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THE CIVIL LAW AND THE INNER SELF: ROMAN *INIURIA* AND THE TRANSFORMATION OF THE PRIVATE SPHERE

Talya Deibel*

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ABSTRACT

This paper focuses on the transhistorical nature of the protection of personality interests in the civilian tradition. It takes Roman iniuria as a key concept to analyze the legal protection of the "inner selves" of human beings. The legal framework of iniuria stands out as an illustration of how social and moral phenomena which belonged to the interior realm such as honor, dignity, emotions, and

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reputation carried legal value in Roman law. Starting from its origins in Roman antiquity, this paper views the inner self through the legal prism of personality protection and comments on how formative periods in history prepared the doctrinal basis for modern civil codes. In this context, Roman iniuria becomes an illustration of how private law transgresses the boundaries between the outer-the inner and the body-the mind. As such, this paper provides a broader vision based on comparative and historical methodologies to be able to analyze personality rights in the 21st century.

Keywords: defamation, iniuria, inner self, personality rights, private sphere, Roman law

I. INTRODUCTION

The natural person is a legal construct. Modern laws assume that the person is a corporeal and psychological being. First, the natural *persona* is an embodied creature; she has a body with physical boundaries. But she is more than just flesh and bones. The law assumes that this *persona* also has an "inner self": she has a deep and rich inner realm, which is ontologically hidden. This inner realm is a *forum internum*, composed of memories, thoughts, feelings, ideas, intentions, and so on. It is opaque and impenetrable.[1] We can trace the philosophical construct of an inner self back to ancient Platonist conceptions of the soul's inherent divinity.[2]

The normative relevance of the inner self in the European legal tradition is often attributed to the Neoplatonist reconceptualization of the soul and rationality in the medieval era.[3] However, Roman

1. For the evolution and nature of the idea of an inner self, *see* Patrick O'Callaghan, Talya Deibel, and Felicitas Benziger, https://perma.cc/7WRV-ZYXZ (last visited October 8, 2024).

2. Peter Petkoff, *Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights,* 7(3) RELIG. & HUM. RTS. 183 (2012).

3. Jeanne Gaaker, "*Sua cuique persona?" A Note on the Fiction of Legal Personhood and a Reflection on Interdisciplinary Consequences,* 28 L. & LITERATURE 287, 291-293 (2016).

law presents us with many examples where Roman jurists, through juridical creativity, developed special legal instruments to protect the personality interests which belonged to the inner realm. This paper presents an overview of the protection of the inner self in the civilian legal tradition, exploring in particular how the protection of personhood emerged in the Roman law of delict. So understood, the protection of the inner, intimate, and private sphere has always been part of legal personhood.

Modern laws protect the inner and outer aspects of personhood with various methodological tools. For instance, modern civil laws protect personality interests, which are directly related to the body and to the inner self through personality rights, most notably in the law of delict or tort law.[4] Personality rights are seen as products of Kantian-inspired German legal scholarship. They refer to a bundle of rights which aim to protect legal interests associated with personhood and, as such, which are closely tied to their holder.[5] They aim to preserve the physical and mental integrity of the *persona*. They protect the body, commercial credibility, social reputation, dignity, the emotional sphere, privacy, personal data and so on.[6]

Personality interests like honor, reputation, and dignity already had legal protection in Roman private law. For instance, the *actio iniuriarum* was a legal action given against an ancient Roman delict

4. It is important to note that 'delict' is a civilian concept. In the common law tradition, tort law is seen as the functional equivalent of the law of delict. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS. ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1031 ff (1992); AGNÈS LUCAS-SCHLOETTER, DROIT MORAL ET DROITS DE LA PERSONNALITÉ: ÉTUDE DE DROIT COMPARÉ FRANÇAIS ET ALLEMAND (Paris 1 2000); Gert Brüggemeier, *Protection of Personality Rights in the Law of Delicts/Torts in Europe: Mapping Out Paradigms* , *in* PERSONALITY RIGHTS IN EUROPEAN TORT LAW 1 (G. Brüggemeier, A. Colombi Ciacchi and P. O'Callaghan eds., 2010); Olivier Moréteau, *French Tort Law in the Light of European Harmonization*, 6 J. CIV. L. STUD. 759 (2013).

5. Elspeth C. Reid, *Personality Rights: A Study in Difference*, *in* MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 387 (V. Palmer and E.C. Reid eds 2010); Georgio Resta, *Personnalité, Personlichkeit, Personality: Comparative Perspectives on the Protection of Identity in Private Law*, 1 EJCL 215 (2014).

6. Roger Brownsword, *Human Dignity from a Legal Perspective*, *in* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY (M. Düwell et al. eds., 2014).

called *iniuria* (injury). This action had initially protected legal interests in the body (*corpus*). However, in the classical era, it had been extended to the protection of reputation (*fama*) and dignity (*dignitas*). Roman jurists built this legal architecture which primarily protected the "inner self". They granted legal protection against defamatory speech, insults, curses, or any other types of verbal abuse, which could cause harm to the inner self of the victim.

But this history should not just be of interest to legal historians. Rather, it has contemporary relevance for modern private law theory. Today, we are living in a digital age where emerging legal categories of personhood, AI-human interactions, or neuro-rights are being carefully debated.[7] For instance, the integration of AI technology into human bodies and minds blurs the lines between the inner and the outer realms.[8] This motivates legal scholars to search for new theories, conceptualizations, and categorizations to answer current legal challenges. Even though emerging technologies create new layers of complexities in the context of the protection of personhood, they primarily raise questions regarding the intangible aspects of legal personhood including personality rights, privacy, mental integrity, and pain and suffering. This paper proposes to revisit the foundations of private law, not only for intellectual curiosity, but rather also as a necessary step to provide theoretical depth for future legal debates. This requires exploring the distinction between "inner" and "outer" further in the Roman law of delict. In this

7. Marcello Ienca and Roberto Andorno, *Towards New Human Rights in the Age of Neuroscience and Neurotechnology*, 13 LSSP 1 (2017); Jan Christoph Bublitz, *Novel Neurorights: From Nonsense to Substance*, 15 NEUROETHICS 6 (2022); Talya Ucaryilmaz Deibel, *Back to (for) the Future: AI and The Dualism of Persona and Res in Roman Law,* 12 EJLT 1 (2021); Carlos Amunátegui Perelló, *Natural and Artificial Neural Networks: The Chilean Legal Framework*, 14 J. CIV. L. STUD. 355, 362 (2022); VISA KURKI, LEGAL PERSONHOOD (2023). Chile is the first country who provided explicit protection on mental integrity and brain data through a Constitutional reform in 2021. Chile's pioneering example should be considered in its relation to their established tradition of Roman law research and teaching in the law *curricula.*

8. CHARLES FOSTER AND JONATHAN HERRING, IDENTITY, PERSONHOOD AND THE LAW, 3-4 (2017).

context, the *actio iniuriarum* emerges as an indication of how the boundaries between the body and the inner self have always been artificial.

Roman law presents us with a high degree of epistemic continuity in respect of modern legal institutions that belong to the civilian tradition. For instance, Roman legal theories prepared the doctrinal basis for Kantian-inspired modern civil codes in Europe.[9] Scrutinizing *iniuria* shows that modern personality rights are not novel, but centuries-old products of the European legal heritage. Moreover, its legal evolution demonstrates a trans-European legal pattern on the conceptualization of the inner self and the legal protection of the interior realms of human beings. Accordingly, this paper traces the legal evolution of *iniuria* and *actio iniuriarum* back to Roman antiquity to demonstrate how the inner selves of the parties gradually became central in providing delictual protection. To illustrate this, it first explores the legal nature and doctrinal basis of *iniuria* in Roman law. Second, it demonstrates the forward-looking characteristics of *iniuria* in how it crosses boundaries between tangible and intangible realms. Third, it analyzes the protection of the private spheres in Rome and its relation to *iniuria*.

In this context, Roman *iniuria* stands out as the first legal symbol that transgressed the boundaries between the outer and the inner realms. In antiquity, social and ethical phenomena like honor, dignity, and commercial reputation carried legal value. The Roman understanding of *iniuria* bridges different legal interests in the body (*corpus*), reputation (*fama*), and dignity (*dignitas*). Moreover, this paper demonstrates that the legal evolution of *iniuria* is directly related to these social values which are seen as part of the inner realm. It is beyond doubt that these values were understood differently in different periods in Roman legal history. For instance, the archaic period, the classical period, and the Late Empire present us with different conceptions of how damage to personality and to

9. RESTA, *supra* note 5.

the "inner self" was understood. Moreover, the protection of personhood changed character in medieval law through the Christian re-contextualization of Roman law, and later through its re-interpretation in natural law doctrines.[10] The analysis of each formative period in the civilian legal history falls outside of the scope of this paper and requires further elaboration. Nevertheless, analyzing Roman *iniuria* through a transhistorical legal prism permits us to have a comprehensive overview of the legal conceptualization of the inner self and how it gradually became central in the protection of personhood. Even though the Roman understanding of the "innerness" was different than our modern approach, this analysis provides us with a valuable perspective to comment on the emergence and transformation of the "private" in European legal history.

II. MEANING OF *INIURIA*

Modern personality rights invoke dualism. For instance, the protection of personhood is often based on a separation between the mind and the body. However, Roman *iniuria* demonstrates that rigid boundaries were not central to private law. For example, the definition of *iniuria* was not very clear in Roman law.[11] It was context dependent. First, *iniuria* referred to the absence of law (*sine iure*) in general.[12] *Iniuria* also signified immorality in Roman law.

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10. *See* HUGO DONELLUS, COMMENTARII DE IURE CIVILI (1595), available at Munich Digitization Center (MDZ) Homepage (last visited 8 October 2024), https://perma.cc/DF6T-RK8Q; HUGO GROTIUS, DE IURE BELLI AC PACIS (Kessinger Rare Book Series 2010), GUIDO ALPA, THE RIGHT TO BE ONESELF 40 ff (2024).

11. For example, Terentius (190-159 BC) and Plautus' (254-184 BC) texts informed Roman law scholars to a great extent. ALAN WATSON, THE STATE, LAW, AND RELIGION: PAGAN ROME 17 (1992).

12. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1962) 215; Guiseppe Valditara*, Roman Law and Civil Law Reflections upon the Meaning of Iniuria in Damnum Iniuria Datum*, *in* WRONGFUL DAMAGE TO PROPERTY IN ROMAN LAW: BRITISH PERSPECTIVES (P.J. du Plessis ed., 2018) 224–254; MARIA FLORIANA CURSI, INIURIA CUM DAMNO (2002); Maria Floriana Cursi*, Les paradoxes de la typicité du système romain : l'exemple de la protection extracontractuelle du dommage,* 92 RHDFE 2, 5 (2014); Maria Floriana Cursi, *La formazione delle obbligazioni ex delicto*, 58 RIDA 143, 148 (2011).

It contained a range of tortious behaviors which were considered against good morals (*contra bonos mores)*.[13] Roman law was based on *mores civitatis*; general civic rules. These societal norms had been translated to the legal sphere by early legislative initiatives such as the Law of XII Tables (mid-5th century BC) in the early Roman Republic. For example, Table I-XIII-XV mentioned fixed penalties in case of personal injuries.[14] Morality was considered a source of law especially when regulating the private sphere such as family law and inheritance law. Legal acts *contra bonos mores* were deemed invalid.[15] Only in the Late Empire, did this intricate tie between its social, ethical, and legal meanings dissolve.

