.
6. Public vs. private: in general and in the jurists
- a. The jurists did not deal with these topics in any detail. They largely confined themselves to those things (excluding criminal law) about which a private party could sue: property, torts, and contracts, family law, commercial law, and wills, trusts, and estates
 - b. The public/private distinction in modern law has been criticized. The unconscious purpose of the distinction, it has been argued, is to mask the policy nature of what the state is doing in the area of private law and to prevent the consideration of broader public-policy concerns in that area. The distinction, as we have seen, goes back to the Romans, and we rarely find the jurists discussing what we would call public policy in the context of private law, though public policy may lie behind some of their decisions.
 - c. The function of the distinction in the Principate may have been to make the jurists feel, and to some extent to be, more autonomous. The jurists were a Republican institution. They survived into the Principate. In an increasingly autarchic world, they carved out private law as their special preserve, and if they could not prevent the emperor from dealing with it, they at least saw to it that he consulted with them before he did.
7. Sources of law: GI.1.1: Gaius begins with, and Justinian continues with, something about sources of law. The Gaius passage we have already seen:
- “1. Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius ciuile* (civil law) as being the special law of that *ciuitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of mankind. This distinction we shall apply in detail at the proper places.”
8. Sources of law: JI.1.1.4, 1.2pr–1: What Justinian has is something of a mess:
- “Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.”

“The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law by the knowledge of which we see even the lower animals are distinguished.”

“1. The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations. Thus the laws of the Roman people are partly peculiar to itself, partly common to all nations; a distinction of which we shall take notice as occasion offers.”

Jl.1.1.4 and Jl.1.2pr are quotations from Ulpian’s *Institutes* (D.1.1.1.2 and 1.1.1.3). Jl.1.2.1 , except for the first sentence, is a quotation from Gl.1.1. But Gaius and Ulpian were not saying the same thing. Ulpian has a tripartite distinction: law of nature, law of nations, and civil law; Gaius has a bipartite distinction: law of nations and civil law. Ulpian’s distinction derives from the Stoic philosophical tradition, Gaius’ from the Peripatetic and, ultimately, the Aristotelian tradition.

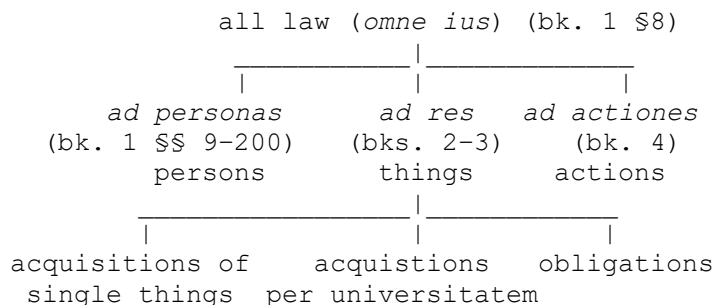
9. Sources of law: natural law, *ius gentium*, and civil law

Because of the authoritative nature of Jl, these passages were, for a time, a source of massive confusion. Ultimately, they proved fruitful, because it meant that later ages had to figure out for themselves what the role of natural law and *ius gentium* should be for them. For the Roman and Byzantine jurists, it is not clear that it made much difference. Classical Romans tended to be eclectic in their philosophy. Justinian (Jl.1.3.2) will later say that slavery is not a matter of natural law but was introduced by the *ius gentium*. That is a Stoic idea, not an Aristotelian one. Both the classical and the Byzantine jurists were quite comfortable saying that their law was a mix of *ius civile* and *ius gentium* and/or *ius naturale*, and then went on to expound what that law was without much regard to its origins. This is a topic to which we can, and probably should, come back at the end of the course.

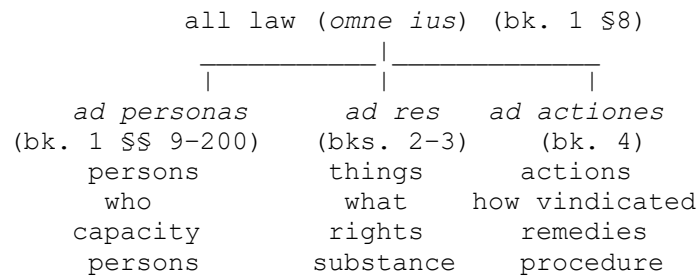
10. Basic categories: Gl.1.8

“The whole of the law (*omne ius*) observed by us relates either to persons (*ad personas*) or to things (*ad res*) or to actions (*ad actiones*).”