In contractual relations, requirements of morality were replaced by *bona fides* (good faith) and *aequitas* (equity). *Iniuria* was also a material reflection of *mala fides* (bad faith): it represented malicious behavior.[16] *Fides* was the Roman goddess who symbolized honesty and fidelity.[17] It signified *tacitum in pectore numen*, that is, the silent virtues with divine character, which belong to the inner world of man. The idea of inner virtues became central in Roman private law through the influence of Greek philosophy and Stoicism.

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13. David Ibbetson, *Iniuria, Roman and English*, *in* INIURIA AND THE COMMON LAW, (E. Descheemaeker and H. Soctt eds., 2013) 33-48; ZIMMERMANN, *supra* note 4, at 1005-59; D 47.10.15.2; 47.10.15.5; 47.10.15.38, Ulp.77 ad ed. (for the translations of the Digest texts, *see* ALAN WATSON, THE DIGEST OF JUSTINIAN (1998).

14. ERIC DESCHEEMAEKER AND HELEN SCOTT, INIURIA AND THE COMMON LAW (2013); ZIMMERMANN, *supra* note 4, at 1050 ff. However, in case of *"membrum ruptum"* (maiming of a limb), retaliation was suggested as a legal remedy.

15. ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW (1953) 413; D.28.7.15, Pap. 16 qua.

16. In Rome, wilfully acting against *bonos mores* was generally seen as sufficient and no further *animus iniurandi* was required. VALDITARA, *supra* note 12, at 226; FRITZ SCHULZ, CLASSICAL ROMAN LAW 597 (1951); NORBERT HORN, AEQUITAS IN DEN LEHREN DES BALDUS 7 (1968); TALYA UCARYILMAZ, BONA FIDES (2018); Mario Talamanca, *La bona fides nei giuristi romani: "Leerformeln" e Valori dell'Ordinamento, in* IL RUOLO DELLA BUONA FEDE OGGETTIVA NELL'ESPERIENZA GIURIDICA STORICA E CONTEMPORANEA, ATTI DEL CONVEGNO INTERNAZIONALE DI STUDI IN ONORE DI ALBERTO BURDESE (A. Burdese and L. Garofalo 2003), 1-312.

17. GERARD FREYBURGER, FIDES, ÉTUDE SÉMANTIQUE ET RELIGIEUSE DEPUIS LES ORIGINES JUSQU'À L'ÉPOQUE AUGUSTÉENNE 228 (1986); Roberto Fiori, *Fides et bona fides, hiérarchie sociale et catégories juridiques*, 86 RHDFE 465, 466 (2008); UCARYILMAZ*, supra* note 16.

More specifically, *iniuria* referred to a Roman delict: harm to body and the inner sphere of the *persona.* In the Roman context, bodies and inner selves only deserved protection through *iniuria* if the victim was a "person" in its technical legal sense. Our modern illustrations of subjectivity, personhood, and legal capacity are Roman. However, the Roman idea of "equality before law" was distinctly different from our modern understanding. Roman personhood was based on status. The status of liberty *(status libertatis)*, the civic status *(status civitatis),* and the family status *(status familiae)* defined legal subjectivity. One had to be a free citizen of Rome who is *sui iuris* (not subjected to another person's law) in order to be able to be considered as a person. Practically, this meant mostly free male citizens of Rome were considered as 'persons' whereas rest of the society were not far from being mere objects (*res*).[18] *Iniuria* protected personality interests of legal subjects in this stratified society of Rome. *Iniuria* had a double meaning: it referred to both an attack on one's personality and unlawfulness.

Yet, these were interconnected.[19] The rules about *iniuria* are

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18. Being considered *sui iuris* signified not being under the power of sovereignty (*patria potestas*) of another person. Women could also be *sui iuris* in Rome if they were not under the *patria potestas* of a *pater familias*. G.INST. 1.48 sq; Max Kaser, *Der Inhalt der Patria Potestas*, 58 ZSS 62, 63 (1938); Richard P. Saller, *Patria Potestas and the Stereotype of the Roman Family*, *in* 1 CONTINUITY AND CHANGE 7, 15 (1986); Lacey Walter Kirkpatrick, *Patria Potestas, in* FAMILY IN ANCIENT ROME: NEW PERSPECTIVES (R. Beryl ed., 1986) 121; JANE GARDNER, FAMILY AND FAMILIA IN ROMAN LAW AND LIFE 10 (1998); CARLOS FELIPE AMUNÁTEGUI PERELLÓ, ORIGEN DE LOS PODERES DEL PATERFAMILIAS; EL PATERFAMILIAS Y LA PATRIA POTESTAS (2009); SCHULZ, *supra* note 16, at 72; JANE GARDNER JANE AND THOMAS WIEDEMANN, THE ROMAN HOUSEHOLD: A SOURCEBOOK 5 (1991); GIOVANNI PUGLIESE, ISTITUZIONI DI DIRITTO ROMANO (2nd ed., 1992). Moreover, in Rome the word "*persona*" is even used to refer to slaves. A slave was both *persona* (person) and *res* (thing/object). *See* G. INST. 1.21. UCARYILMAZ DEIBEL, *supra* note 7; SCHULZ, *supra* note 16, at 72; WILLIAM W. BUCKLAND, THE ROMAN LAW OF SLAVERY 85 (2010); Jacob Stagl, *El concepto de persona y la filosofía del "impersonal" in* 2 PERSONA Y BIOÉTICA 278, 283 (2015); Carlos Felipe Amunátegui Perelló, *Archaic Ideas on the Concept of Libertas*, *in* LIBERTAS AND RES PUBLICA IN THE ROMAN REPUBLIC 16-17 (C. Balmaceda ed., 2020).

19. PAUL-LOUIS HUVELIN LA NOTION DE L' "INIURIA" DANS LE TRÈS ANCIEN DROIT ROMAIN (1903) 88-91, 108-131; GIOVANNI PUGLIESE, STUDI SULL'INIURIA, 14-16 (1941); SCHULZ, *supra* note 16, at 593.

mostly found in the *Corpus Iuris Civilis* (CIC), the primary compilation of Roman jurisprudence made during the reign of Justinian in the 6th century, in Constantinople. The motivation behind the compilation was to support a legal reform in Byzantium, and to revive legal practice and education of the classical era.[20] The CIC was used as the blueprint of modern private law codifications. It had been extensively studied in the medieval era and formed the theoretical core of European *ius commune*. In the early Middle Ages, the influence of medieval canon law was only confined to the Church. And only with the reception of Roman law did it start having a formative influence in the justice system.[21]

One of the main parts of the Justinianic compilation is called *Instititutiones* (Institutes). This part was initially designed as an introductory text which explains the basic structure of the legal institutions. *Institutiones* was based on a text written by the classical jurist Gaius which dates to 2nd century BCE. Gaius listed four kinds of delicts: *furtum* (theft), *rapina* (robbery), *damnum iniuria datum* (damage to property), and *iniuria* (damage to personhood). *Damnum iniuria datum* referred to harms to articles of property and this included slaves. In the 3rd century BCE, the famous *lex Aquilia*, which established the fundamentals of delictual or extra contractual liability, was introduced.[22] This law provided a compensatory remedy for injuries to slaves and as such, *iniuria* became exclusively for free subjects of law. Concepts like fault, wrongfulness, and causality had first emerged in the civilian tradition within this context. The action given by *lex Aquilia* initially included patrimonial loss (*damnum*) and later gradually widened its scope to include consequential economic loss, such as medical treatments or loss of earnings. While

20. Especially the period between 1st century BC and the second half of the 3rd century AD was emblematic. WILLIAM W. BUCKLAND, A TEXTBOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINANUS (1950).

21. Debora Shuger, *The Regulation of Language in Medieval Theology: The Summa Theologica of St Thomas Aquinas, in* CENSORSHIP MOMENTS: READING TEXTS IN THE HISTORY OF CENSORSHIP AND FREEDOM OF EXPRESSION 104-105 (G. Kemp ed., 2015).

22. ZIMMERMANN, *supra* note 4, at 1007 ff.

lex Aquilia protected patrimonial rights, *iniuria* protected personality rights.[23] Here too, the word *iniuria* signified damage inflicting behavior.

The second major part of the CIC was called *Digesta* (Digest). This part was designed as a collection of opinions and juristic writings of classical jurists. Many informing texts about *iniuria* can be found in Book XLVII of the Digest. However, these texts, as informing as they are, do not clearly demonstrate the precise nature of *iniuria*. According to Descheemaeker, they rather set the foundations of an open-ended principle in Roman law: "the body and the inner self should be protected." Through *iniuria*, legal interests that belonged to the inner and outer spheres of personality could find protection in Roman law. *Iniuria* could either be physical (like assault and battery) or non-physical/verbal (like libel and slander).[24] For example, as the classical jurist Ulpian had explained, *actio iniuriarum* (the legal action given against *iniuria*) covered three major legal interests: *corpus* (body), *fama* (reputation), and *dignitas* (dignity).[25] It is known that the application area of *actio iniuriarum* had expanded to a great extent particularly in the classical period through praetorian law and in the imperial era. Glossators and Canonists followed this pattern and protected legal interests which belonged to the inner realm such as hurt feelings, dignity, and honor through the law of delict. This Roman approach was also visible in the common law system. For instance, Blackstone categorized actions based on the interests they aimed to protect. The actions which protected "the personal securities of individuals" *de facto* provided personality protection. This included life, body, health, as well as reputation.[26]

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23. D. 47.10.1.3, Ulp. 56 ad ed.

24. *See also* PAULUS, SENTENTIAE, V.4.6. For the development of defamation laws in English law parallel to Roman *iniuria see* ZIMMERMANN, *supra* note 4, at 1074-75.

25. D.47.10.1.2, Ulp. 56 ad ed. "*omnem iniuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere*".

26. WILLIAM BLACKSTONE, COMMENTARIES 3, 119 (R. Burn ed., 1783).

III. PUNISHING *INIURIA*

Roman delicts had a dual character: they were hybrids with penal and compensatory functions. They were sometimes referred to as *delicta privata* (private crimes), as procedurally they were prosecuted privately. These delicts created private law obligations of extra-contractual nature. Yet, they had deterrent and punitive functions. For example, they were *de iure* neither actively nor passively transmissible. In other words, their actionability was closely tied to the personality of the wrongdoer. In the archaic era, for instance in the context of the Law of XII Tables, compensation was based on the amount of the damage.[27] Later through the legal reforms in praetorian law, penalties started to be flexibly determined by the judge. His discretion was based on the gravity of the conduct, social class of the parties, their relative economic situations, and so on. This practically meant that the penalty could be much higher than the actual damage, much beyond compensation.[28]

This was visible in the legal design of the *actio iniuriarum*.[29] While the Romans did not know the theory of rights, our modern understanding of rights has been developed through the prism of Roman procedural law. For example, the civil procedure of the classical era which was called "the formulary procedure" was central in the development of private law.[30] Formulary procedure introduced actions as primary means for legal protection and legal creativity. This was a two-step procedure. First, the plaintiff had to bring his claim to the attention of the high magistrate (*praetor*). If the *praetor* decided that there was a legal interest which potentially needed pro-

27. NICHOLAS, *supra* note 12, at 209-10; ZIMMERMANN, *supra* note 4, at 1050.
28. G. INST. 3.224.
29. BUCKLAND, *supra* note 20, at 589-90; ZIMMERMANN, *supra* note 4, at 1052.
30. SCHULZ, *supra* note 16, at 13 ff; ANTONIO BURDESE, MANUALE DI DIRITTO PRIVATO ROMANO 88 (1969); BUCKLAND, *supra* note 20, at 627; MARIO TALAMANCA, ISTITUZIONI DI DIRITTO ROMANO (2011), PAUL J. DU PLESSIS, BORKOWSKI'S TEXTBOOK ON ROMAN LAW 72 (2015); RENÉ ROBAYE, LE DROIT ROMAIN 43 (5th ed. 2016).

tection, he gave him a cause of action. This was done through a document called the *"formula"* which simply contained authorization and guidelines for the judge when deciding the merits of the case.[31]

In Roman law, the relationship between rights and actions was reversed. First came the action, later followed the right.[32] Having the *formula* potentially meant having a right. As such, most modern rights with private nature in European laws had been introduced through *formulas.* The term *actio* did not refer to a unified concept either. For instance, some of them established a property right (*actio in rem*) and some of them established a contractual right (*actio in personam*). *Praetors* could also create new action types through analogy (*actio utilis*), assumption (*actio ficta*), on case basis (*actio in factum concepta*) or simply based on equity and good faith (*actio in aequum et bonum concepta).* The *actio iniuriarum* was an example of the latter.[33] As such, it afforded the judge a high degree of discretion. For instance, the *formulas* replaced fixed penalties of the Law of XII Tables with damages assessed at the discretion of the judge.[34] The pecuniary award had been granted to the claimant to compensate him for a loss suffered and/or to punish the defendant for the wrongful conduct. This flexibility made private law more adaptable and productive in each new case. It also characterized the transhistorical elements of European law, based on equity and good faith.

Starting from the Late Empire, the formulary procedure started to be gradually replaced with a quasi-modern idea of civil and criminal procedure (*cognitio extra ordinem*). In this new procedure, the

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31. PUGLIESE, *supra* note 19, at 106.

32. Similarly, the common law was traditionally organized around particular actions. JAMES GORDLEY AND ARTHUR T. VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW: READINGS, CASES, MATERIALS 242 (2009).

33. PUGLIESE, *supra* note 19, at 106; MAX KASER, RUDOLF KNÜTEL AND SEBASTIAN LOHSSE, RÖMISCHES PRIVATRECHT 203 (21st ed., 2017); VINCENZO ARANGIO-RUIZ, ISTIUZIONI DEI DIRITTO ROMANO 142 (40th Ed., 2012). These distinctions disappeared in the Justinianic era.

34. DESCHEEMAEKER AND SCOTT, *supra* note 14; JOHN M. KELLY, STUDIES IN THE CIVIL JUDICATURE OF THE ROMAN REPUBLIC 40-70 (1976).

victim had the option to choose whether to seek a civil or criminal remedy.[35] This was also a defining moment for the establishment of clear boundaries between law of delict and criminal law.[36] The amplification of the criminal character of *iniuria* was a characteristic of the imperial authority. In the Late Empire, the distinction between the praetorian law and *ius civile* disappeared and public law became the central tool of governance. However, even though the civil and criminal procedures became increasingly separated from each other, the penal function of *actio iniuriarum* never disappeared. This provided a wide protective sphere against harm to personality, and through its abstract character, it kept its relevance.

Non-pecuniary loss such as damage from pain and suffering, loss of reputation, or damage to honor was primarily protected through this penal function of *iniuria.* In Roman law, the word *damnum* (damage) only referred to pecuniary loss. As such, immaterial loss did not create *damnum* in its technical sense. If the victim incurred any material loss, the award granted was seen as compensatory only up to the value of the *damnum*. Any amount above this was seen as having a punitive function. This does not mean that the *actio iniuriarum* was of purely penal character. Rather, it was an action with dual nature.[37] In case of damage to the inner self, its punitive aim became central in providing relief. This continued in the *ius commune* and was later transmitted to the early modern civil codes. The civilian tradition still reflects the punitive nature of *actio iniuriarum*.

Roman legal approach illustrates that material damage, which can easily be expressed in pecuniary terms, was seen as ontologically different to the damage to the inner realm. For example,

35. RAYMOND MONIER, MANUEL DE DROIT ROMAIN 45 (1954); TALAMANCA, *supra* note 30, at 67; ZIMMERMANN, *supra* note 4, at 1071; KASER, KNÜTEL AND LOHSSE, *supra* note 33, at 203.

36. GORDLEY AND VON MEHREN, *supra* note 32, at 242; ZIMMERMANN, *supra* note 4, at 1065.

37. DESCHEEMAEKER AND SCOTT, *supra* note 14; ZIMMERMANN, *supra* note 4, at 1053-62; SCHULZ, *supra* note 16, at 595-97.

Descheemaeker proposes using the term *solatium* to refer to compensation for emotional distress and injured feelings.[38] The term *solatium* belonged to the Roman social realm, rather than having a technical meaning.[39] In the medieval era, *solatium* had been stripped from its original Roman meaning and Christian ethics was introduced as basis of responsibility and moral agency. The responsibility was determined purely causally, based on piety and other Christian values. If one caused harm to another person's feelings, he had a moral responsibility to compensate it. For instance, in *De iure naturae et gentium* Pufendorf had repeated the famous maxim of Ulpian.[40] *"Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere."* (The purpose of the law is to live honestly, not to harm others, and to give everyone what they deserve.) Accordingly, the condition not to harm others (*neminem laedere*) became a general principle of medieval law and was treated as the basis of *actio iniuriarum*. For example, Thomasius, who was strongly influenced by Pufendorf, had used *solatium* in this context.[41] The medieval understanding of *solatium* was not an award given in return of a wrongful conduct. It rather referred to a consolation for the person who suffered. It was primarily awarded as part of the moral duty arising from being human and from piety.[42]

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38. *See*, RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1975).

39. Eric Descheemaeker, *Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Theory in* INIURIA AND THE COMMON LAW 67-95 (E. Descheemaeker and H. Scott eds., 2013). The term *solatium* was transmitted to English law via Scots law. Similarly, the Germanic reinterpretation of Roman law primarily excluded the Roman idea that immaterial personality interests such as honor and dignity can be expressed through pecuniary terms. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 823, 253. However, German BGHZ developed a standard practice of awarding compensation for non-pecuniary harm (as *solatium*) when the intrusion to the victim's personality right is objectively serious (*atrox*). ZIMMERMANN, *supra* note 4, at 1093; BUCKLAND, *supra* note 20, at 591.

40. D.1.1.10.pr, Ulp. 2 reg.; SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI VIII, (1672) available at Munich Digitization Center (MDZ) Homepage (last visited 8 October 2024), https://perma.cc/A7N3-DKD4.

41. Reinhard Zimmermann, *Usus Modernus Legis Aquiliae and Delictual Liability Today*, 1 STELLENBOSCH L. REV. 67, 109 (1990).

42. CHRISTIAN THOMASIUS, INSTITUTIONES IURISPRUDENTIAE DIVINAE (1688) II V 6; 11; 20; 21; 34 available at Munich Digitization Center (MDZ) -

Tracing down its legal evolution demonstrates that the penal characteristic of *iniuria* is directly tied to the protection of the inner self in modern laws.[43] Modern private law mechanisms also function as deterrents when it comes to the damages to the inner realm. One reason for this is that the damage to the inner self (to emotions, pain, suffering, feelings of dignity, honor, and so on) can never be accurately and objectively measured, and therefore properly compensated. This also shows that the centrality of property as a value has been prioritized over the centrality of the person when it comes to protecting the inner self.[44]

IV. INTENTION TO HARM

It was initially not clear whether the inner self of the wrongdoer was important in establishing the liability from *iniuria* in Roman law. In the early periods of Roman law, liability from *iniuria* was established objectively, solely by a causal relationship. The mental state of the wrongdoer, whether he acted intentionally or not, was not part of the primary discussion. However, over time, the objective standard of *iniuria* evolved into a rather subjective evaluation.[45] This subjective element referred to the psychological phenomena (thoughts, will, desire, purpose, intention) that belong to the inner sphere of the wrongdoer. Yet, objective and subjective elements have always been interwoven, and their relative weight were context dependent.[46]

During Rome's Republican period, the assessment of *iniuria* was reorganized around the inner state of the wrongdoer. However, every state of mind was unique and potentially unknowable. Intention was not a uniform phenomenon either. What could turn lawful

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Homepage (last visited 8 October 2024), https://perma.cc/A7N3-DKD4; VALDITARA, *supra* note 12, at 241.

43. D.47.10.1.1, Ulp. 56 ad ed.

44. VALDITARA, *supra* note 12, at 254.

45. ZIMMERMANN, *supra* note 4, at 1060; GORDLEY AND VON MEHREN, *supra* note 32, at 351.

46. ZIMMERMANN, *supra* note 4, at 1061.

conduct to an unlawful one was only 'degrees' of intent.[47] This phenomenon was referred as having *"infamandi causa"* (purpose to harm) in praetorian edicts.[48] While objective wrongfulness was determined based on the exterior materiality of an action; *infamandi causa* signified the inner realm. It signaled the intention (*dolus*) as a pre-condition of responsibility. For example, actions done in jest did not lead to liability.[49] The conduct was potentially actionable if the purpose of the wrongdoer was to bring material or immaterial harm to the victim.[50] The *praetor* had the discretion to refuse to give an action even if the defendant had acted *infamandi causa.* Yet, most of the times this resulted with a "presumption of intentionality" based on the typicality of the case.[51] This demonstrated the link between *iniuria* and the inner self in Roman law while bridging the gap between objective and subjective assessment of liability.

In the classical era, the subjective element belonging to the inner sphere was not enough to demonstrate the need for a legal remedy. The intention had to be materialized in the outer world through words or explicit/implicit actions.[52] Moreover, such conduct had to be potentially suitable to contribute to the creation of harm in the personality interests of the other party such as damage to the reputation or honor.[53] This is an example of classical Roman law's rela-

47. DESCHEEMAEKER AND SCOTT, *supra* note 14.

48. ZIMMERMANN, *supra* note 4, at 1056-57. For the historical development of *infamandi causa* as the foundation of the *iniuria* liability see Peter Birks, *Infamandi Causa Facta in Disguise*, ACTA JURIDICA 83, 100 (1976).

49. Helen Scott, *Contumelia and the South African Law of Defamation in* INIURIA AND THE COMMON LAW 119-139 (E. Descheemaeker and H. Scott eds., 2013).

50. DESCHEEMAEKER AND SCOTT, *supra* note 14; BIRKS, *supra* note 48, at 91-92.

51. ZIMMERMANN, *supra* note 4, at 1005-07; GORDLEY AND VON MEHREN, *supra* note 32, at 336. ZIMMERMANN, *supra* note 4, at 1066.