Justinian says the same thing quoting Gaius. J. may have meant it to apply only to private law, but he does not say so. It is not clear that G. does not include public law in the tripartite division, though he does not mention public law here, and he does not focus on it anywhere in the book. He does not have the brief title that J. has at the end on criminal law (Jl.4.18), though G. does mention criminal law a couple of times in passing.



About a third of the way through book 3, Gaius says "Let us proceed now to obligations. These are divided into two main species: for every obligation arises either from contract or from delict" (GI.3.88). Gaius then proceeds to consider contract and delict in some detail.



- a. Today we think very little about the law of persons. The 14th amendment has a great deal to do with that; so does liberalism. Maine's great shift from status to contract. For G., and to a large extent for J., the 'who' question is so vital that (1) it must be dealt with first and (2) its consequences need hardly be talked about. Put another way the 'what' question concerns Roman citizens, in their own power (*sui iuris*), and largely male. This does not mean that only they had rights, but we can be sure only of them. Others we must ask about.
 - b. The legal realists have taught us the danger of distinguishing between substantive rights, on the one hand, and remedies, on the other. A substantive right is no good unless it can be enforced, and how it will be enforced is critical to understanding the nature of the right. We will have to put it to one side for now with the caveat that we will argue later that separating substance from procedure was characteristic of the institutional treatises and of post-Classical writing (because the *extraordinaria cognitio* was not integrated back into the substantive system), but that it was not characteristic of juristic writing in the classical period
 - c. If we look at this trichotomy from a critical viewpoint, we might say that its function is to create a false consciousness. By splitting off persons from rights and remedies, we make rights look better. In the case of the first distinction we mask the fact that very few people have the full panoply of rights. In the case of the second we mask the fact that rights require state enforcement. As to the second I've already suggested that there are some historical reasons why we may believe the dichotomy is overemphasized, though to the extent that it is true we are dealing with the cutting edge of the public/private distinction. Indeed it's even worse because of the problems of enforcement. The legal system may be closed when there are great wealth disparities, as there were in Rome.
 - d. As to the distinction between capacity and rights, I must protest, at least so far as Gaius is concerned, for very little as to capacity is found in bk. 1; some of it falls by the wayside, some of it (quite a bit actually) is in books 2, 3, and 4, For example, GI.2.62-4 deals with capacity to alienate, GI.2.80-96 with acquisition through others, subjects that have substantial parallels in JI.2.8 and .9. The principal and almost exclusive concern of GI.1 is the acquisition and loss of status
11. Some characteristics of the *ius personarum*
- a. The law of persons is not a category either of the *ius civile* or of the *edictum perpetuum*. Some have even suggested that the phrase 'law of persons' (*ius*

- personarum*) in Gaius is an interpolation. It seems, however, pretty basic in the three places where it occurs (GI.1.9, 1.48, 2.1).
- b. The law of persons seems to be built out of some pretty fundamental social stuff – the jurists did not have much power to change it even if they had wanted to.
 - c. The focus in GI on acquisition and loss of status is (1) characteristic of Roman legal writing generally; they frequently say more about getting into and getting out of a category than they do about what’s in the category, and (2) at least in the case of the law of persons the substance may be too obvious to state.
 - d. For G. it is hard to see how distinction between capacity and substance masks anything. For J. this is less obvious. J. tries to argue, for example, that he has made things better for those in the lower-status categories without ever talking about the distinction between rich and poor.
 - e. There may be a danger in not having an express law of status – the liberal fallacy: “The law in its even-handed majesty forbids both rich and poor from sleeping under bridges and begging for bread.” In our own time we have re-introduced the law of persons, with courses on women and the law; race, racism and the law; poverty law; children and the law
12. The same order of topics as in GI is preserved in JI, and the same topics are covered, though the division into books is not quite the same. J. also considers some topics that Gaius does not. We were comfortable saying for G. that persons, things, and actions maps onto who, what, and how vindicated. For the most part G. deals with the categories, their creation and extinction, but not their content. For example, he does not define paternal power (*patria potestas*). He assumes that you know what it is and asks how do you get it and lose it. In J., however, G’s organization and purpose gets blurred because J. treats, to some extent, the substantive rules, particularly with regard to persons.
13. Before we get into Gaius’ scheme for persons, I want to deal with some fundamentals that may, in the long run, prove more fruitful for explaining how the mechanisms for acquiring and losing status and much else came about. All of these moves are described in Gaius, though he does not tell us in every case just what words were used. They probably all antedate the 1st c. BC. Some of them are very old indeed, and they totally ignore the distinctions between and among persons, things, and actions.
- a. We have seen the *legis actio sacramentum in rem* before. It comes out of book 4, the procedure book. “The plaintiff says:¹ “I say this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have placed my rod on him.” The defendant says the same thing, and after a further exchange, the case goes to trial. (GI.4.16).
 - b. Now let us imagine that the plaintiff says the same thing as in the previous case, but here the defendant doesn’t answer or confesses the claim. Let us also imagine that the defendant is, in fact, the owner, but he has just failed to defend his right before the praetor and the judgment goes for the plaintiff by default. What the defendant has just done is convey his property to the plaintiff. This is known as ‘cession in court’ (*in iure cessio*). Gaius first mentions it in the context of transferring a guardianship (*tutela*)