52. ZIMMERMANN, *supra* note 4, at 1067.

53. KARL LARENZ AND HANS WILHELM CANARIS, LEHRBUCK DES SCHULDRECHTS 413-414 (13th ed., 1994); GORDLEY AND VON MEHREN, *supra* note 32, at 358. For instance, persons in a position of authority such as clergymen were not presumed to have acted *animo iniurandi.* ZIMMERMANN, *supra* note 4, at 1067.

tionship with the inner realm and exterior world. Roman law attached legal consequences to phenomena that belonged to the inner realm. However, this was neither categorical, nor arbitrary. There was always an exterior, outer and societal element to support the appeal to interiority.[54]

The intention of the wrongdoer had been expressed with the term "*animus iniurandi"* in the Late Empire.[55] In Rome, *animus* referred to the mind as opposed to the tangible body. It was the seat of the inner self as consciousness. In the medieval era, *animus* started to be used to indicate the soul and immortality. This is not surprising considering the word has proto-Indo-European roots in -*ane* (to breathe), which later became Greek *anemos* (the wind). *Animus* represented life and movement. This is an illustration of the phenomena within the inner self being potentially dynamic and in a constant flow of change. Similarly Roman law required *animus iniurandi* to be contemptuous. It was a specific form of *mala fides* (bad faith), representing the malicious intent to cause another pain or loss.[56] This intent was directed against legitimate personality interests in the body (*corpus),* reputation (*fama),* and dignity (*dignitas).*[57]

As previously discussed, the *actio iniuriarum* was connected to the social rank of the victim. For example, the potential for the conduct to contribute to disrepute was assessed based on the asymmetrical relationship between the wrongdoer and the injured person.[58] They were seen as external manifestations of the intent. As such, they materialized *animus iniurandi*. In particular, aggravated forms of *iniuria* (*iniuria atrox*) were determined *ex facto* (based on the gravity of the attack), *ex loco* (based on the location of the attack), and *ex persona* (based on the parties involved).[59] Especially when

54. THEODOR MOMMSEN, RÖMISCHES STRAFRECHT (1899) 800 ff.
55. ZIMMERMANN, *supra* note 4, at 1067.
56. Simon Whittaker and Reinhard Zimmermann, *Surveying the Legal Landscape, in* GOOD FAITH IN EUROPEAN CONTRACT LAW 30 (R. Zimmermann and S. Whittaker eds., 2000).
57. D.47.10.3.2, Ulp. 56 ad ed.; ZIMMERMANN, *supra* note 4, at 1060.
58. D.47.10.7.8, Ulp. 57 ad ed; MARIA JOSÉ FALCÓN Y TELLA, EQUITY AND LAW 29 (P. Muckley 2008).
59. G. INST. 3.225; BUCKLAND, *supra* note 20, at 592.

the claimant had superior social status, the wrongful conduct was considered as *iniuria atrox*. This was determined in each case, based on the different social status of parties relative to each other. This requirement continued during the medieval era and later in the early modern period. Nonetheless, *iniuria* was not necessarily tied to a hierarchical structure.[60] The delict itself was not *de iure* defined by social standing. The relative status of the parties was significant in materializing elements that belonged to the inner realm. This historical context is illustrative of the intricacies of the relationship between the inner and outer elements of personhood.

The subjective element gained higher importance in the assessment of *iniuria* starting from the post-classical era as part of Christian ethics. Defamation had a particular place in the medieval law as it was also seen as a wrongdoing against the Divine. Verbally damaging a person's reputation, name, and moral stance was seen as act of defamation. Christianized verbal *iniuria* was seen as a "sin of the tongue."[61] Initially, *animus iniurandi* became central in the protection of personhood against defamation and verbal abuse in the medieval era. [62] Over the course of centuries, *animus iniurandi* became the defining element in establishing delictual liability in medieval law.[63] For example, Azo from Bologna analyzed CIC in his 13th century work, *Summa codiciis*. He emphasized that *iniuria* depended on the aggressor's will to harm (*animus iniurandi*) and on the relative statuses of the parties involved.[64] A century later, Bartolus de Saxoferrato clarified that Canonists gave more weight to the inner self of the wrongdoer compared to the Civilians who mostly focused on tangible aspects. Medieval *iniuria* was not only measured by its social consequences. Rather, the intention to harm the victim gave

60. DESCHEEMAEKER AND SCOTT, *supra* note 14.
61. SHUGER, *supra* note 21, at 123.
62. PUGLIESE, *supra* note 19; SCHULZ, *supra* note 16, at 597.
63. ZIMMERMANN, *supra* note 4; GORDLEY AND VON MEHREN, *supra* note 32, at 336; SCHULZ, *supra* note 16, at 563.
64. Melissa Vise, *The Matter of Personae in Medieval Italy,* 63 AM. J. LEGAL HIST. 131 (2023).

iniuria its color. For instance, juridical persons such as monasteries could not be held guilty of delict due to "not having a soul." This was because they were by nature incapable of having *animus iniurandi*.[65]

The moral significance of the intention as part of the inner self is particularly visible in the writings of St. Augustine. In particular, his famous dictum *"ream linguam non facit nisi mens rea"* (for words to be culpable there must be a culpable intent) is a typical example of this. It shows that St. Augustine was primarily interested in the epistemic implications of foregrounding intentionality and the nature of words as signs as manifestations of the interior realm. In this sense, the transition from word to act in medieval law was distinctly Roman in its approach. According to St. Augustine, words reflected utterance whereas the intent reflected the inwardness. The key was the subject's inner self as his state of mind: his beliefs, knowledge, will and intentions.[66] Christian theology located the essence of the delict in the wish, intent, and the desire.[67] For St. Augustine, the tongue was not guilty unless the mind was guilty. St. Augustine made the inner world into something "human" while the Divine was still central in his philosophy. However, the inner realm was public whereas the corporeal body was private and mundane.[68] Wrongful conduct took humans away from the public realm of inner wisdom towards the inferior external tangible world.[69] St. Augustine's dictum was later included in the Canon Law compilation, *Corpus Iuris Canonici*. This was a defining moment in the medieval

65. SHUGER, *supra* note 21, at 127.

66. *Id.*, at 123-26; Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 ILL. L. R. 117 (1922-1923).

67. LEVITT, *supra* note 66, at 128.

68. St. Augustine provides us with a valuable account to analyse the medieval understanding of the inner self-aligned with Roman natural law tradition and its modern applications. The teachings of St. Augustine reflect how he prioritizes rational explanations of the mystical experience as part of his Neo-Platonist philosophy. It is also known that one of the earliest mentions of *mens rea* (guilty mind) was in the writings of St. Augustine. Anne F. Noyes, *Early Causes and Development of the Doctrine of Mens Rea*, 33 KY. L.J. 306 310 (1943); LEVITT *supra* note 66, at 129; PHILIP CARY, AUGUSTINE'S INVENTION OF THE INNER SELF 129 (2000).

69. CARY, *supra* note 68, at 130.

construction of *iniuria*, as opposed to the secularized approach seen in classical Roman law.

Animus iniurandi was later further developed and theorized by the German Pandectist School. In this context, the Canonist vision of *iniuria* was formative in how the phenomena which belong to the inner realm were made explicitly central to civil law.[70] How *animus iniurandi* became one of the primary substances of *iniuria* was not a novelty of medieval law; as we have seen, it had already been developed in the classical Roman era. However, the Roman view of *iniuria* reflected multiple external elements as part of its public character. In other words, this historical legal prism demonstrates an increase in the significance of the inner self from the classical era to medieval law. Medieval *iniuria* was characterized by how it was located in the inner realm. This view dominated Canon law, theological ethics, and early modern civilian traditions.[71]

V. TRANSGRESSING BOUNDARIES

Material practice applicable to the legal protection of personhood is deeply rooted in the historical process. The historical development of *iniuria* is an emblematic example. First, it can be traced back to the dual character of *actio iniuriarum* as both a penal and compensatory legal remedy. Second, it can be spotted in how the intention to harm gradually became central in providing delictual protection. Third, it is visible in how *iniuria* bridged the gap between the corporeal and the incorporeal personality interests.

Each of these examples indicate how the primary characteristic of Roman *iniuria* is its capacity to transgress boundaries due to its fluidity and "productive generality."[72] It shows how subjects and objects, inner and outer, public and private have been constantly redefined in European legal history. This is important when discussing

70. ZIMMERMANN, *supra* note 41, at 84.
71. SHUGER, *supra* note 21, at 33–38.
72. DESCHEEMAEKER AND SCOTT, *supra* note 14; SCHULZ, *supra* note 16, at 596.

contemporary questions revolving around this boundary problem. Private law theory shows that binaries and boundaries are context dependent and flexible.[73]

For instance, *iniuria* was initially introduced to protect corporeal interests and was later expanded to cover the interests of the inner self. In the archaic period, the Law of XII Tables condemned unjustified physical aggressions towards other persons as *iniuria*.[74] Some of these aggressions were mentioned specifically.[75] In general, *iniuria* was introduced as a legal tool to seek for vengeance and/or compensation for a certain material damage. Later, immaterial damage started to be claimed via *iniuria* through praetorian law.[76] Roman *iniuria* demonstrates a high level of abstraction due to the procedural methodologies of the classical jurists.[77] This helped *iniuria* to function as an epistemic bridge between the inner and the external world. It transgressed boundaries between different realms when construing verbal trespass as analogous to physical assault.

Iniuria primarily protected the *corpus* (body). From a modern perspective, *actio iniuriarum* was designed to protect physical/bodily integrity. However, only in the 2nd century did the term *corpus* begin to be used in reference to *iniuria*.[78] The relationship of the body to the inner realm is one of the key challenges of modern laws

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73. UCARYILMAZ DEIBEL, *supra* note 7; Georgio Resta, *The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives*, 26 TUL. EUR. & CIV. LF. 33 (2011) For the role of flexible methodologies in Roman legal tradition, *see* RICHARD BAUMAN, LAWYERS IN ROMAN TRANSNATIONAL POLITICS: A STUDY OF THE ROMAN JURISTS IN THEIR POLITICAL SETTING IN THE LATE REPUBLIC AND TRIUMVIRATE 9 (1985).

74. PUGLIESE, *supra* note 19, at 22.

75. VALDITARA, *supra* note 12, at 227. HUVELIN, *supra* note 21, at 377; PUGLIESE, *supra* note 19, at 37-38. For example, unjustified tree cutting had been listed as a punishable type of *iniuria* and was given the praetorian action *actio arborum furtim caesarum.* This stems from a tangible understanding of harm and only reflects *iniuria* as 'unlawfulness'. However, it is symbolic in demonstrating how nature (and property) had been extensions of personhood. It is also informative when discussing emerging legal categories of personhood such as rights of nature.

76. C.9.35.3; C.9.35.5.

77. DESCHEEMAEKER AND SCOTT, *supra* note 14.

78. Paul J. du Plessis, *An Infringement of the Corpus as a Form of Iniuria: Roman and Medieval Reflections*, *in* INIURIA AND THE COMMON LAW 141-153 (E. Descheemaeker and H. Scott eds., 2013).

of delict/tort laws. Often, damage related to a tangible part of the body deserves more compensation than damage to mental or psychological integrity.[79] Similarly, emotional pain and suffering, which belong to the inner self, are seen as challenging to prove, and as such it becomes very difficult to establish delictual liability. This is a relic of the medieval application of Roman *iniuria. "Liberum corpus nullam recipit aestimationem"* (the value of a freeman's body cannot be expressed in pecuniary terms) was one of the major principles of Roman law.[80] The Christian re-contextualization of this principle barred actions for pain, suffering, and disfigurement in the medieval era.[81] However, recent advancements in biotechnology have been demonstrating that the inner realm is very much intertwined with the tangible *corpus*. The mental realm of the individual cannot be evaluated in isolation of the physiology of the body.