¹ Hunc ego hominem ex iure Quiritium meum esse aio secundam suamcausam. Sicut dixi, ecce tibi vindictam imposui.

- (GI.1.168). The normal method of transfer of property was by handing it over (*traditio*). But you can't hand over a *tutela*; it's incorporeal. So, with a couple of exceptions, *in iure cessio* was the only way of conveying incorporeals. In fact, however, it could be used to transfer anything for which a claim of ownership lay, corporeal or incorporeal.
- c. Now let us imagine that the property in question is a slave, and the plaintiff does not claim that he owns the slave, but that the slave is, in fact, free. Any free man could make such a claim. If the owner of the slave conceded the claim, the slave is now a free man. This is 'manumission by the staff' (*manumissio vindicta*) (GI.1.17, .18, 1.20).
 - d. The scene now changes. We are no longer before the praetor but in the presence of five witnesses and a man holding a scales, all of whom are male Roman citizens above the age puberty. The purchaser of the slave recites the beginning of the *sacramentum* formula: "I say this man is mine by Quiritary right." But then he adds "and be he purchased to me with this bronze ingot and bronze scale."² And he strikes the ingot on the scales. The result is that the slave is now owned by purchaser with full title peculiar to Roman citizens (Quiritary title), assuming that the seller had such title. (GI.1.119).
 - i. This was the only form of conveyance that was effective to convey Quiritary title to slaves, beasts of burden, Italic land, and rustic praedial servitudes (*res mancipi*).
 - ii. Now let us suppose that person being conveyed is not a slave but a son in the power of his father. A free man cannot become a slave in Rome, but the purchaser does acquire power over him. He may make him work for him, but he can't treat him as a slave. He is said to be *in mancipio* of the purchaser. A provision in the XII Tables said that if a father sold his son three times, the son would be freed from the power of the father. How does the father get him back so that he can sell him again? Well, one way would be if the father claimed him as a free man from the third party, and the third party conceded the claim. The first and the second time that this happens, the son returns to the power of his father. The third time it happens, the son is freed from the power of his father by the statute.
 - iii. Now what? Well, we can leave it right there. The son is now emancipated. (GI.1.132–33).
 - iv. Or we can add one more fictitious piece of litigation. A third-party who wants to adopt the son can claim that the son is, in fact, his son and in his power. The father concedes this, and the son has been adopted (GI.1.134).
 - e. *coemptio* – Marriage with *manus* was an archaic institution in which the wife left her family and joined that of her husband. She became, it was said, like a daughter to him, which seems to mean that she received an intestate share equal to that of a child of the marriage. The institution was barely alive in Gaius' time, but one of the ways in which a husband could acquire *manus* over his wife was by a form of imaginary sale, known as *coemptio*. We don't know the form of words used, but we can imagine what they might have been. Something like: "I declare that this woman is mine by Quiritary

² *Isque michi emptus esto hoc aere aeneaque libra.*

right, and be she purchased to me with this bronze ingot and bronze scale.” The result seems clear, the wife is now *in manu* of her husband. (GI.1.113, 1.123)