Neurotechnology is a clear illustration of this. For many neuroscientists, we are nothing but the biochemical and electrical reactions of our neurons. In that sense, neurological or psychiatric harm today is evaluated within the context of physical integrity. This is a solution for clear-cut cases where the tangibleness of the damage can easily be established. In most cases, however, damage to the inner self remains within the confines of the black box of the human mind. Ancient Rome did not have neuroimaging technologies or neurotransplants which blur the boundaries between the inner and the outer: the physical and the mental realms. Nonetheless, Romans had a better overview of "the body" than modern lawyers do. *Corpus* meant more than mere bodily integrity for Romans. Rather, it signified various legal interests which have a relationship to corporeality. This required a certain level of tangibleness. However, the tangible

79. Christoph Bublitz, *The Body of Law: Boundaries, Extensions, and the Human Right to Physical Integrity in the Biotechnical Age,* 9 JLB 1, 3 (2022).

80. D.9.3.7, Gai. 6 ad ed.; D.9.1.3, Gai. 7 ad ed.; ZIMMERMANN, *supra* note 4, at 1015.

81. Pieter Pauw, *Aspects of the Origin of the Action for Pain, Suffering, and Disfigurement*, JSAR 244, 245 (1977); SHUGER, *supra* note 21, at 119.

element had been embodied in the societal implications of the damage to the inner self. For instance, sexual harassment had always been considered in the context of *iniuria* even though there was no direct damage to bodily integrity.[82]

This can also be traced back to the procedural development of the *actio iniuriarum.* This action was first introduced in a general praetorian edict.[83] In addition, certain special edicts issued in the classical period imposed liability for wrongful conduct, which did not necessarily involve any physical contact between the victim and the wrongdoer. Descheemaeker and Scott emphasize that there was originally no procedural relationship between the general regulations on *iniuria* and these special edicts. In other words, physical assault and non-physical harm inflicting behavior were introduced as separate types of wrongful conduct. However, they demonstrated shared characteristics, and starting from the beginning of the classical period, they formed a procedural unity.[84] The *actio iniuriarum* assumed such a general character that each individual type of *iniuria* started to be seen as superfluous.[85] In these edicts, it was emphasized that one could commit *iniuria* by actions *(iniuria re*) or by words (*iniuria verbis*). In the medieval era, Azo provided a third category and he included insults committed in writing (*iniuria litteris*) as part of this list.[86]

A. Protecting the Victim's Inner Self: Dignitas, Fama, and Beyond

The *actio iniuriarum* covered three major legal interests: *corpus* (body), *fama* (reputation), and *dignitas* (dignity).[87] *Dignitas* and *fama* represented immaterial social values, which are capable of be-

82. DESCHEEMAEKER AND SCOTT, *supra* note 14.
83. MONIER, *supra* note 35, at 43-44; BUCKLAND, *supra* note 20, at 590.
84. DESCHEEMAEKER AND SCOTT, *supra* note 14; PUGLIESE, *supra* note 19, at 106.
85. D.47.10.15.3, Ulp. 57 ad ed.; D.47.10.15.29 Ulp. 77 ad ed.; DESCHEEMAEKER AND SCOTT, *supra* note 14.
86. SCHULZ, *supra* note 16, at 595.
87. D.47.10.1.2, Ulp. 56 ad ed.; "*omnem iniuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere*".

ing offended by non-physical aggressions. Defamatory speech, insults, curses, or any other types of verbal abuse that could cause harm thus obtained legal protection. These social values belonged to the inner realm of the victims. The expansion of *actio iniuriarum* to dignity, honor, and reputation is an illustration of the initial protection of the inner self in private law theory. Moreover, this also demonstrates how the protection of the mind has always been central in the discussions regarding personality.

1. Dignitas

In Roman law, *corpus* (body) and *fama* (reputation) had relatively more straightforward legal meanings. However, *dignitas* was a difficult term to conceptualize in the legal realm. Roman *dignitas* was about a person's worthiness in its relation to his social and political status. From a modern perspective, it referred to both dignity and honor. It corresponded to worthiness of respect, charisma, and esteem.[88] It was acquired externally, through political or military action.

Today, *dignitas* is understood as human dignity. It denotes the human being's intrinsic worthiness, and is inherent in personhood and all humankind.[89] Individuals have equal and intrinsic worth by virtue of being human. Respect of human dignity is both the fundamentals and the necessary result of the protection of personhood. The legal framework protecting human dignity thus presents a wide array of instruments including bioethics, human rights, and private law. This is the result of a long legal evolution of Roman *dignitas* through the prism of humanist tradition, Christian ethics, and Kantianism.

In Rome, dignity, just like personhood, was status-dependent.

88. Hubert Cancik, *Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, De Officiis I, 105–107*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 20 (D. Kretzmer and E. Klein eds., 2021).

89. CANCIK, *supra* note 88, at 19; CHARLES FOSTER, HUMAN DIGNITY IN BIOETHICS AND LAW (2011).

This also meant that it was gendered by design. Only men, and particularly men with high social and political ranks, possessed *dignitas*.[90] *Dignitas* was assessed in its relation to the Roman society. The same idea still stands in the English word "honor." In Roman society, honor connoted with excellence, worthiness, and virtuousness. Roman honor faced a drastic transformation after the Punic Wars when Rome economically transformed. Accordingly, this reflected a stratified, unequal, militaristic, and later imperial idea of self-worth. The dignitary asymmetry in Roman law developed in parallel to the Roman idea of personhood.[91]

Roman *dignitas* had developed in Stoic philosophy. Cicero used the word *dignitas* to refer both to rank and ethical worth. For Cicero, *dignitas* referred to the noble feelings of the persons, feelings which belonged to the inner realm, and the power of translating them into action. In only one paragraph in *de officiis*, did he use the term to refer to all mankind.[92] In Roman law, *dignitas* referred to an inalienable interest. The person was a temporary repository of the dignity vested in him. In the medieval era, similarly, *dignitas* became the eternal and atemporal worthiness vested in the vulgar mortal.[93]

The term *dignitas* was used rather flexibly in civilian legal history. However, as in most Roman private law instruments, such flexibility contributed to the modern theorization of human dignity. In the context of *iniuria,* it referred to all personality interests which fell outside the scope of *corpus* and *fama.* (Sub-)interests that belonged to *dignitas* were liberty, family relationships, sexual integrity, protection of one's home and intimate sphere, self-esteem, freedom from wrongful prosecutions or from insults, and identity. In this context, it was profoundly modern in character.[94]

One illustration of verbal infringement of one's dignity was

90. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 190 (2011).
91. DESCHEEMAEKER AND SCOTT, *supra* note 14.
92. CANCIK, *supra* note 88, at 20.
93. Stéphanie Hennette-Vauchez, *A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, 9 INT. J. CONST. L. 32, 50 (2011).
94. DESCHEEMAEKER AND SCOTT, *supra* note 14.

contumelia (humiliation). Having its roots in Stoic philosophy, the term derived from *contemnere*, and in Greek *hubris.*[95] *Contumelia* referred to an exaltation of the self, manifested in violence or other types of misbehavior. It kept its relevance in medieval law and was generically defined as one of the examples of *"iniuria in verbis".*[96] *Contumelia* was the key concept which transformed the archaic understanding of *iniuria* and set the grounds for the modern application of defamation laws.[97] However, more importantly it showed that physical damage and verbal *iniuria* had been surprisingly intertwined and constantly affecting each other. For instance, in some cases of minor physical assault, its implications on the victim's dignity amounted to a heavy illustration of *iniuria*. The application area of *contumelia* was altered during the Late Empire and Justinianic era, affected by Christianity. For instance, verbal abuse targeting the religious sphere of the victim started to be penalized under *verbal iniuria.* This included wrongful accusations, to convince someone to accept another religion, or to disturb a prayer.[98]

Early canon law gave Roman law a patristic character. However, from Gratian on, it drew extensively on the *Corpus Iuris Civilis* and the secular discourses of the civilian tradition.[99] By the mid-sixteenth century, canon and civil law had become interdependent. The Christian reconceptualization of Roman *dignitas* was organized around its relationship to divine powers and *ius divinum* (divine law). As expressed earlier, *verbal iniuria* was considered as capable

95. Peter Birks, *Harassment and Hubris: The Right to an Equality of Respect*, 32 IRISH JURIST 1, 8 (1997); DESCHEEMAEKER AND SCOTT, *supra* note 14; HUVELIN, *supra* note 19, at 105; BUCKLAND, *supra* note 20, at 589.

96. ZIMMERMANN, *supra* note 4, at 1064; SHUGER, *supra* note 21, at 104.

97. In the common law tradition, the interest protected through defamation law is a person's estimation in the eyes of others. However legal interests which belong to the most inner spheres such as outraged feelings and self-esteem are more strongly protected in the civilian tradition. ZIMMERMANN, *supra* note 4, at 1071; *see also* Eric Descheemaeker, *Mapping Defamation Defences,* 78 MOD. L. REV. 641, 644 (2015).

98. C. Th.6.35.1; C. Th.10.4.1; C. Th. 16.2.1; C. Th.16.2.5. are considered as texts which illustrate specific types of verbal *iniuria.*

99. SHUGER, *supra* note 21, at 103.

of harm to the dignity of the person, as well as to the Divine. This is visible in English legal theory, with slander having three victims: the offender, the victim and society.[100] In the medieval era, the punitive dimension of *iniuria* was amplified through a wide array of sanctions, such as capital punishments and whipping. However, like in the classical legal design of *iniuria*, the higher social status of the victim (whether as a deity or a saint) played a major role. In other words, in medieval law, dignity was again defined through its special relationship with the ruling power.

The *actio iniuriarum* also provided post-mortem protection as an illustration of how Roman *dignitas* was of high social importance. Verbal *iniuria* could be committed against deceased persons if the attack intentionally injured the memory of the dead. This was also applicable in case of physical attacks against dead bodies. Accordingly, immaterial damages towards deceased persons could be compensated through the *actio iniuriarum*.[101] Medieval scholars extensively debated the nature of the attacks against dead bodies. For instance, demembration of a limb from a dead body was categorized as *iniuria.* According to Suárez, the wrongdoer had to be punished for demembration due to the malicious intent of such an act.[102] The post-mortem protection of the body was an illustration of the legal protection for personality interests belonging to the boundary zones between *corpus* and *dignitas*. Moreover, the protection extended to other subjects such as the family of the deceased. Today, the treatment of dead bodies is still seen through this lens. Our modern conceptualization of *dignitas* has a similar, ancient, and outer-looking reflection. Either the rest of her family, or society in general has an interest in the preservation of the dead person's dignity. This is one reason why medical students in the anatomy class cannot treat

100. Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law,* 15 VAND. L. REV. 1051, 1055 (1962).
101. D.47.10.27, Pau. 27 ad ed.
102. Jonathan Brown, *Dignity, Body Parts and Actio Iniuriarum*, 28 CQHCE 522, 527 (2019).

the cadavers as mere course material.[103]

These examples demonstrate that the Roman *dignitas* belonged to a liminal zone between the inner world and outer realm. The *actio iniuriarum* remained in the confines of continental civil codes and mixed jurisdictions including Scots and South African law. However, Roman protection of *dignitas* through *iniuria* illustrates that human dignity is a question about the boundaries of personhood both in the civil law and common law traditions.