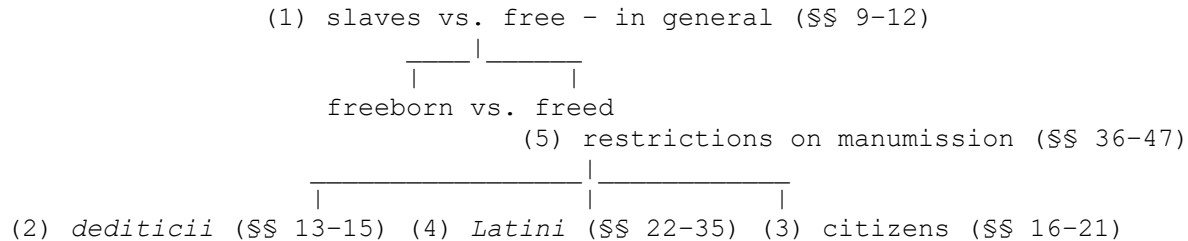
- f. Far more important in Gaius’ time was the testament by bronze and scale (*testamentum per aes et libram*). The usual six characters of a mancipation ceremony were joined by a seventh, known as the purchaser of the family (*familiae emptor*). The *familiae emptor* claimed to buy the testator’s *familia*, his entire estate, so that the testator could make a testament. (GI.2.104). All that is rather mysterious, and there is much speculation about what the function of the *familiae emptor* originally was. In Gaius’ time he simply said the words and struck the scales. Then the testator said what was really going on: “According as it is written in these tablets and on this wax, so do I give, so do I bequeath, so do I call to witness, and so, *Quirites*, do you bear me witness.”
- g. Not every society manipulates its institutions in the way that the Romans did. Perhaps the way that they both hung on to the past in ways that preserved institutions that had long ceased to be functional, but, at the same time, manipulated them to serve their current purposes gives us a clue as to why they became such good lawyers.

II. GAIUS’ *INSTITUTES* – PERSONS – PART 1 – SLAVE VS. FREE (GI.1.9–47)

- 1. Immediately above, we took a look at the general categories in Gaius, and we began an exploration of the law of persons by looking at the general category of the law of persons. We then showed how long before Gaius, the Romans had manipulated a basic formula in their law, “I say this man is mine by Quiritary right,” not only to create categories within the law of persons (emancipation, adoption, *manus*), but also within the law of property (conveyance of incorporeals and *res mancipi*) and succession (*testamentum per aes et libram*). Let us now explore what Gaius has to say in remaining sections of book 1, sections 9 through 200, the first eight sections having been devoted to generalities.
- 2. But first a generality of our own. What interests Gaius? What interests him is how you get into and how you get out of a category. This is a characteristic not only of Gaius’ mind but of Roman legal thought generally. Here are some consequences of this way of proceeding.
 - a. Keeping this in mind turns out to be a good way to explain why Gaius orders his material in the way that he does.
 - b. More broadly, it means that Roman law, like English, will develop by developing new categories not by revising old ones. Change happens when someone comes up with something in between or beside existing categories. An example in English law would be the development of the action on the case in the mid-14th century. An example in Roman law that we will come to shortly is the development of the category of Junian Latins.
 - c. Another way to put this is to say that not only for the jurists but also for those with the power to legislate fundamentals are not questioned. They are worked around. If you want to call this mystification you may, so long as you remember that Gaius, and, indeed, the whole society, was equally mystified.
- 3. The 191 sections in Gaius on law of persons are divided in two large groups. The first, and shorter, one, sections 9 through 47 explores the distinction between slave and free, and turns out to be almost entirely about the intermediate category of the freed, those who were not born free but became free, normally as the result of manumission. The second, and much longer, group, sections 48 through 200, explores the distinction between those who are *sui*

iuris, ‘of their own right’, and those who are *alieni iuris*, ‘of the right of another’. Here, too, what interests Gaius is not those who are totally of their own right, but those whose control of their affairs is somehow limited, and not those who totally in the control of another, but those who are in the control of another but not totally so.

4. Let us take a look at the specifics of the first group:



The section numbers show both the order of the material and the amount of space that Gaius devotes to each topic. The order of the material is also given in a number in parentheses that precedes each topic. *Dediticii* on the last line are manumitted slaves who did something, or were required to do something, in their careers as slaves that means that they can never become Roman citizens. *Latini* are the Junian Latins just mentioned.