2. Fama

The *actio iniuriarum* provided legal protection against defamation, prohibiting unlawful conduct and words aimed at damaging another person's honor and reputation. In Roman law, *fama* signified "the good name". For instance, natural lawyers used the word "good esteem" to refer to *fama.*[104] Both *fama* (reputation) and *dignitas* (dignity/honor) represented primarily immaterial personality interests, and they were both linked to the social status of persons.[105] Yet, *fama* mostly referred to credibility as a social and legal asset, whereas *dignitas* reflected a sense of self-worth, which derived from Roman ethics and Stoic anthropology.

In other words, *fama* represented a more outward-looking concept. It was strongly linked with deserving respect and reputation in the society. The conceptual antonym of reputation in Rome was *infamia.* This was a social sanction which was later transmitted into the legal realm. Those who engaged in shameful and dishonest business transactions were considered infamous under Roman law. *Infamia* referred to losing respect and credibility, particularly in the commercial society of the classical era. One of its practical results was the restriction of civic capacity. When a person was declared

103. Charles Foster, *Dignity and The Ownership and Use of Body Parts*, 23 CQHCE (2014) 417; BROWN, *supra* note 102, at 525.
104. DESCHEEMAEKER AND SCOTT, *supra* note 14.
105. Bernardo Periñán, *The Origin of Privacy as a Legal Value: A Reflection on Roman and English Law,* 52 AM. J. LEGAL HIST. 183, 193 (2012).

infamous, his testimony was not accepted, and he was barred from having certain public office. *Infamia* also signified institutionalized disgrace as part of the loss of social and legal status.[106] As we have already seen, reputation in Rome was status specific, reserved to a defined segment of society. Especially for merchants, reputation had high economic value. For instance, defamation of credit and commercial reputation was given special attention in the Digest.[107]

Fama was nevertheless intertwined with honor, as it reflected the personality interest in deserving respect in society. This protected the inner realm as well as its reflections in the social sphere.[108] According to Birks, the reason why respect was legally protected was to remedy feelings of belittlement.[109] Through *iniuria*, the legal protection of "respect" can be traced back to its Roman and ecclesiastical understanding.[110] One key point in history was the introduction of the special praetorian edict at the end of 1st century BCE, possibly with the effect of Greek philosophy.

This edict provided protection against all types of defamation.[111] Accordingly, the rubric *"ne quid infamandi causa fiat"* (Let nothing be done to bring *infamia* upon another) became one of the defining features of *iniuria.* As such, any conduct which brought *infamia,* shame or disgrace to another was penalized under *actio iniuriarum*.[112] This legal protection of the inner self gave Roman law its modern and forward-looking character. For instance, duels (as private self-help mechanisms) were not common in Roman society.

This is because they had been developed as ritualized social practices in places where *fama* and *dignitas* were not legally

106. BUCKLAND, *supra* note 18, at 91. ABEL H.J. GREENIDGE, INFAMIA: ITS PLACE IN ROMAN PUBLIC LAW AND PRIVATE LAW 67 (1894); Max Kaser, *Infamia und Ignominia in den Römischen Rechtsquellen*, 73 ZSS 220 (1956); PUGLIESE, *supra* note 19, at 265; ROBAYE, *supra* note 30, at 209.
107. Ulpianus libro 77 ad edictum D.47.10.15.32.–3.
108. BIRKS, *supra* note 95.
109. DESCHEEMAEKER AND SCOTT, *supra* note 14.
110. SHUGER, *supra* note 21, at 109.
111. MONIER, *supra* note 35, at 44; PUGLIESE, *supra* note 19.
112. D.47.10.1.2, Ulp. 56 ad ed.

protected.[113] In Rome, this was not necessary since the *actio iniuriarum* already provided legal protection.

Written attacks against one's reputation *(libellus famosus)* were also seen as *iniuria* in Roman law. One common example was through satire.[114] Satire developed in Rome through the influence of Greek culture. Naevius was the first poet to be imprisoned because of satire around the 3rd century BCE. This gradually became a common fear in the society. In one of his letters to Augustus, the famous Roman poet Horatius explained how poets had to change style because of the fear of committing *iniuria*.[115] In Rome, it was also customary for poets to act and to perform pantomimes. Alongside words and texts, actions against reputation were also penalized through the *actio iniuriarum*. Moreover, *iniuria* committed on the theater stage was considered as serious (*atrox*).[116] One can trace this back to the militaristic characteristic of Roman society. Satire towards commanders were tolerated in the Roman army only after victories. Any other time, it was harshly punished to keep the military discipline intact.[117]

Infamia is of significant social importance in understanding the evolution of defamation laws in Europe. For instance, *infamia* itself reflects a legitimate and institutionalized type of defamatory truth telling. Certain Roman texts emphasize that there is no ground for penalty in case the defamation is truthful.[118] However, medieval lawyers condemned true allegations which could be morally reprehensible as they were also offenses against the divine realm. This reflected the idea of an inner self which is in connection with the

113. PERIÑÁN, *supra* note 105, at 193-98 (2012); ZIMMERMANN, *supra* note 4, at 106; Frank Carr, *The English Law of Defamation: With Especial Reference to the Distinction Between Libel and Slander,* 18 L. Q. REV. 546 (1902).

114. ÉDOUARD CUQ, MANUEL DES INSTITUTIONS JURIDIQUES DES ROMAINS 520 (2nd ed.,1928).

115. HORATIUS, EPISTULARUM, II, 152-155.

116. D. 47.10.15.4; D.47.10.15.12, Ulp. 77 ad ed.

117. HUVELIN, *supra* note 19, at 58, 67.

118. D.47.10.18 pr Pau. 55 ad ed.; Eric Descheemaeker, *Truth and Truthfulness in the Law of Defamation*, *in* LES APPARENCES EN DROIT CIVIL 13-48 (A.S. Hulin, R. Leckey and L. Smith eds., 2015).

eternal and Divine. Nonetheless, the legal approach varied from court to court in the period of *ius commune*. In modern laws, defaming a guilty person is dealt with a similar strategic sensibility.[119] Although modern debates are complex, this presents a continuum with Roman law and its medieval applications. The modern debates on freedom of expression vis-à-vis personality protection presents a trans-European pattern.[120]

The significance of *fama* is particularly visible in the moral theology of St. Thomas Aquinas, which had a fundamental effect in theorizing *iniuria.*[121] For Aquinas, *iniuria* reflected the violation of the virtue of justice.[122] The inner self was a place to find God, and as such, defamation violated *ius divinum*. For instance, *detractio* (detraction) as unjustly damaging a person's *fama* by the revelation of a fault or crime, was a special kind of *iniuria*, and a violation of *ius divinum*.[123] Similarly, blasphemy was seen as part of Roman *iniuria*, inflicting shame, dishonor, and vituperation towards the heavenly. For example, a man who threw a rock at an image of the Virgin Mary in the Plazza Vecchio in Bologna was condemned to be burned due to blasphemy in 14th century.[124] As Bartolus de Saxoferrato emphasized, blasphemy was simply a criminal form of *iniuria verbis*, with the only difference being that the target was divine and not human. Judicial practice around blasphemy suggests that *personae* in the medieval era included the divine.[125] This reflected the Roman

119. SHUGER, *supra* note 21, at 114. Law aims to establish a balance between protecting a person's good reputation and multiple public interests. This includes securing the right to freedom of information, expression, and opinion while protecting the inner realm of the individuals. For example, the German Constitutional Court's 1994 decision briefly summarizes this tension: "the right to freedom of opinion is not protected without reservation. Its limits are set by right to personal honour." Bundesverf 28.08.1994 NJW 1994 2943. General principles of private law such as good faith, prohibition of abuse of rights, and proportionality are often used as instruments to decide which competing interests should be prioritized in legal disputes. ZIMMERMANN, *supra* note 4, at 1078. On the dissemination of true information, *see* GORDLEY AND VON MEHREN, *supra* note 32, at 254, 280-95.

120. SHUGER, *supra* note 21, at 115.

121. DU PLESSIS, *supra* note 30, at 609.

122. VALDITARA, *supra* note 12, at 226; CURSI, *supra* note 12.

123. CARY, *supra* note 68, at 122; SHUGER, *supra* note 21, at 106-08.

124. VISE, *supra* note 64, at 5-6, 7.

125. *Id.,* at 9-17.

idea of the *persona* as a flexible legal construct based on the intertwined relationship between the corporeality and the inner self, where the personality interests such as *fama* and *dignitas* were intertwined.

3. Protecting The Mind

The Romans did not have neurotechnology. They did not know how the mind worked as we do today. However, the history of neurosurgery dates back to antiquity. It was Aristotle who distinguished *cerebrum* and *cerebellum*, for example. In Rome, it was the classical era physician and philosopher Galen who pioneered neuroanatomy. He dissected nervous systems of many species to see how certain nerves affected different parts of the body. He almost accurately described the human spine, spinal cord, and vertebral column. Galen was influenced by Aristotle and Stoic philosophy, the Stoics believing that the soul was situated in the heart. Galen criticized this view; he localized the psyche and mind in the brain. According to his view, mind and body were intertwined.[126]

The relationship between mind and body was central to legal questions, decades earlier than Galen's discoveries. Classical jurists discussed whether damage to the mind would create a ground for *actio iniuriarum*. For instance, in one Digest text, it was investigated whether there would be *iniuria* if anyone altered somebody's mind by drugs or by other means.[127] The Roman solution was expanding *iniuria* to the protection of the mind. Roman private law provided the analytical framework and theoretical substance which is still applicable to questions regarding neurotechnology and law of delict/tort law today.

Roman *iniuria* also provided a methodological tool to protect the emotional world of humans. For example, chronologically the first

126. Christopher Gill, *Galen and the Stoics: Mortal Enemies or Blood Brothers?*, 52 PHRONESIS 88, 89 (2007).
127. D. 47.10.15, pr Ulp. 77 ad ed.

special praetorian edict established extra-contractual liability in case of *convicium* (clamor).[128] *Convicium* in Rome particularly referred to acts of malevolent incantation (*carmen famosum*) and curses (*occentatio*).[129] Before the 2nd century, they were not considered as *iniuria* but rather, seen as public crimes which posed serious threats to society.[130] For instance, the Law of XII Tables ordered capital punishment for such acts.[131] *Convicium* was characterized as acts causing either physical damage or *infamia.* Especially in Cicero's texts, this was emphasized as a key illustration of *iniuria*.[132] This is not a coincidence considering he was strongly committed to the traditional understanding of Roman values such as honor, dignity, and reputation.

Convicium was regarded as by nature *contra bonos mores*. It meant more than a simple curse and verbal abuse. It was seen to inflict bodily and mental harm by invocation of supernatural or religious powers.[133] It referred to damaging someone physically, socially or emotionally with the help of divine powers. As such, it could also cause damage to the *fama* of the victim. It was not the curse itself, but its potential to cause *infamia* was the primary reason why *convicium* was criminalized. Yet, the relationship with the divine made *convicium* different to pure defamation. Mostly, this required a plurality, a cooperation of wrongdoers.[134] Over time *convicium* transformed into the modern idea of defamation, as its ties with the supernatural powers had gradually lost their relevance.[135]

The requirement of *contra bonos mores* was decided on equity and on a case-by-case basis. This element particularly provided flexibility as it permitted the behavior to be penalized when it was

128. D.47.10.15.2; D 47.10.15.26, Ulp. 57 ad ed.; ZIMMERMANN, *supra* note 4, at 1053-55; BIRKS, *supra* note 48, at 94.
129. ZIMMERMANN, *supra* note 4, at 1054.
130. MONIER, *supra* note 35, at 41; HUVELIN, *supra* note 19, at 69.
131. Tabula VII.
132. CICERO, DE REPUBLICA IV, 10,12.
133. D.47.10.15.27, Ulp. 77 ad ed.; ÉLIANE MASSONEAU, LE CRIME DE MAGIE ET LE DROIT ROMAIN 140 (1933).
134. D.47.10.15.4, Ulp. 57 ad ed.; HUVELIN, *supra* note 19, at 428.
135. PAULUS, SENTENTIAE, V.4.21.

simply socially unacceptable. This is illustrative of how social transgression is essential in determining the unlawfulness of the acts with delictual nature.[136] Societal expectations were central in assessing the claim for damages in Rome.[137] *Bonos mores* had political relevance in Roman law and society. This is especially visible starting from the Republican period where Roman culture had transformed through militaristic victories and the influence of Greek philosophy. The Roman *civitas* faced a financial and social transformation, and as such, the old values which received expression through *"bonos mores"* became more relevant in law. Praetorian edicts functioned as checks and balances to make sure the old values survived the societal transformations. That is to say, the foundations of *actio iniuriarum* can be found in the Roman *aequitas*. The claims in *actio iniuriarum* were assessed *"ex bono et aequo."* Personality protection was decided based on good faith and equity, as fundamental legal values which belong to the inner realm.

The inner self of the victim played a formative role when deciding for damages. This was primarily visible in the protection of the feelings of the injured person. The *actio iniuriarum* was sometimes referred as *"actio vindictam spirans"*: a legal revenge for the hurt feelings.[138] As highlighted by Seneca, the effect of *iniuria* was relative; for sensitive persons the damage could be heavier.[139] In one Digest text, it was emphasized that if one forgave the wrongdoer or did not remember the wrong action after having suffered from it, he could not bring an action.[140] It was also emphasized that one of the conditions to bring an *actio iniuriarum* was an immediate response

136. DESCHEEMAEKER AND SCOTT, *supra* note 14; DESCHEEMAEKER, *supra* note 97, at 646 ff.
137. Patrick O'Callaghan, *The Right to Freedom of Thought: Drawing on Common Law Principles to Implement the Right* (May 22, 2024) https://perma.cc/NWJ8-HXUU.
138. MONIER, *supra* note 35, at 43; BUCKLAND, *supra* note 20, at 591; Johann Neethling, *Personality Rights: A Comparative Overview* 38 CILSA 210, 221 (2005). *See also* CICERO, PRO CAECINA XII, 35.
139. SENECA, DE CONTANTIA SAPIENTIS I.
140. D. 47.10.11.1, Ulp. 57 ad ed.

to *iniuria*. One could not bring an action if one had "hidden" injured feelings.

In other words, the emotional world of the subjects had socio-legal importance in Roman law. For instance, *amicitia* (friendship) was protected as part of the private, intimate sphere. Similarly, secrecy of correspondence was seen as deserving legal protection by the Roman law of delicts in addition to already existing social sanctions. Cicero emphasized in the Senate that the protection of secrecy had been part of the conventions of the "civilized life and good morals."[141] This was right after Mark Anthony published his personal letters written to Caesar after his death. Although *amicitia* did not necessarily imply the political, it referred to bonds with social nature. Yet, the protection of the emotional sphere was often seen as having a gendered character in Rome. For example, Cicero often mentioned *amicitia* between males.[142]

Similarly, another special praetorian edict was introduced to protect "the moral reputation" of women and of children.[143] Verbal sexual harassment and what we today know as stalking were prosecuted through the *actio iniuriarum*.[144] This primarily protected the personality interests of the *pater familias* (head of the household) as what we call "private" and "inner" today was understood differently in Rome.[145] For instance, the private realm was often seen from the perspective of the Roman family as a unit. Nonetheless, it also provided protection for the emotional sphere of the victim. For instance, even the usage of smooth words *(blanda oratio)* to deceive someone could have been seen as part of a wrongful damage to the inner realm. This is another illustration of

141. PERIÑÁN, *supra* note 105, at 194.
142. Leo Peppe, *Women and Civic Identity in Roman Antiquity*, 1 AUST. LAW. J. 23 (2017).
143. ZIMMERMANN, *supra* note 4, at 1054. DESCHEEMAEKER AND SCOTT, *supra* note 14.
144. D.47.10.15.20, 47.10.15.22, Ulp. 77 ad ed.
145. It is not clear from the wording whether the action was given on the behalf of the *pater familias* or on behalf of the primary victims of the assault. ULPIANUS LIBRO 56 ad edictum D.47.10.1; DESCHEEMAEKER AND SCOTT, *supra* note 14; BUCKLAND, *supra* note 20, at 327.

how *iniuria* provided the generative legal framework to protect different aspects of personhood. What we consider modern or even futuristic today, had already been provided for in an action, whereas modern laws feel "stretched to their limits" by the need to respond to contemporary legal threats to the inner self.[146]

VI. TRANSFORMATION OF THE PRIVATE SPHERE

The development of Roman *iniuria* provides us with a valuable perspective to analyze the emergence and transformation of the private realm in European legal history. This private sphere includes legal interests which are in close connection to personhood such as the body, reputation, dignity, and honor as well as the intimate sphere where one can be protected from intrusion. Today the protection of the intimate private sphere is provided by several legal tools including data protection laws, privacy laws, the rights to freedom of thought, conscience, and religion. Especially in the age of technology, privacy became the central concept for protecting personality interests such as private personal data. However, one aspect of privacy is often neglected: privacy helps to provide the inner breathing space for the free development of personhood.[147]

Romans understood "innerness" differently from the way we understand it today. Roman *iniuria* presents us with examples of how Romans had a collective understanding of the interior, self, subjectivity, and private. For instance, the Roman conceptualization of the private sphere was not individualistic, but status-based. It was materially linked with the concept of *domus* (private residence) and the family as a legal unit. However, since antiquity privacy has been intertwined with freedom. Revisiting the transformation of the idea of a "private sphere" in Rome helps us to re-establish the strong connection between privacy and freedom.

The person is the paradigmatic subject of law today. The liberal

146. DESCHEEMAEKER AND SCOTT, *supra* note 14.
147. NEIL RICHARDS, INTELLECTUAL PRIVACY (2015).

conception of the autonomous individual revolves around freedom as the primary condition of personhood.[148] Freedom is rooted in natality, as understood by Hannah Arendt; theoretically, human beings are free by virtue of being born. Being unfree jeopardizes our status as persons. Consequently, it also endangers our privacy as a basic requirement of personhood. This was clearly visible in Roman history. The Roman understanding of what we call "privacy" and "personhood" today were based on status. Roman law created a distinct equilibrium between public and private.[149] In this equilibrium, the formation of legal subjectivity was not individualistic. Rather, it referred to groups of moral agents as constellations of power.

The Roman family was a collective intimate sphere which received legal protection. It was an economic, social, and legal institution. It signified a legal fiction which was based on property relations rather than a biological tie. It was organized around the sovereignty exercised by the *pater familias* (head of the household) who was the only legal subject with norm-making powers. This capacity was s*ui iuris* and was a condition for being considered as a legal "person." The Roman *pater familias* who was the only legal person in the family had legal protection for his personality interests including his inner and outer spheres. For this reason, some scholars argue that privacy in its modern sense were already present in Rome.[150] However, this was a privilege given to only some persons with respect to their status.

The word family comes from *famulus* which means to be tied; to be subjected to another. The legal structure of the Roman family served to centralize the power of the authority of the *pater familias* over other members including *filii familias* (household) and *servi*

148. HANNAH ARENDT, THE HUMAN CONDITION 38, 44 (1958).
149. ARENDT, *supra* note 148, at 59; Paul Veyne, *The Roman Empire*, *in* 1 A HISTORY OF PRIVATE LIFE: FROM PAGAN ROME TO BYZANTIUM 106 (P. Ariès & G. Duby eds., 1987).
150. PERIÑÁN, *supra* note 105, at 193.

(slaves).[151] The unlimited power of sovereignty of the *pater familias* was called *patria potestas*. This referred to a quasi-property regime within the family. The origins of *patria potestas* are often traced back to ownership.[152] This power not only included the management of the finances of the family but also demonstrated itself in the wide exercise of sovereignty over the body, mind, and labor of the others which belong to the group. *Patria potestas* reflected an imposition of the will of the sovereign as a fundamentally restrictive force in the classical era. This central power was later transferred to the Roman emperor, the Church, the feudal lord, and the modern nation-state.[153] Modernity presents us with a transformation in the nature and exercise of such power by a reversal of the political axis of individualization.[154] As a result, privacy is no longer conditional and status-based.

In their seminal paper, Warren and Brandeis define privacy as the "right to be alone".[155] This presents a clear contrast between the Roman and modern ideas on privacy. This contrast is relevant when we contemplate what it means to be legally protected as an individual with an inner self. For instance, *patria potestas*, which was specific to Roman law, demonstrated how the personal sphere had been political in Rome.[156] On the one hand, *patria potestas* signified

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151. BUCKLAND, *supra* note 20; ROBAYE, *supra* note 30, at 306; SALLER, *supra* note 18, at 15.

152. MICHEL VILLEY, LE DROIT ROMAIN 19 (2012); BUCKLAND, *supra* note 20, at 142; NICHOLAS, *supra* note 12, at 76.

153. In the Imperial era, the Roman family gradually lost autonomy in private affairs. The dynamics of public and private realm were re-regulated. During the Augustan reign, family affairs which were initially seen as private became subjected to new laws such as *lex Iulia de maritandis ordinibus* (BC 18), *lex Iulia de adulteriis* (BC 18), and *lex Papia Poppaea* (BC 9). The transfer of family relations into the public realm resulted with the replacement of the authority of *pater familias* with the authority of emperor. Even though the monopoly of violence was gradually given to the State, the sovereignty power of *pater familias* over his subjects continued in the Late Empire. PUGLIESE, *supra* note 18.

154. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED (2003); MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS (2008).

155. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

156. PUGLIESE, *supra* note 19. Similarly, *iniuria* is seen as purely Roman. SCHULZ, *supra* note 16, at 598. On the Greek influence in Roman law, *see* James

power in the private realm. On the other hand, this power took the shape of a capacity of action in the public realm.[157] Through this capacity, the protection of personhood gained legal significance. Other members of the household including slaves or women were also presumed to have inner selves, having emotions, memories, virtues, feelings, ideas, and wills. This can be traced back to history of Platonic philosophy and religion.[158] However, only the inner realms of the *sui iuris* had legal protection in Rome. This was the first indication that personhood and the inner self were primarily legal fictions.