5. The graphic illustrates the basic characteristics of Gaius’ thought: For G. slavery is given, as is free birth. It is the intermediate status that is spelled out. In the basic divisions, freeborn, freed, and slaves, it is the freed that get almost all the attention, both in the beginning and at the end. In the division of the freed, it is the intermediate category that interests G. *Dediticii* and citizens together take up less space than Junian Latins alone. If we have to summarize it generally, it is probably safe to say that Gaius is not really talking about the distinction between slave and free, he is talking about who among the freed is going to be admitted to the community as a citizen.
6. Justinian’s *Institutes* generally follows Gaius’ order and topics, but with some differences.
- a. JI.1.3–4 (≈ GI.1.9–11) add general remarks on slavery and how one is called freeborn (*ingenuus*).
 - b. JI.1.5, the general treatment of manumission (≈ GI.1.12–35), breaks Gaius’ order as does his abolition of the categories of *dediticii* and *Latini*. One might ask what effect this change has on the emphasis of the whole treatment of slave vs. free. It certainly makes is shorter.
 - c. J.1.6–7 parallel G.’s remarks on restrictions on manumissions (≈ GI.1.36–47), but J. repeals the *lex Fufia Caninia* making manumission look as if it were more more freely available.
7. One of the striking features of Gaius’ treatment of slave vs. free is how many statutes, *senatusconsulta* (S.C.), and imperial constitutions it cites. In chronological order:
- a. *l. Fufia Caninia* (2 BC) places limitations on the number of testamentary manumissions. The provisions are complicated, varying by the number slaves that the master has (GI.1.43). Even is he had more than 500, he could not manumit more than 100.
 - b. *l. Aelia Sentia* (4 AD) creates the category of *dediticii* and requires that manumissions of slaves under the age of 30 be made *vindicta* and before a *consilium* consisting of five senators and five equites. Those 30 or older had to be manumitted by one of the traditional forms, which carried a 5% tax.

- c. *l. Iunia ?Norbana* (perhaps 19 AD) creates the status of Junian Latins for those not *dediticii* whose manumission did not meet the requirements of the *l. Aelia Sentia*.
- d. Under the *l. Visellia* (c. 25 AD) anyone who being a freedman (*libertus*) who serves as a policeman for 6 years becomes a citizen. Notice the use of policy in the technical sense here. The rules of private law are being changed in order to achieve a public goal.
- e. Under an edict (*edicto*) of Claudius (41 X 54 AD) any Junian Latin who builds a ship that carries corn to Rome becomes a citizen.
- f. Under a constitution of Nero (*a Nerone constitutum est*) (54 X 68 AD) any Junian Latin who spends more than 100,000 sesterces on a Roman house becomes a citizen.
- g. The *S.C. Pegasianum* (72 AD, temp. Vespasian) extends the privilege of *anniculi causae probatio*, proof of the birth of a child who survived to the age of one year, to Junian Latins freed over the age of 30. The *a.c.p.* was previously available under the *l. Aelia Sentia* to those freed under the age of 30. Under it if the Junian Latin had married and produced a child who was one year old or older, he, his wife, and the child all became citizens.
- h. Under a constitution of Trajan (98 X 117, *Traianus constituit*) a Junian Latin who operated for three years a mill that ground 100 measures or more of corn daily became a citizen.

That public policy should be brought to bear on whether someone becomes a citizen is certainly not surprising. We have a tendency to regard the question of citizenship as being one of public law. There are even broad parallels between the encouragement of Junian Latins to do things that were regarded as being of public benefit and provisions of our own immigration laws and regulations.

Just what public policy is at stake in some of the provisions is more complicated. Some of the restrictions on manumission, particularly those of the *l. Fufia Caninia*, seem to have been designed to preserve a substantial portion of a decedant's estate for his heirs. Some seem designed to prevent the evasion of creditors. The *l. Aelia Sentia* and the *l. Iunia* clearly reinforce each other, but just what is being done and why is made unclear by the facts that we do not know for certain the date of the latter and that no surviving account compares the provisions of the two.

A policy reflected in the *anniculi causae probatio* is a major policy in the Augustan legislation on the family, the *leges Iuliae et Papiae Poppaeae*: the encouragement of child-bearing.

Behind much of this lies a concern that was particularly prominent in the late Republic and in the first century of our era: the proportion of freedmen in the society in that period was growing, and some of them were quite well off. Traditionalists, particularly in the upper-classes, were concerned that the society was changing, as indeed it was. At the same time, the society could no longer function without freedmen. For most of the first century, the imperial chancery was staffed largely with freedmen. The status of Junian Latins, then, reflects the ambivalence of the society toward freedmen, an ambivalence that even the mid-2d century Gaius may share.