This inner self was sheltered through the *actio iniuriarum* and through the protection of the intimate sphere. Materially, the intimate sphere was confined to the private residence (*domus*)[159]. This was also the seat of the family as a political structure. The Roman family first emerged as a closed institution in the *oikos* economy based on agriculture and later evolved into a rather complex structure which revolved around trade relations.[160] The origins of *patria potestas* can be traced back to the agricultural society of antiquity where property, including the utilization and maintenance of the *domus* was collective.[161] In this context, the *actio iniuriarum* also functioned as the protection of the private inner sphere.

The Platonist idea of the inner self as the soul's connection with the divine is a reflection of this archaic conceptualization of the private sphere. Religion was a central component of the antiquity. The connection of the private realm with the divine powers is instructive in understanding how private law was developed in the archaic period, and later in its medieval reconceptualization. Roman society and the Roman city state (*civitas*) were built on *pax deorum* (peace

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Gordley, *Ius Civile and Civil Codes: Lessons from the Romans*, 54 LOY. L. REV. 555 (2008).

157. ARENDT, *supra* note 148.

158. CARY, *supra* note 68, at 140.

159. SCHULZ, *supra* note 16, at 596.

160. ARENDT, *supra* note 148.

161. Richard Saller, *Pater Familias, Mater Familias and the Gendered Semantics of the Roman Household,* 94 CLASS. PHILOL. 182 (1999).

of the Gods). This referred to the harmony and peace between Roman society and divinities, both in public and private realms. In ancient Roman religion, *Lares familiares* were the guardian deities who were believed to have protected the private realm. This private realm was formed around the Roman family and its private residence. Rituals for *Lares familiares* were conducted daily, around the fire which was believed to keep the family intact. Unjustified intrusion to the private sphere including the *domus* was seen as *iniuria* under the Law of XII Tables.[162] This reflects a period where families were collective subjects of law instead of individuals.

Similar examples are visible in the early empire where legal measures were introduced to expand the application of *iniuria.* For instance, *lex Cornelia de iniuriis* provided new specific actions for certain physical *iniuria*, including violating the boundaries of the *domus*.[163] This action dates to Sulla's dictatorship around 81 BCE and is often read in its societal context, the internal chaos at the end of the Republican era. Yet, it is important as it was a significant step towards the legal framework of "*iniuria*" having more criminal character.

Digest texts by Ulpian emphasize that *iniuria* could be directly or indirectly committed.[164] As illustrated earlier, wrongful conduct against the wife, slaves, or children of the *pater familias* were considered as if it was an attack against the *pater familias* himself.[165] This is because subjectivity and personhood of the *pater familias* had stretched to the ones under his authority. This is also why it was not possible for the *pater familias* to commit *iniuria* against his subjects as accepting otherwise would have been against the nature of *patria potestas*.[166] Similarly, to convince a person to leave the house

162. VALDITARA, *supra* note 12, at 239; SCHULZ, *supra* note 16, at 596.
163. SCHULZ, *supra* note 16, at 598; ZIMMERMANN, *supra* note 4, at 1058.
164. Jacob Giltaij, *Lex Cornelia de Iniuriis and "hyperlinks" in Roman law,* 24 FUNDAMINA 21, 23 (2018); SCHULZ, *supra* note 16, at 572.
165. D.47.10.1, Ulp. 56 ad ed.; DESCHEEMAEKER AND SCOTT, *supra* note 14; BUCKLAND *supra* note 20, at 327.
166. G. INST. 4.78.

without his or her servant was seen as attack on personality as the ties between the master and the slave were seen as part of one's reputation and dignity.[167] All these examples illustrate that the Roman inner self was not materialized within the confines of the body. Rather, it was within the confines of the private sphere in general. *Iniuria* linked privacy to personhood.

Different manifestations of sovereignty were visible in various forms in Roman history. For example, the early Roman institution *manus* signified a formal act of marriage which put the wife under a quasi-property regime.[168] This was significant because marriage was primarily seen as a social phenomenon in Rome. Roman marriage was a union built on the constant desire to be in a religious and social partnership.[169] Through the marriage the wife entered the husband's religious and inner sphere; to his *cultus* and *dignitas*. As such, any attack against the wife was by nature an attack against the *dignitas* of the *pater familias*.[170] This was protected through the *actio iniuriarum.*

As opposed to the rigid lines between public and private, or the inner and outer which characterized modernity, the Roman family demonstrated how these lines have been artificially and flexibly constructed.[171] Roman *iniuria* was dependent on the social context. Roman antiquity, as well as the imperial and Byzantian period, reflected a highly stratified society. In that sense, personality protection was developed as a legal response to existing social sanctions of the class system. For instance, the *actio iniuriarum* provided protection especially when there were such power asymmetries between parties.

It primarily functioned against those who could not be reached

167. CUQ, *supra* note 114, at 520.
168. A marriage *cum manu* resulted with the loss of previously existing legal personhood of the woman. Her private property was transferred to her husband. However, she could demand her share when the *manus* ended. This is why some scholars see *manus* as a morally neutral institution which simply determined the property regime within the marriage. BUCKLAND, *supra* note 20.
169. PUGLIESE, *supra* note 19, at 106.
170. BUCKLAND, *supra* note 20, 591; PEPPE, *supra* note 142.
171. ARENDT, *supra* note 148.

within the intimate private legal sphere.[172] As discussed earlier in detail, social status was particularly important in materializing verbal *iniuria*.[173] The situations of the parties relative to each other carried *iniuria* from the inner sphere to the outer world.

Christianity had a formative effect in making the intimate private sphere legally relevant. In the Late Empire, Christianity became central to the social fabric of Rome, and this included the legal construct of personhood. For instance, attacks against religion became primary illustrations of *iniuria* as violations of the intimate private sphere. This also demonstrated how the inner self started to gain importance compared to a materialistic vision of the body and the house. Especially in the medieval era, the Neoplatonist reconceptualization of the soul and rationality provided the basis for the legal protection of the inner self.[174] This is reflected in St. Augustine's conceptualization of the inner world of an individual as a "private human sphere."[175] The medieval account of the inner self is tied to Christian philosophy where the inner realm was seen as an infinite spatial location to see the Divine.[176] In other words, when the Christian Church became the source of law, the Roman approach on the "innerness" was replaced with the doctrines on the soul and immortality. This permitted Roman law's status-based perspective on personhood to be expanded and accordingly, the inner self gained more attention.[177]

Later, early modern political theorists reconceptualized this as a "secularized inner space" to justify possessive individualism.[178] The idea of a "secular" inner self was not alien to the foundations of the civilian legal tradition. However, Roman and modern understandings of the inner spheres presented with distinct characteristics

172. John M. Kelly, *The Meaning of the Lex Aquilia*, 80 L. Q. REV. 73 (1964).
173. HUVELIN , *supra* note 19, at 23.
174. Petkoff, *supra* note 2.
175. Philip Cary, *Philosophical and Religious Origins of the Private Inner Self,* 46 ZYGON 121, 128 (2011)
176. CARY, *supra* note 175, at 122-31.
177. Gaaker, *supra* note 3, at 291.
178. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1689).

based on different conceptualizations of private. Modernity replaced the personhood as "status" with a legal figure of the person as the paradigmatic subject of law. The Roman and medieval accounts on the inner self and private spheres were exchanged with an individualistic approach on personhood.[179] Yet, the protection of privacy and the private intimate sphere can only be comprehensively understood when it is historicized. The contemporary discussions are part of this continuous transformation of the private, as illustrated by the Roman *iniuria.*

VII. CONCLUSION

Roman law presents us with a wide array of juridical creativity. This is one reason why private law theories often date back to ancient Rome. Private law is built on an epistemic continuum between Roman law and today's laws. This is more than mere inspiration; modern private law doctrines are based on legal remedies which flourished in Roman antiquity. Such remedies had been transformed over centuries through cross-pollination of different political discourses. For instance, they were re-conceptualized in the imperial era, in the Byzantine period, in medieval law and Christian *ius commune*. Each period had distinct political characteristics which created a new legal reality. The Enlightenment and a strictly applied Cartesian perspective transformed the Romanist tradition. Yet, early modern and modern private law codifications did not decouple themselves from antiquity. They were even seen as "exfoliations of Roman law."[180] This should not be understood as a plea to ignore the vertical distance between different political and legal periods in the civilian legal tradition. However, this paper suggests focusing on the social and legal patterns which present a continuity. One example is the narrative of "the inner self" and "personality protection" in the civilian tradition which dates back to Roman *iniuria.*

179. Gaaker, *supra* note 3, at 293.
180. SHUGER, *supra* note 21, at 103.

Law assumes a division between the inner and the outer. For instance, private law is organized around the separation of the body (*corpus*) and the intangible inner self. The body is tangible, and as such it is more suitable to be expressed in terms of patrimonial interests. However, the aspects of personhood which are non-tangible are less likely to be expressed in pecuniary terms. This includes our inner self: our self-worth, sense of respect, feelings, memories, thoughts, ideas, will, mind, psychological integrity and so on. The inner self is a distinct, private, and intimate realm. Personality rights have been developed to protect both the body and the inner sphere in civilian tradition. However, in practice, damage to personality is much easier to assess when it can be materially demonstrated.

This paper focuses on the relevance of the inner self to private law theory. This analysis illustrates that the protection of personhood presents us with a trans-European legal pattern organized around the protection of the inner realm. Tracing *iniuria* to its Roman and medieval roots emphasizes that the protection of humans primarily raises questions about the intangible aspects of personhood. This is especially important when we consider the relationship between privacy and general personality rights in the 21st century. Roman *iniuria* indicates how the protection of the intimate, inner, and private sphere has always been part of our personhood.

Moreover, the historical analysis of *iniuria* also demonstrates the intricate and interdependent relationship between the inner and outer spheres. This is especially relevant today when we are dealing with emerging legal categories of personhood. For instance, AI technology and neurotechnology change our legal understanding of what the body is and what the inner self is. The advancements in these technologies blur the lines between inner and outer, as well as between private and public realms. Through this transhistorical legal prism, *iniuria* becomes a key symbol in transgressing boundaries between physical and non-physical.

The Roman *iniuria* existed in different forms in different periods

of Roman law. The archaic period, the classical period and the imperial era present us with different understandings of what personhood was in European legal history. *Iniuria* illustrates how the inner self gradually became a central component of personality staring from the post-classical era. This is visible in how its flexible legal design permitted the victims to claim for immaterial damage. The gradual expansion of its area of application made the modern theories on personality rights and damage from emotional pain and suffering possible.

The Roman understanding of *iniuria* bridges the gap between the body and different legal interests which belong to the inner self such as reputation (*fama*) and dignity (*dignitas*), as well as the integrity of the mind as the location of the psyche. This makes *iniuria* ever more relevant to contemporary discussions regarding the protection of personhood. First, it demonstrates the doctrinal basis of personality rights and in the civilian tradition law. Second, it presents us with an analytical framework which is distinctly modern, yet more flexible and creative.